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(The Founder of Banaras Hindu University)



(25.12.1861 - 12.11.1946)

"It is my earnest hope and prayer, that this centre of life and light, which is coming into existence, will produce students who will not only be intellectually equal to the best of their fellow students in other parts of the world, but will also live a noble life, love their country and be loyal to the Supreme Ruler."

- Madan Mohan Malaviya

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# **INDIA'S INTELLECTUAL PROPERTY JURISPRUDENCE : AN OVERVIEW**

**S.K. Verma\***

**Abstract :** India has a well established legal framework to safeguard IPRs which meets its international obligations and at the same time addresses its developmental concerns. India's present intellectual property (IP) regime has a long history, having its roots in the system established by the Britain in India. India has made numerous efforts in recent times to make its intellectual property rights (IPR) regime not only TRIPS compliant, but with other major IP treaties. The paper presents an overview of the IP jurisprudence in the country by taking stock of the legislative, administrative and enforcement measures on IPRs since the TRIPS coming into force and the forward perspective in this regard. An examination of the existing framework and also the assessment of the unresolved issues has been done in the present paper.

**Key Words:** Intellectual Property Rights, Patents, Trademarks, Copyright, Designs, Geographical indications, Plant Varieties, IPR administration.

## **I. INTRODUCTION**

Intellectual property rights (IPR) are private rights enforceable within the territory of a country and assigned to an individual or individuals for a specific period of time in return for making public the results of their creativity or innovation. India has a well established legislative, administrative and judicial framework to safeguard IPRs which meets its international obligations while utilizing the flexibilities provided in the international regime to address its developmental concerns.

India's present intellectual property (IP) regime has a long history, having its roots in the system established by the Britain in India. Patents were first introduced through the Protection of Inventions Act, 1856, replaced by the Patent and Designs Protection Act, 1872. Through the 1911 Patent and Designs Act, patent administration was brought under the control of the Controller of Patents. The Act was amended in 1950 and later, based on the report of the Ayyangar

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\* Professor and Former Dean Faculty of law, Delhi University; Director Indian Law Institute; Indian Society of International Law.

Committee, the Patents Act, 1970 was enacted. The Act introduced product and process patents in all sectors but the former was not available for inventions relating to food, medicines or drugs or substances produced by chemical processes. The Act, together the Patent Rules 1972, was focused towards encouraging inventions and securing that these inventions are worked on a commercial scale in India without undue delay. On trademarks front, prior to the Trade Marks Act, 1940, the registration was carried out under the Indian Registration Act, 1908. The 1940 Act was replaced by the Trade and Merchandise Marks Act, 1958. The first Copyright law was enacted in 1914.

Apart from being a member of WTO/TRIPS Agreement, India is a member/signatory of some important international IPR instruments: Paris Convention for the Protection of Industrial Property, 1883; Berne Convention for the Protection of Literary and Artistic Works, 1886; Patent Co-operation Treaty, 1970 as amended; Treaty on the International Regulation of Audiovisual Works (Film Register Treaty), 1989 (signed in 1989); Nairobi Treaty on the Protection of the Olympic Symbol, 1981; WIPO Convention for Protection of rights of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, 1971 [Phonograms Convention]; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961 (signed October 1961); Washington Treaty on Intellectual Property in Respect of Integrated Circuits, 1989 (signed May 1990); Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure, 1977; and Universal Copyright Convention, 1952. India became a party to the Protocol Relating to the Madrid Agreement, 1989 for the international registration of marks on July 8, 2012.

But India is still not a member/signatory to a number of important conventions, viz., the Madrid Agreement concerning the International Registration of Marks, 1891; the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957; the WIPO Copyright Treaty, 1996; WIPO Performances and Phonograms Treaty, 1996; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1958; the international convention for the protection of new Varieties of Plants (UPOV Convention), 1961 as revised; Trademark Law Treaty (TLT), 1994; and Patent Law Treaty (PLT) 2000.

The government of India actively participates in the negotiations of emerging treaties such as Substantive Patent Law Treaty (SPLT) and the proposed WIPO Treaty on the Protection of Rights of Broadcasting Organizations at the WIPO.

India has made numerous efforts in recent times to make its intellectual property rights (IPR) regime not only TRIPS compliant, but with other major IP treaties. The study here presents an overview of the IP jurisprudence in the country by taking stock of the legislative, administrative and enforcement measures on IPRs since the TRIPS coming into force and the forward perspective in this regard.

## II. LEGISLATIVE MEASURES

After it became a member of the Trade Related Intellectual Property Rights Agreement (TRIPS), the Government of India has introduced a number of changes in its IP laws to make them TRIPS compliant. Presently the following major IP related statutes exist:

- ♦ The Copyright Act, 1957 (last amended in March 2012)
- ♦ The Trade Marks Act, 1999
- ♦ The Patents Act, 1970 as amended in 2005
- ♦ Designs Act, 2000
- ♦ The Geographical Indications of Goods (Registration and Protection) Act, 1999
- ♦ The Semiconductor Integrated Circuits Layout - Designs Act, 2000
- ♦ The Protection of Plant Varieties and Farmers' Rights Act, 2001

Trade Secrets (undisclosed information) are protected under the common-law; particularly the Contract Act, Sec. 27A. The Customs Act, 1962, is relevant on Border Measures for enforcement of IPRs. The Biological Diversity Act, 2002 has also some overbearing in the IP protection of bio-resources and the traditional knowledge (TK). Thus, except for a law on data protection (under Article 39.3 of the TRIPS), the laws on different rights are well in place and are TRIPS compliant.

### Patents

The Patents Act, 1970 was amended in a phased manner as per the transitional arrangements provided by the TRIPS in 1999, 2002 and 2005. The first major amendment in 1999 (made applicable from January 1, 1995) was the follow-up action to implement the decision of the Dispute Settlement Body of the WTO<sup>1</sup> to give effect to TRIPS Article 70.8 (to establish a 'mailbox' system) and 70.9 (to provide 'exclusive marketing rights'). Some of the key changes brought about by the 2002 and 2005 amendments are as under:

- 1) Introduction of product patent for pharmaceutical, drugs and chemical inventions since 2005.<sup>2</sup>
- 2) uniform term of twenty years from the date of filing for all categories of inventions (sec 53).
- 3) both pre-grant and post-grant opposition of patent application are provided.
- 4) new definition of 'invention' and 'inventive step', and additional criteria such as 'technical or economic' significance into the 'inventive step' or 'non obviousness' standard.
- 5) Expansion of the new use exclusion in section 3(d) by providing that 'the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance' would not be

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1 For the Appellate Body Report, see Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (4 December 1997), available at : [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds50\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm). For the Panel Report, see WT/DS50/R, 5 September 1997, available at : [www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members2\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members2_e.htm).

2 Between 2005 and 2010, 3488 pharma patents have been granted.

patentable.

- 6) Conditions for obtaining compulsory license have been clarified, and provide additional grounds for compulsory licensing.
- 7) Allows the issuance of a compulsory license to enable exports of pharmaceutical products to countries with insufficient or no manufacturing capacity.
- 8) The mailbox applications<sup>3</sup> that result in the grant of a patent, the right to the patentee shall accrue from the date of grant of a patent and the patent holder shall be entitled to receive 'reasonable royalty' from such enterprises that have made a 'significant investment' in 'producing and marketing' a drug covered by the mailbox application prior to 1 January 2005.<sup>4</sup>
- 9) The Act encapsulates the Bolar provision (Section 107A(a)) by excluding from infringement, '*the act of making, constructing, using, selling or importing a patented invention*' for the purpose of obtaining information to be submitted to a regulatory authority.
- 10) Allows parallel imports of patented products under section 107A (b) provided the exporter of such patented product is 'duly authorised under the law to produce and sell or distribute the product'. The provision thus follows the principle of 'international exhaustion'.
- 11) Provides necessary safeguards for the protection of public interest, national security, bio-diversity, TK, etc.
- 12) Exemptions for research and teaching are provided.
- 13) Intellectual Property Appellate Board (IPAB) has been constituted (in 2003), which hears appeals against the decisions/orders of the Controller of Patents.
- 14) The healing techniques in well established ethnic systems of medicines such as Ayurveda, Siddha and Unani system and formulations can not be patented.
- 15) Residents not to apply for patents outside India without the prior permission (written), unless -
  - (a) the application for patent for the same invention has been made six weeks before the application outside India; and
  - (b) there is no secrecy directions given with regard to that invention.

### ***Patentability Criteria***

An invention, to be patentable, has to satisfy the criteria of novelty, non-obviousness (inventive step) and industrial application (utility) as defined in the Act, and the essentials as mandated by Article 27 of TRIPS. Under the Act, 'Inventive step' is "a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art." [S.2(ja)]. New invention means any invention or technology which has not been anticipated

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3 Mailbox applications related to pharmaceutical and chemical inventions filed between 1.1.96 and 1.1.2005 are judged for 'novelty' on the basis of the filing date and not with reference to 2005, the year in which product patents were introduced in India.

4 Patents Act, 1970, sec. 11 A, proviso, amended by Patents (Amendment) Act, 2005.

by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e. the subject matter has not fallen in public domain or it does not form part of the state of the art [S. 2(1)].

Section 3 of the Act contains a list of inventions not patentable and includes some well known 'public interest' exclusions to patentability such as any method of agriculture or horticulture, a process for medical or other treatment of human being, animal or plants, and any plants and animals in whole or any part thereof, other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals.

In order to safeguard the public interest of healthcare and to protect the generic industry and technological growth of the country, the Act prevents "ever greening" of patents (S.3(d))<sup>5</sup> by prohibiting the patenting of new forms of existing pharmaceutical substances that do not demonstrate significantly enhanced 'efficacy'. Although Section 3(d) is applicable to all types of inventions, the Explanation makes a particular reference to pharmaceutical inventions (aimed at pharmacology inventions). The underlying assumption behind section 3(d) is that derivatives, such as salt forms, polymorphs, isomers, etc. that are structurally similar to known pharmaceutical substances are likely to be functionally equivalent as well, and if this is not the case and the new form of an existing substance works better than the old form, it is up to the patent applicant to demonstrate this and justify the claim. To establish improved efficacy, an applicant must provide data comparing the efficacy of the "new form" with that of a "known" substance. Provision got judicial exposition in *Novartis AG & Anr. v. Union of India & Others*.<sup>6</sup>

In this case, Novartis, for its invention 'Imatinib' in 1993, for the treatment of chronic myelogenous leukemia (CML), was granted a patent on 28 May 1996 in the USA.<sup>7</sup> Imatinib is the free base, which was further researched upon and converted into a salt form, namely imatinib mesylate, from which the beta crystalline, a particular polymorphic form, was found by Novartis, which then formulated the beta crystalline form of imatinib mesylate into a pharmaceutically useful drug, called Glivec that got approval from the FDA in 2001. The case in India was centered around the grant of patent to beta crystalline form of imatinib mesylate, which was rejected by the patent office, among others, on the ground of lack of significantly enhanced "efficacy" under section 3(d). The Madras high court, while rejecting the case of the Novartis, held that the Explanation in sec. 3(d) creates a deeming fiction that derivatives of a known substance are deemed to be the same substance unless they differ significantly in properties with regard to efficacy, which the court held to be 'therapeutic

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5 Patents Act, 1970, Sec. 3(d) : the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

6 (2007) 4 *MLJ* 1153. After this decision, despite invoking sec. 3(d) in many cases, many patents have been granted.

effect efficacy'. The Court emphasized that the properties of the derivative of a known substance must differ significantly with regard to efficacy, which can easily be shown in comparative details based on such science. On section 3(d), the applicant needs to place on record two things: (i) data relating to the therapeutic effect of the known substance, and (ii) data relating to the therapeutic effect of the claimed substance. In an Appeal to the Supreme Court, the court, on section, decided that the substance that Novartis sought to patent was indeed a modification of the raw form of imatinib, which was publicly disclosed in the 1993 patent application and in scientific articles, that Novartis did not present evidence of a difference in therapeutic efficacy between the final form of Glivec and the raw form of imatinib, and that therefore the patent application was properly rejected by the patent office and lower courts.<sup>8</sup>

Chapter 08.03.05.04 of the Manual of Patent Office Practice and Procedure (of March 2011) relating to sec. 3(d) provides that the new subject-matter should differ significantly in properties with regard to efficacy from the known substance. Complete specification should clearly describe this aspect.

As per section 3(k), "A mathematical or business method or a computer programme per se or algorithms" are not inventions and hence not patentable. The words *per se* are prone to different interpretations at the hands of the patent office, with some examiners granting patents to any software that demonstrated a technical effect of some sort. The Manual of Patent Office (2011), attempts to lay down guidelines to interpret the provision as follows:

If the claimed subject matter in a patent application is only a computer programme, it is considered as a computer programme *per se* and hence not patentable. Claims directed at 'computer programme products' are computer programmes *per se* stored in a computer readable medium and as such are not allowable. Even if the claims, inter alia, contain a subject matter which is not a computer programme, it is examined whether such subject matter is sufficiently disclosed in the specification and forms an essential part of the invention.

Accordingly, a patent application having claims directed to software programme/algorithm with computer instructions cannot be claimed as a patentable invention. To avoid application of Section 3(k), in the claims, hardware components must be shown to form the essential part of the invention and some form of inter-dependence should be shown between the software and hardware components. A computer program that has industrial application and those that are used in combination with hardware are patentable.

In order to protect traditional knowledge, the Act excludes from patentability any invention which, in effect, is TK or which is an aggregation or duplication of known properties of traditionally known component(s).<sup>9</sup>

To protect bio-diversity and to prevent 'bio-piracy', the Act mandates that if any bio-resource is used in an invention, the applicant is required to disclose the source of the biological material. The noteworthy provisions are:

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7 US Patent Number 5521184.

8 April 1, 2013, Civil Appeal No. 2706 - 2716 of 2013.

9 Patents Act, 1970, Section 3 (p)

- i) *Section 10(4)(d)(ii)(D)*- which mandates that every patent specification which mentions a 'biological material' shall "disclose the source and origin of the biological material in the specification" when used in an invention;
- ii) *Section 25 (j)* - a patent can be opposed on the ground " that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention"; and
- iii) *Section 64(p) &(q)* - a patent can be revoked for failure to disclose or wrongful mention of the source of biological material in the specification or if the invention is based on traditional knowledge, oral or otherwise, of any local community of India or elsewhere.<sup>10</sup>

Now, with the 2005 Act, micro-organisms are a patentable subject matter in India. Section 3(j) is worded in similar terms as TRIPS Article 27 (3)(b) and provides that the following shall not be considered an invention:

*Plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for the production or propagation of plants and animals;*

Plant varieties are however protectable under the Protection of Plant Varieties and Farmers' Rights Act, 2001. Inventions related to atomic energy are also not patentable.

### **Opposition**

The Patents Act, 1970 provided a pre-grant opposition mechanism. It had several grounds on which a patent could be opposed including the lack of novelty, inventive step or utility or that the claimed invention does not fall within eligible subject matter or that the specification does not disclose the source of geographical origin of biological material used for the invention.<sup>11</sup>

The 2005 Act has substantially amended section 25 of the 1970 Act. While retaining the pre-grant opposition, it has introduced a post-grant opposition mechanism. The key difference between the pre-grant and the post-grant opposition mechanism is that the pre-grant opposition can be filed by any person, but the post-grant opposition by an interested person.<sup>12</sup> The grounds of opposition are similar in both the pre-grant and post-grant stage. There are eleven grounds of opposition listed in the Act (S. 25). Grounds of revocation/opposition have been enlarged, which include the non-disclosure/wrongful mention of geographical origin of biological materials, and anticipation based on TK (§ 25, 64).

A competitor who fails to challenge a patent application at the pre-grant/post-grant stage can seek revocation of the patent under Section 64 of the Patents Act.<sup>13</sup> Here again, the grounds that could be cited for revocation

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10 Recently, on December 18, 2012, the Indian Patent Office has published the Guidelines for processing of patent applications relating to Traditional Knowledge and Biological Material. See the Patent Office website: [www.ipindia.nic.in](http://www.ipindia.nic.in)

11 Patents Act, 1970, Ch. V (sections 25-28).

12 See *Sankalp Rehabilitation Trust v. F. Hoffmann-la Roche AG*, discussed below.

13 In much the same way as the post grant opposition mechanism, it has to be a 'person interested' who initiates the challenge and not just any person.

(whether by a direct petition to the Controller or as a counter claim during infringement proceedings) are broadly similar to that available at the pre-grant and post-grant stage. This combination of pre-grant and post-grant opposition mechanism and a revocation mechanism while makes the regime very effective for filtering out frivolous claims, but may affect the finality of the claim.

In fact, some mailbox applications have been challenged under the pre-grant opposition procedure. Thus, for example, *Natco Pharma Ltd*, an Indian pharmaceutical company, opposed an application by *Novartis India Ltd* pertaining to an anti-cancer drug 'Imatinib Mesylate' on the ground that it lacked novelty and that it fell within the subject matter exclusion under section 3(d), as it claimed a new form that does not show increased efficacy. According to *Natco*, the Indian patent application merely claimed a crystal form (Beta) version of a drug that was already known in 1993.<sup>14</sup> This challenge succeeded and *Novartis* was denied a patent.<sup>15</sup>

In a post-grant opposition, in a recently decided case (on November 2, 2012), *Sankalp Rehabilitation Trust v. F.Hoffmann-la Roche AG*,<sup>16</sup> the IPAB has rejected the appeal of Roche on the ground of sec. 3(d). Roche's famous Pegasys patent, covering a new form of pegylated interferon, which was earlier revoked by the Patent office in the post grant opposition by NGOs, at the behest of patient groups, on the ground that it is "obvious" and that it fails the section 3(d) test. The IPAB further held that patient groups are certainly "persons interested" who can challenge patents within the meaning of the Act, for patents are not mere private rights alone, but have a significant "public interest" dimension as well.<sup>17</sup>

### ***Infringement***

The patentee enjoys the exclusive right to manufacture, use, sell and import the patented item. The Act provides civil and criminal remedies for infringement of a patent, which include injunction, including interlocutory injunction, damages, account of profits, as civil remedies; and seizure and destruction of infringing material, articles and implements as criminal remedies (s. 108).

However, the Act provides the standard exemptions of 'experimental use', for teaching and research,<sup>18</sup> and in the specific context of inventions that require regulatory approval, the well known Bolar exception applies<sup>19</sup>. In the case of

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14 Press Trust of India, *Natco Opposes Novartis' Patent Claim*, available at : <http://inhome.rediff.com/money/2005/jun/20natco.htm>.

15 In Re Application for Patent No. 1602/MAS/98 *Novartis AG v. CIPLA Ltd* 25 January 2006. CIPLA was not a party to the compulsory license application, sold Bayer's patented drug in the Indian market as Soranib and has challenged the validity of the Bayer's patent. *Natco* has also challenged the validity.

16 ORDER (No. 250/2012), OA/8/2009/PT/CH and M.P. NO.85 & 111 of 2012 in OA/8/2009/PT/CH

17 Pegasus is India's first granted pharmaceutical product patent. It is also India's first post grant opposition case.

18 Patents Act, 1970, Section 47

19 *Id.* Section 107A (a)

process patents, if the products (patented and the substitute product) are the same, then the burden of showing that the process does not infringe is on the defendant.

### ***Compulsory Licensing***

Chapter XVI [Ss 82-94] of the Act enumerates circumstances when CLs can be issued. The Act gives effect to the provisions of TRIPS Agreement and permits exceptions under the Paris Convention, particularly on local working of the patent. The terms and conditions for the issuance of license are similar to the TRIPS Agreement. The grounds for granting compulsory licenses under the Act are that:

- ♦ That the reasonable requirements of the public with respect to the patented invention have not been satisfied; or
- ♦ That the patented invention is not available to the public at a reasonable affordable price; or
- ♦ That the patented invention is not worked in the territory of India. (Sec. 84(1))

Reasonable requirements of the public shall be deemed to have not been met if due to patentee's refusal: (i) establishment of new trade/industry in India has suffered, (ii) the demand of the patented article has not been met, (iii) a market of export of patented article manufactured in India has not been supplied, or (iv) development of commercial activities in India has been prejudiced (Section 84(7)). The non-availability of the patented invention at a 'reasonably affordable price' is also a ground for the revocation of the patent.<sup>20</sup>

Compulsory license can be issued upon notification by the Central Government (Sec. 92). It can also be issued on application for manufacture and export of generics of a patented drug to meet public health emergency in a developing/least developed country in accordance with the Doha Declaration (Para 6) on 'TRIPS Agreement and Public Health'<sup>21</sup> and the TRIPS Council Decision of August 2003<sup>22</sup>(Sec.92A).

The Act has made the procedure for the grant of compulsory licenses simpler. It provides that where the applicant has made efforts to obtain a license from the patentee on reasonable terms and conditions and such efforts have been unsuccessful within a reasonable period, the Controller can now interpret reasonable period to mean a period not ordinarily exceeding 6 months (Section 84(6)). A person can make an application to the Controller for the grant of a compulsory license only three years after the grant of a patent, unless there is

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20 Section 84 (1) (b) and Section 85, entitled 'Revocation of Patents by the Controller for non-working'.

21 Declaration on the TRIPS Agreement and Public Health, WTO Res. WT/MIN(01)/DEC/2, 4th Sess., Ministerial Conference, 20 November 2001, available at : [www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_TRIPs\\_e.doc](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_TRIPs_e.doc).

22 Implementation of Paragraph 6 of the Doha declaration on the TRIPS Agreement and Public Health, WTO Doc. WT/L/540 and Corr.1, 1 Sep. 2003, available at : [http://www.wto.org/english/tratop\\_e/trips\\_e/implem\\_para\\_6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/implem_para_6_e.htm).

a national emergency. However, the Act fails to provide a timeline within which the Controller must deal with compulsory license application once made. Rule 97 of the Patent Rules allows the Controller to refuse the application for CL when a *prima facie* case has not been made out and allows a notice of opposition to the CL (Rule 98). Once issued, the terms of the CL can be amended (Rule 100).

In cases of national emergency or extreme urgency or in case of public non-commercial use, the Central Government can at any time declare by notification in the Patent Office's Official Journal that it is necessary to make compulsory licenses available under a particular patent (sec. 92). In issuing the compulsory license, the Controller is to ensure that the drugs are available to the public at the lowest prices. Ch. XVII (§ 99-103) allows use of inventions for government purposes or on its behalf and acquisition of inventions by the Central government by notifying in the Official Gazette. The Central government is to pay to the applicant/patentee adequate compensation. Amount of the compensation will depend on the economic value of the patent and in case of a dispute, the matter will be decided by the high court.

Local manufacturing is an essential condition for grant of a patent. Controller can seek information from a patentee/licensee regarding the "extent to which the patented invention has been commercially worked in India" (S. 146). General principles applicable to working of patented inventions are that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale without undue delay (S. 83). Non-working of a patent is also a ground for revocation of a patent.<sup>23</sup>

The local working provision could arguably be in conflict with Article 27 of the TRIPS Agreement which prohibits any discriminatory treatment based on whether products are imported or locally produced. But the Agreement allows the Members to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and in a manner conducive to social and economic welfare, and to balance of rights and obligations.<sup>24</sup>

The non-working, alongwith the high price of the drug, was an issue in the first compulsory license issued by the Controller-General of Patents in the *Bayer Corporation v. NATCO Pharma* on March 12, 2012 under Section 84 of the Patents Act. The Natco has been granted license for making the generic version of the kidney/liver anti-cancer drug Sorafenib Tosylate (bearing brand name Nexavar) by Bayer, which was granted Patent on the drug on March 3, 2008 in India. The Controller invoked sec. 84 which enlists three conditions for issuing of CL and found that all the three conditions above were satisfied in this case, namely:

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23 In the Annual Report of the Patents Office for 2010-2011 around 6777 patents were shown to be commercially working (i.e. out of 39,594 patents which were in force). In 2009-10 around 4189 patents were being commercially worked and in 2008-09 the figure was around 4752, available at: [www.ipindia.nic.in](http://www.ipindia.nic.in)

24 The issue, however, is yet to be resolved by a WTO panel, which had an opportunity to decide in a US complaint against Brazil, which had a similar provision. See *WTO Panel on Brazil - Measures Affecting Patent Protection, Report of the Panel on Brazil - Measures Affecting Patent Protection*, Request for the Establishment of a Panel by the United States, WT/DS199/3 (Jan. 9, 2001), available at: <http://docsonline.wto.org/DDFDocuments/t/WT/DS/199-3.doc>.

- ◆ Since Bayer supplied the drug to only 2% of the patient population, the reasonable requirements of the public with respect to the patented drug (Nexavar) were not met.
- ◆ Bayer's pricing of the drug (Rs. 2.8 lakhs for a months' supply of the drug) was excessive and did not constitute a "reasonably affordable" price,
- ◆ The product was neither easily available nor affordable due to its high pricing.
- ◆ Bayer did not sufficiently "work" the patent in India.

Terms of the CL are set as follows:

- ◆ Natco will pay a 6% royalty on the net sales (every quarter) to Bayer,
- ◆ Will only charge Rs 8800 for a monthly dose (120 tablets) of the drug (as committed by Natco in its CL application.),
- ◆ Natco committed to donating free supplies of the medicines to 600 deserving patients each year (recorded in the CL),
- ◆ The license is non-exclusive and non-assignable.<sup>25</sup>

Earlier, in the *F.Hoffmann-La Roche Ltd. v. Cipla Limited (2008)*, also the non-working and high pricing of the drug Erlotinib (used in the treatment of non-small lung cancer) was an issue apart from the invalidity of the patent for lack of novelty. The Delhi High Court, on September 7, 2012, disposed off the case, holding the patent of Roche as valid but at the same time held that Cipla's generic drug, Erlocip has not infringed the patent as Roche had merely led evidence (that too only from its own literature on the drug and not a scientific analysis of its constituents) to show that Cipla's drug was also erlotinib hydrochloride (EH) and claimed that manufacture of Polymorph B by Cipla was sufficient to trigger infringement of Claim 1 of Roche's patent. Though this is India's first drug decision but it is not very clear on validity of the patent and its infringement.

Failure to keep informed the Controller about his foreign applications related to the invention up to the date of grant of patent in India by the applicant may lead to the refusal/cancellation/revocation of the patent (sections 8, and 25(h)).<sup>26</sup>

### ***Unresolved Issues***

*Examination Guidelines:* In March 2011, the Patent Office brought out the Manual of Patent Practice and Procedure to help in the examination of patent applications. Very recently, the Department of Industrial Policy and Promotion (DIPP) has brought out the Guidelines for Examination of Biotechnology applications, adopted on March 25, 2013; and also Guidelines for processing of patent applications relating to traditional knowledge and biotechnological material,

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25 The decision of the Controller-General was challenged before the IPAB. which also dismissed Bayer's appeal against the decision on September 14, 2012. The order of the IPAB has been challenged before the Bombay High Court.

26 *Chemtura Corp. v. Union of India & Ors.* (CS (OS) No. 930 of 2009 , Delhi H.C. Aug. 3, 2009)

December 18, 2012.<sup>27</sup> It is however pertinent to mention that the 'inventive step' test under the Patents Act has been made more comprehensive by the addition of criteria such as 'technical or economic' significance. An objective determination of 'technical' or 'economic' significance is required to help examiners applying these criteria. Similarly, the new use exclusion has been expanded by the addition of an 'efficacy' precondition in section 3(d). Guidelines do not help in an objective determination of when a new form can be said to entail added efficacy.

*Guidelines on royalty payment:* Presently there are no set guidelines on the royalty payment, where a compulsory license is being issued. Section 100(3) provides for adequate remuneration where the invention is used by the Government. A Discussion Paper on CL, brought out by the Ministry of Commerce and Industry with particular reference to pharmaceutical sector in July 2010 provided for above 4% royalty as indicated in the Tierred Royalty Method [TRM], an aggregate payment of 10% on the sale returns. But, by a press release on April 12, 2011, the Government has concluded that the framework of the Indian Patents Act and Rules fully meet all obligations and provides adequate guidance for the issue of CLs, including the royalty payment. Hence, no additional guidelines are required.

*'New entity' and 'micro-organism':* The Government of India in 2005 had referred the issues of 'new entity' and 'micro-organism' to an expert committee under the chairmanship of Dr Mashelkar to decide the scope and their patentability, and examine whether it would be in line with the TRIPS Agreement to limit the grant of patents for pharmaceutical substance to new chemical entity or to new medical entity involving one or more inventive steps. The committee was also to examine whether it would be TRIPS-compatible to exclude micro-organisms from patenting altogether. The Committee, in its revised report in March 2009, stated that linking the grant of patents for pharmaceutical substances only to a new chemical entity or to a new medical entity *may prima facie* amount to 'excluding a field of technology' even when they satisfy the basic requirements of patentability, which would not be TRIPS compatible. Similarly, for 'micro-organism', strict guidelines are required for examination of the patent applications involving micro-organisms from the point of view of substantial human intervention and utility. The committee concluded that excluding micro-organisms *per se* from patent protection would be in violation of TRIPS Agreement.<sup>28</sup> The recent Guidelines for Examination of Biotechnology prohibit the patenting of micro-organisms which are directly isolated from nature, and only genetically modified micro-organisms are patentable subject matter.

*Database:* In December 2007, India was recognized as International Searching Authority (ISA) and International Preliminary Examining Authority (IPEA), but it has yet to become fully operational. Main stumbling block is the reliable database. The patent office does not have any robust searchable electronic database of Indian patents to rely on. Very recently, it has prepared databases on three areas: Ekaswa- A Database: Patent applications filed in India

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<sup>27</sup> Texts are available at the Patent Office website: [www.ipindia.nic.in](http://www.ipindia.nic.in)

<sup>28</sup> See report on the Patent Office's available at: [www.ipindia.nic.in/](http://www.ipindia.nic.in/)

from January 1995 onwards; Ekaswa-B Database: Patent applications notified for opposition, published from January 1995 to December 2004; and Ekaswa-C Database: Patent applications published in official Journal of Patent office (18 month publications) published from January 2005 onwards.

### **Trademarks**

Trademarks are protected in India in two ways:

- (i) By registration under the Trademarks Act,
- (ii) Under the common law principle of 'passing off, if the mark is not registered.

The Trademarks Act, 1999 (the 1999 Act) came into force from 15 September 2003 by repealing the Trade and Merchandise Marks Act, 1958. The term of protection for TM is 10 years, which is renewable. The main differences brought about by the new law are:

- i) It enlarges the definition of trademarks to include distinctive shape of goods, packaging and combination of colours;
- ii) provides for the registration of 'service marks';
- iii) provides protection to well-known marks;
- iv) provides for the registration of collective marks owned by an association of persons; retains registration of certification marks;
- v) transfers the final authority for the registration of certification of trade marks to the Registrar from the Central Government;
- vi) prohibits the use of some one else's trade mark as part of corporate names or name of business concern;
- vii) increases the grounds of trademark infringement, such as likelihood of dilution or disparagement of a registered trademark and comparative advertising;
- viii) simplified procedures for registration;
- ix) introduces the concept of 'permitted user', which includes, but is not restricted to a 'registered user' and simplifies the procedure for registration of registered user;
- x) term of a trademark has been increased to 10 years, which is renewable;
- xi) provides for registration of Convention applications for which the priority deadline is six months.
- xii) establishes an Intellectual Property Appellate Board (IPAB) for speedy disposal of appeals from the orders and decisions of the Registrar of Trade Marks, (operative from September 15, 2003);
- xiii) provides for the assignment of unregistered trademarks without goodwill;
- xiv) provides for the filing of a single application for goods or services falling in more than one class (multi class filing);
- xv) enhances punishment for the offences relating to trade marks at par with the Copyright Act, 1957 to prevent the sale of spurious and counterfeited goods and makes some trade mark offences cognizable.
- xvi) increases the powers of the court to grant *ex parte* injunction in certain

cases.

- xvii) Border measures for counterfeited goods are provided;
- xviii) trademark owners can now file a law suit in the District court for infringement/passing off actions at their place of business, as opposed to where the defendant resides;

These changes in statutory framework on trademark law, though in line with TRIPS, however does not cover 'trade names', indication of source or appellation of origin, which can be protected under the law of 'passing off', beside the unregistered trade marks.

#### ***Criteria for Registration under the Trademarks Act***

Under Indian trademark law, the definition of a 'trademark' for the purpose of registration is sufficiently wide to cover any of the following elements:

- ♦ any name, including personal names and surnames, and signatures;
- ♦ any invented word or arbitrary word which is not directly descriptive of the character or quality of the goods or services;
- ♦ letters, numerals or any combination thereof;
- ♦ devices, including fancy devices or symbols;
- ♦ monograms;
- ♦ colour combinations, or a single colour in combination with a word or device;
- ♦ shapes of goods or their packaging;
- ♦ three-dimensional marks; and
- ♦ sound marks, when represented in conventional notation or described in words.<sup>29</sup>

Smell as a trademark, however, is not covered.

Based on the above, a trademark is registrable if it is:

- ♦ capable of being represented graphically;
- ♦ capable of distinguishing the goods or services of one person from those of others; and
- ♦ used in relation to goods or services for the purpose of indicating a connection in the course of trade between the goods or services and the owner or authorized user of the mark.

In establishing the second criterion above - distinctiveness - descriptive marks are usually weakest, with the degree of distinctiveness becoming increasingly strong for suggestive, arbitrary, fanciful and invented marks respectively. However, even descriptive words may acquire a sufficiently high

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29 Sound marks are not mentioned explicitly in legislation but the understanding (by government and private practitioners) is that provided the sound can be reproduced graphically, either by musical score or other means of notation, sound marks should be allowable provided the test of distinctiveness is satisfied. See the official website of the Indian patent office, available at : [http://patentoffice.nic.in/tmr\\_new/FREQUENTLY\\_ASKED\\_QUESTIONS.htm](http://patentoffice.nic.in/tmr_new/FREQUENTLY_ASKED_QUESTIONS.htm)

degree of distinctiveness through use. An exception to this general rule arises when there has been an honest and concurrent use of a mark.

### ***Examination/Opposition***

The Trademarks Act has a streamlined registration procedure and an examination report is issued within a month of filing the application. Any objections raised by the registrar are communicated to the applicant, who may submit a written response within a month of receiving notice (this period may be extended), or alternatively, request the registrar for a hearing. The registrar will communicate its decision to the applicant in writing; and if the applicant is dissatisfied with this decision, may file an appeal within the prescribed timeframe.

After all the objections raised by the registrar are met, the application is published in the *Trademarks Journal*. After publication, any party may file a notice of opposition to registration within three months (which may be further extended by a month at the registrar's discretion). After the conclusion of the opposition proceedings, the trademark application may be accepted or rejected. The onus is on the applicant to establish that it is entitled to registration of the trademark as applied for.

### ***Infringement***

Any unauthorized use of the mark or a deceptively similar variant by any person, other than the registered proprietor, in relation to the class of goods in respect of which the mark is registered would amount to an infringement of the trademark. As mentioned earlier, an unregistered trademark can be protected through the common law action of passing off. However in such a case, the plaintiff has to prove that the:

- i) mark has reputation associated with it;
- ii) defendant's use of a similar mark causes or is likely to cause confusion in the minds of the consumer, as to source/sponsorship with the plaintiff's mark.

The standard defence of honest concurrent use applies in any action for infringement. The Act provides civil and criminal remedies for any infringement of the trademark. Any person, falsely applying trademark or selling or providing services to which trademark or false trade description is applied will be subject to imprisonment for 6 months to 3 yrs and a fine of Rs. 50000 to 2 lakh. The second or subsequent convictions will entail penalty and imprisonment for 1 to 3 years and fine of Rs 1 to 2 lakh. Civil remedies are: injunction, damages, accounts of profit, or an order for destructing or erasing labels and marks.

### ***Recent Developments***

On September 21, 2010, the Trade Marks (Amendment) Act, 2010 has been passed by the Parliament. The amendment Act is in the context of India becoming a party to the Madrid Protocol, 1989 on July 8, 2012. The Trade Marks (Amendment) Rules, 2013 have been made to give effect to the Trade Mark (Amendment) Act 2010. The amendment Act was notified on July 8, 2013, and the 'Guidelines for functioning under the Madrid Protocol' were published on

17 December 2013. The Protocol is a simple, facilitative and cost effective system for international filing of trade marks for registration. It would enable Indian companies to register their trade marks in Member Countries of the Protocol through filing a single application in one language and by paying one-time fee in one currency. As a result, a new Chapter IVA has been added and other corresponding amendments have been made in other provisions of the Act to give effect to the Madrid system.

There is now complete on-line filing of international applications and receipt of designations and other correspondence from the International Bureau, which has been included in the amended Rules. The classification of goods and services have to be as per Nice Classification., though India is not a party to the Nice Classification.

### **Copyright**

India's Copyright Act, 1957, which came into effect from January 1958, been amended six times, viz., in 1983, 1984, 1992, 1994 1999 and 2012. The 1994 the amendment was g the most substantial, to meet its national and international requirements. The 1999 amendment brought the copyright law completely in accordance with TRIPS Agreement. India has not yet acceded to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) of 1996, though the 1994 amendment Act, to some extent, tried to address the challenges posed by the digitization of work and the internet. The 2012 Amendment Act,<sup>30</sup> besides addressing the internet challenges to copyright, .has brought out some of the following changes:

- ♦ WCT and WPPT related amendments - for this purpose section 14 has been amended to include 'commercial rental' to bring it in line with the TRIPS article 11 and Articles 7 & 9 of the WCT and WPPT respectively in the case of cinematograph film and sound recording. Fair use provisions have been extended to the digital environment. Any transient and incidental storage of any work through 'caching' has been provided as exceptions as per the international practice. Any deliberate storing and unauthorized reproduction and distribution of such works amount to infringement attracting civil and criminal remedies. Storing and reproduce the work in any material form includes storing in electronic or other means. The technological measures used by the copyright owner to protect his rights are protected and any circumventing measures by any person in this regard are punishable with two years imprisonment and fine (sec. 65A). In compliance with Articles 12 and 19 of the WCT and WPPT respectively, the Act provides for protection of Digital Rights Management Information (Sec. 65B).
- ♦ Performer's Rights: The amendment has introduced affirmative performers' rights, who will now have the exclusive right to do or authorize the doing of any of the acts in respect of the performance, without prejudice to the rights conferred on authors, as stated therein (sec. 38A). They have the right to communicate to the public; and have been conferred moral rights on

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30 Assented by the President on June 8, 2012.

their performances; and have the right to restrain or claim damages in respect of any distortion, mutilation or other modification of their performance that would be prejudicial to his reputation (Sec. 38B).

- ♦ Rights of the author of the work have been strengthened. The author of the musical or literary work incorporated in a cinematograph film or sound recording shall not assign the right to receive royalties in any form other than as a part of the film or sound recording. Any assignment of copyright in any work contrary to the terms and conditions of the rights already assigned to a copyright society<sup>31</sup> to which the author is a member shall be deemed to be void (Sec. 19). The moral rights of the author have also been made co-terminus with the authorship rights and which can be exercised by the legal heirs of the author also (Sec. 57).<sup>32</sup>
- ♦ Compulsory Licensing: Section 31 of the Act provides for 'compulsory licensing' in situations where the 'Indian work' is withheld from the public. Now the scope of the section has been amplified by extending it to 'any work', and also any unpublished work (sec. 31A). Compulsory license can be issued of works for the disabled, any person working for the benefit of the persons with disabilities on a profit basis or for business can apply for compulsory license to the Copyright Board for the conversion and distribution of books in any accessible format (sec. 31B), Work created for the benefit of the disabled in any accessible format to facilitate access to persons with disability, for private or personal use, educational purpose or research shall be a fair use, provided that the copies of the works in such accessible format are made available to the persons with disabilities on a non-profit basis but to recover only the cost of production (sec. 52zb)  
The Act provides statutory license to broadcasting organizations to broadcast literary, musical work and sound recording subject to the payment of royalty fixed by the Copyright Board.
- ♦ Copyright Board has been reconstituted with wider powers.<sup>33</sup>
- ♦ The Act strengthens the border measures to stop the import of infringing copies (sec. 53). This is in compliance with the Government Notification - the Intellectual Property Rights (Imported Goods) Enforcement Rules 2007, brought under the Customs Act, with a definite time lines to enforce the measures against infringing copyright work.

Term of protection depends on the nature of work being protected. For literary and artistic works, it is life of the author plus 60 years and in case of broadcasting, 25 years and for performer's rights, 50 years

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31 At present, there are four copyright societies: Society for Copyright Regulation of Indian Producers for Film and Television (SCRIPT); The Indian Performing Right Society Ltd. (IPRS); Phonogram Performance (India) Ltd. (PPL).and Indian Reprographic Rights Organization (IRRO). They have to get re-registered.

32 On moral rights, *see, Amar Nath Segal v. Union of India*, 2005 (30) PTC 253 (Del).

33 Now the Board will have the power to set the tariff fee/compensation to be charged by the copyright societies for their licensed work. See the decision of the Supreme Court in *Super Cassettes Industries Ltd. v. Music Broadcast Pvt. Ltd.* [Civil Appeal Nos.4196-4197 of 2012 arising out of SLP(C) Nos. 26581-26582 of 2011], decided on May 4, 2012 to the contrary available at : [www.advocatekhaj.com/library/judgments/announcement.php?WID](http://www.advocatekhaj.com/library/judgments/announcement.php?WID).

### ***Remedies for Infringement***

The Act provides for both civil and criminal remedies for infringement. In a civil action, remedies available are: injunction, damages, and order for seizure and destruction of infringing articles. In certain circumstances, even a secondary infringer can be held liable. Criminal remedies are in the nature of fine and imprisonment. Police have the power to seize infringing goods/ plates used for infringing purposes without warrant. Court may order the destruction of infringing copies of the work or all plates in the possession of the offender to be delivered to the owner.

A civil suit is to be instituted in the concerned civil court in whose jurisdiction plaintiff resides/carries on business. Fair dealing is a defence as enlisted in section 52. It also provides civil remedies for groundless threats (s. 60). In *India TV v. Yash Raj Films*, Plaintiff aired episode of India Beats featuring Vasundhara Das. She was also interviewed in the studio of the plaintiff in front of a live audience. Few clips of the song from the movie *Salaam Namaste* were shown when she sang the title song of *Salaam Namaste*, originally sung by her for the film. Defendant in its notice alleged that this is a violation of the copyright in the song and in the sound recording. But the court prohibited the defendants from sending such notices and decided that the case is covered under fair use/fair dealing or *de minimis*.<sup>34</sup>

### ***Some Unresolved Issues***

1. *Royalty Guidelines*: Guidelines need to be framed to fix royalty compensation rates for compulsory licensing in relation to works such as sound recordings to save the time on litigation.
2. *Sui-generis Database Protection*: Unlike Europe, India does not have any *sui-generis* mechanism to protect unoriginal databases. The government needs to conduct a study to determine whether such a sui generic form of protection would be good for the country.<sup>35</sup>

### **Designs**

The Indian Designs Act, 2000 is TRIPS compliant.<sup>36</sup> It defines 'Design' as only those features of shape, configuration, pattern, ornament or composition of lines or colours that are applied to any article, whether in two dimensional or three dimensional or in both forms. The Indian designs regime has adopted the detailed classification of designs followed internationally.

In order to be protected, a design has to be new and original and must not have been disclosed to the public in India or any other country. It is also essential that the design should not have any functional property associated with

34 Judgement delivered by the Delhi High Court on August 21, 2012, available at : [www.indiankanoon.org/doc/115992789/](http://www.indiankanoon.org/doc/115992789/)

35 See, study conducted by NASSCOM on behalf of WIPO : A Study On The Impact Of Protection Of Unoriginal Databases On Developing Countries: Indian Experience available at : [http://www.wipo.int/documents/en/meetings/2002/sccr/pdf/sccr7\\_5.pdf](http://www.wipo.int/documents/en/meetings/2002/sccr/pdf/sccr7_5.pdf).

36 The Rules were framed in 2001, amended in 2008. There is a Manual of Designs Practice and Procedure enlisting the important decided cases on designs.

it - i.e., the design must be purely ornamental ('it is judged solely by the eye'). Illustratively, in a suit filed in 2003,<sup>37</sup> the court refused to grant an injunction to the plaintiff in respect of a registered design for a toothbrush handle on the ground that the hand grip was dictated more by function than aesthetics and could not therefore be protected as a design.

Certain designs qualify for protection under both the Designs Act and the Copyright Act. However, the Copyright Act provides that if any article that is capable of being design registered is not so registered in time, then upon the production of 50 copies of the said article by an industrial process, any copyright in the design ceases as well.<sup>38</sup>

Total term of protection of a design is 15 years - initial term of 10 years and then renewable for 5 more years. As is the case with other forms of intellectual property, a design proprietor enjoys certain exclusive rights in relation to the design, including its use in any article. Any act contravening any of the exclusive rights amounts to an infringement. However, unlike most other IP legislations (excluding patents), there is no provision for criminal remedies.

### **Geographical Indications**

The Geographical Indications of Goods (Registration and Protection) Act, 1999<sup>39</sup> provides for the registration and protection of Geographical Indications in India. The main impetus behind the Act comes from the fact that reputed Indian names representing a variety of unique natural and agricultural products such as 'Darjeeling' tea and 'Basmati' rice have been unduly misappropriated by traders in other countries.

The Act protects agricultural, natural or manufactured goods that are distinct from similar products due to quality, reputation or any other characteristic that is essentially attributable to their geographical origin. Such protection not only protects consumers from deception, but also facilitates the export of such goods from India. The Act, however, does not clearly lay down the criteria for granting protection to a GI.

Any association of persons, producers, organization or authority established by or under the law can apply to be a registered proprietor of a GI. Further, any producer of goods that are covered by a GI registration may apply for registration as an authorised user. Only the registered proprietor or an authorized user has the right to use the registered geographical indication. An infringement action may be brought only by a registered proprietor or an authorized user against third parties. Till the end of 2013, 195 GIs re being granted GIs (including one each from UK and USA).

### **Semiconductor Protection**

Under the Semiconductor Integrated Circuits Layout-Designs Act, 2000

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<sup>37</sup> *M/s Glaxo Smithkline Consumer Healthcare v. M/s Hindustan Lever Ltd* (Suit No. 1214 of 2003) before the High Court of Delhi.

<sup>38</sup> The Copyright Act, Section 15(2).

<sup>39</sup> In force since September 15, 2003.

(SICLD),<sup>40</sup> a 'layout design' includes a layout of transistors and other circuitry elements and includes lead wires connecting such elements and expressed in any manner in a semiconductor IC. As with other forms of intellectual property, only those layout-designs that are original, distinct and unique are granted protection. The Act provides for the registration of a person/entity as a registered user of a protected layout-design. Protection of an IC is for a period of 10 years.

### ***Infringement***

Any action involving the reproduction, importing, selling or distributing of an IC layout design by an unauthorized person amounts to an infringement. The standard 'fair use' defence is provided, i.e., any act of reproducing a registered layout-design, where such act is performed for the limited purposes of scientific evaluation, analysis, research or teaching, shall not constitute an act of infringement. In fact, the Act provides that where a person, on the basis of scientific evaluation or analysis of a registered layout-design, creates another layout-design which is original within the meaning of the Act, that person shall have the right to incorporate such another layout design in a semiconductor integrated circuit or to perform any of the exclusive acts that normally vests with a registered proprietor. Innocent infringement is a defence, i.e., the alleged infringer had no knowledge or no reasonable ground to know that he/she was infringing. After the time when such alleged infringer has received a notice of such knowledge, he/she may continue to perform any of the exclusive acts guaranteed to the registered proprietor only in respect of the stock in hand or ordered before such time. After the exhaustion of such stocks, he/she shall be liable to pay the proprietor of the registered layout-design a sum by way of royalty to be determined by negotiation between proprietor of the registered layout-design and that person or by the Appellate Board having regard to the benefit accrued to such person by performing or directing to be performed such act in respect of such semiconductor IC or article, as the case may be.

The Act does not provide for any civil remedies for infringement except for royalty payment by the innocent infringer after receiving the notice. It provides only criminal remedies. There is, however, a need for guidelines to determine royalty rates to be paid by the infringer.

### **Protection of Plant Varieties**

The Protection of Plant Varieties and Farmer's Rights Act 2001 (hereafter PPV Act) is largely based on UPOV's 1978 and 1991 Acts and is meant to comply with the obligation under Article 27(3)(b) of the TRIPS Agreement to provide for an effective *sui generis* model of protection.<sup>41</sup> The term of protection varies, depending upon the variety.

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40 The Act is not yet fully in force (barring the coming into force of sections 3 and 5 and the creation of the registry). Rules were framed in 2002. Registry became operative from May 2004.

41 The Act came into force on February 4, 2005.

In addition to protecting plant varieties, the PPV Act protects farmer's rights as well. While protecting plant breeders rights (PBRs) over varieties developed by them, it entitles farmers to save, use, sow, re-sow, exchange, share or sell their farm produce including protected varieties.<sup>42</sup>

Four types of varieties can be registered under the Act: New Variety, Extant Variety, Essentially Derived Variety, and Farmers' Variety. The extant variety need not show novelty and the criteria of distinctness, uniformity and stability will be determined as specified by the regulations made by the Protection of Plant Varieties and Farmers' Rights Authority (hereafter 'Authority').<sup>43</sup> The Act also envisages the Plant Varieties Protection Appellate Tribunal. A farmers' variety is defined as 'a variety which, (i) *has been traditionally cultivated and evolved by the farmers in their fields, or (ii) is a wild relative or land race of a variety about which the farmers possess common knowledge*'. Confusion, however, persists in terms of the criteria that would be used for registering such varieties, and it is not clear if it will have to demonstrate the qualities required for protecting a 'new variety' or for protecting an 'extant variety', since a farmer's variety is included within the ambit of 'extant variety'.

The Act has provisions for protecting traditional varieties and sets up a system of benefit sharing based on claims made by persons/NGOs in India to the Authority. Compensation can be claimed if any person/community has contributed significantly to the evolution of a variety registered under the Act. Benefit sharing/compensation will be channeled through a National Gene Fund.

The Act grants, like other IPRs, exclusive rights to the plant breeder. In the case of extant varieties, if such rights are not claimed by the breeder, the Central Government or State Government shall have the right. With regard to farmer's variety, the position is unclear regarding the rights granted and the term of the right, which require some clarification.

The Act contains 'fair use' provisions (such as use for research) that operate as exceptions against claims of infringement. It also provides for the grant of a compulsory license to use the protected variety in case of failure by a breeder to satisfy the reasonable requirements of the public by *inter alia* not providing seeds or propagating material at a reasonable price or becoming otherwise non-available.

### **Trade Secrets/Confidential Information**

Currently, there is no codified law in relation to the protection of trade secrets or confidential information in India (TRIPS talks about the protection of undisclosed information). The Competition Act, 2002 also leaves out the IPRs from its ambit. However, courts have entertained such actions using common

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42 This entitlement to farmers does not apply to branded seeds. 'Branded seed' means any seed put in a package or any other container and labeled in a manner to indicate that such seed is a protected variety.

43 See, Protection of Plant Varieties and Farmers Rights (Criteria for DUS for Registration) Regulations, 2009. Rules for registration were framed in 2003, which were amended in 2009. Regulations were issued in 2006

44 S K Verma, 'Legal Protection of Trade Secrets and Confidential Information' (2002) 44 *Journal of Indian Law Institute* at 336

law principles based on equity and contract. Remedy for civil action for breach of trade secret/ confidential information lies under section 27 of the Contract Act and the Specific Relief Act, 1963.<sup>44</sup> In *John Richard v. Chemical Process Equipment (p)Ltd*<sup>45</sup>, the Delhi High Court observed thus:

*It will ...be in the interest of justice to restrain the defendants from abusing the know-how, specifications, drawings and other technical information regarding the plaintiff's fodder production unit entrusted to them under express condition of strict confidentiality, which they have apparently used ... to the detriment of the plaintiffs.*<sup>46</sup>

The above principle has been applied in many cases. Instances of breach of confidentiality by employees have been successfully argued as a misuse of IPRs as one of the grounds. In *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber*<sup>47</sup>, the defendant, who was a one-time employee of the plaintiff, left with some database and established himself as a competitor of the plaintiff company. The court ruled that plaintiff had copyright over database, which involved confidential information of the plaintiff, under section 2 (o) of the Copyright Act and granted injunction restraining the defendant from using plaintiff's database.<sup>48</sup>

In *American Express Bank Ltd. v. Priya Puri*<sup>49</sup> the plaintiff alleged that the defendant, its ex-employee had disclosed confidential information and trade secrets to a competitor for her own benefits and sought an injunction against the defendant from joining the competing bank and also from using or disclosing any information. The court held that a customer database couldn't be a trade secret, and an employee's right to seek and search for better employment cannot be curbed even on the ground that she has confidential data.<sup>50</sup> However, sometimes, Indian courts have protected confidential information even without any specific contract.<sup>51</sup>

Main civil remedies available in a case for breach of trade secrets/ confidential information have been damages, injunction, accounts and profits. The major drawbacks associated with an action for breach of confidentiality are that

45 AIR 1987 Delhi 372. The plaintiff, an inventor of a fodder production unit gave certain drawings, technical specifications and other materials to the defendant for manufacture of thermal panels to use in the unit. Despite confidentiality agreement, defendants started manufacturing the machines, which were a substantial imitation of the plaintiffs drawings.

46. *Id.* at 383. A similar approach was followed *Escorts Action Equipment Ltd. v. Action Construction Equipment Pvt. Ltd.* (1999) PTC 36 (Del).

47. 6 [1995] DLT 35;

48. In *Diljeet Titus, Advocate v. Mr. Alfred A. Adebare and Ors.* 2006 (32) PTC 609 Del, the court held that the plaintiff had the copyright over its client list, defendants were in breach of copyright of the plaintiff and breach of confidentiality; injunction granted. See also, *Tractors and Farm Equipment Ltd. v. Green Field Farm Equipment Pvt. Ltd. And Ors.*, 2006 (32) PTC 343 (Mad)

49. (2006) III LLJ 540 Del

50 See Supreme Court judgements: *Niranjan Shankar Golakari v. Century Spinning & Mfg. Co. Ltd.* AIR 1967 SC 1098 (contract no in restrain of trade); *Krishan Murgai v. Superintendance Co. of India Pvt. Ltd.*, AIR 1980 SCV 1717 (contract in restraint of trade).

51 *Anil Gupta and Anr. v. Kunal Dasgupta and Ors*, 97 (2002) DLT 257; See also, *Zee Telefilms Ltd. and Film and Shot and Anr. v. Sundial Communications Pvt. Ltd. and Ors.* 2003 (5) Bom CR 404

an adequate remedy is unavailable against the person to whom the information is disclosed. Although damages may be sought against the confidants, they generally do not have the economic capacity to pay adequate damages. The liability of third parties also assumes importance in this connection.

The law on trade secrets, as developed by courts, is so far mainly confined to contractual relationships between private parties, but there is no legal mechanism to protect data submitted to government or government agencies, as required under Art.39(3) of the TRIPS Agreement. This leaves the situation uncertain and may require proper legislative and administrative mechanism from the government. Trade secret is an important form of IP and most innovative companies rely upon this proprietary/confidential information to gain business advantage. A predictable and recognizable trade secret regime will improve the market confidence. The National Innovation Council, set up by the government in May 2011, in its Draft National IPR Strategy has strongly advocated for IPR legislation to protect trade secret.

#### **Protection of Regulatory Data**

Article 39(3) of the TRIPS Agreement obliges its Members to protect test or regulatory data related to pharmaceutical or agricultural chemical products, submitted for approval to the regulatory authorities of the government. So far there is no separate legislation in India in this regard. The Drugs and Cosmetics Act, 1940 regulates the 'import, manufacture, distribution and sale of drugs [and cosmetics];'<sup>52</sup> and provides for the submission of test data in certain cases to the regulatory authority. Similarly, the Insecticides Act, 1968 regulates insecticides and other related agro-chemicals and provides for submission of test data in relation to the approval of these substances. However, neither of these statutes contains any express provisions governing the protection of data submitted to the respective regulatory authorities. This data is likely to be protected only through common law principles of trade secrecy/confidentiality as outlined above.

The issue of data protection was referred to the [Satwant] Reddy Committee, constituted in February 2004, to suggest the steps to be taken to comply with data exclusivity provision of Article 39(3) of the TRIPS Agreement. The report, submitted in May 31, 2007, acknowledges that: (a) data protection is relevant for any product at the stage of market approval, whether or not it is patent-protected; (b) it is a protection provided in return of submission of proprietary test data required for market approval; and (c) it protects against unfair commercial use and disclosure. Report finds that Article 39.3 does not require "data exclusivity" and that, at the present moment, it may not be in India's national interest to grant "data exclusivity" to pharmaceutical drug data. Taking note of the Para 4 of the Doha Declaration, which states that the provisions are to be "interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all," it argues that a "trade secrecy" form of protection is sufficient to comply with Article 39.3 and that India already provides for this (via common law principles). However, it cautiously recommends that since

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52 See Preamble of Drugs and Cosmetics Act, 1940.

there has been no instance thus far of common law trade secrecy provisions applying to the government, this position be made more explicit in the Drugs and Cosmetics Act, 1940 and the Insecticides Act, 1968.

### **Biological Diversity**

The Biological Diversity Act 2002 (BDA)<sup>53</sup> though not directly an IPR legislation, is an important piece of legislation aimed at protecting India's rich biodiversity and associated knowledge thereto, particularly against 'bio-piracy'. The BDA was enacted in pursuance of India's obligations under the UN Convention on Biological Diversity.

With an aim to conserve biodiversity and for the sustainable use of biological resources, the Act -

1. Prohibits the transfer of Indian genetic material outside the country, without specific approval of the National Biodiversity Authority (NBA);
2. Prohibits anyone claiming an IPR, such as a patent, over biodiversity or related knowledge, without the permission of the NBA;
3. Regulates the collection and use of biodiversity by Indian nationals;
4. Provides measures for sharing of benefits from the use of biodiversity, including transfer of technology, monetary returns, joint Research & Development, joint IPR ownership, etc.;
5. Provisions for local communities to have a say in the use of their resources and knowledge;
6. Provisions for the protection of indigenous or traditional knowledge;
7. provides for setting up of National, State, and Local Biodiversity Funds, to be used to support conservation and benefit-sharing;

The Act creates a three-tier structure to regulate the working of the Act: the National Biodiversity Authority (NBA), is authorized to grant access/approval by foreign individuals, institutions or companies to biological resources occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey or bio-utilization, and all matters relating to transfer of results of research to any foreigner; the State Biodiversity Boards (SBB), to allow access to bio-resources by Indians for commercial purposes and to restrict any such activity, which violates the objectives of conservation, sustainable use and equitable sharing of benefits; and the Biodiversity Management Committees (BMCs), set up by a local body within its area for conservation, sustainable use, documentation of biodiversity and chronicling of knowledge relating to biodiversity.

The NBA, while granting approval, will ensure equitable sharing of benefits on mutually agreed terms, between persons seeking approval, local bodies concerned and the benefit claimers. The NBA is authorized to frame guidelines on access and benefit sharing, which may be in monetary or non-monetary terms, including joint ownership of IPRs with the NBA or identified claimers

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53 Biological Diversity Rules were framed in 2004.

(sec. 21). In December 2009, the NBA framed 'The Protection, Conservation and Effective Management of Traditional Knowledge relating to Biological Diversity Rules, 2009'. The draft Rules are aimed to establish an ABS regime based on the principle of prior informed consent (PIC) of the community holding the TK in question.<sup>54</sup>

### ***Linkage with Intellectual Property***

In terms of its specific linkage with intellectual property, it provides that any person intending to apply for any form of intellectual property right in or outside India for any invention based on any research or information on a biological resource occurring and accessed from India has to obtain prior permission of the NBA in the prescribed form. The NBA may impose benefit sharing fee or royalty or other conditions on the financial benefits arising out of the commercial utilization of such rights (section 19).

Under the Patents Act, every patent specification must disclose the source and geographical origin of any biological material used in the invention. If a person applies for a patent, permission of the NBA may be obtained after the acceptance of the patent but before the sealing of the patent by the patent authority concerned.

India has ratified the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity, adopted in October 2010 on Oct. 9, 2012. It is now required to put in place a mechanism for access and benefit sharing (ABS) in relation to genetic resources and TK associated thereto.

### **Traditional Knowledge (TK)**

Along with the protection of its biodiversity, India is concerned about the protection of its rich reservoir of traditional and indigenous knowledge, both coded and informal. Past incidents of misappropriation of such knowledge such as the Neem and Turmeric spurred the Indian government to set up an inter-ministerial committee to look into creating a *sui generis* model for the protection of traditional knowledge. Presently, some of these concerns are addressed by the Biological Diversity Act and the Plant Variety Protection Act, which prevent the unauthorized access to and exploitation of biodiversity and associated knowledge. The Patents Act mandates the disclosure of the source and geographical origin of biological material, whenever such material is used in a patent application. But it is not clear how to decide about the criteria of 'inventive step' and 'non-obviousness'.<sup>55</sup> Since 2005, a total of 525 patent applications related to *Ayurvedic* and Herbal based medicines filed by the domestic parties at the Patent Office.<sup>56</sup>

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54 The draft Rules were to be adopted by May 2010, but are still at the discussion stage by the Committee.

55 The Patent Office has recently (December 18, 2012) published the Guidelines for processing of patent applications relating to TK and biological material. available at: [www.ipindia.nic.in](http://www.ipindia.nic.in)

56 List published by the Patent Office is up to November 30, 2012.

### ***Database on TK***

In order to ward off incidence of piracy/misappropriation of TK, the Government of India through the National Institute of Science Communication and Information Resources (NISCAIR) prepared a comprehensive TK database, commonly referred as the Traditional Knowledge Digital Library (TKDL) about medicinal plants, traditional Indian medicines from the medicinal systems of the *Aurveda, Unani, Sidha, and Yoga (Ayush)* in five languages - English, French, German, Japanese and Spanish. Access agreements on TKDL have been concluded by India with EPO, USPTO, UKIPO, Canadian IPO and Australian IPO, by making it accessible to patent examiners at International Patent Offices for the purpose of carrying out search and examination. The TKDL contains 2,66,537 formulations as of November 2012, with 95,592 in Ayurveda, from 75 books on TK, 1,47,925 in Unani from 10 books, 21,510 in Sidha from 50 books, and 1510 in *Yoga* from 15 books.<sup>57</sup> The TK on these medicinal plants has been documented electronically and classified as per international patent classification (IPC) and is called the Traditional Knowledge Resource Classification (TKRC).

From an IP standpoint, TKDL, though a laudable project, is only a defensive measure aimed at preventing misappropriation of India's TK through proprietary patenting by private individuals. In the last three years, TKDL has identified 1,000 cases of biopiracy of India's TK. As of January 2012, the TKDL has submitted data in 571 cases out of which 88 were either withdrawn or cancelled. Thus, the TKDL has been able to check the piracy of medicinal plants cost-effectively. However, it still does not address concerns in terms of converting this huge knowledge base into wealth for the nation, as also concerns relating to access and benefit sharing with indigenous holders of knowledge.

### **New IPR Legislations on the Anvil?**

Despite India's IP regime being in compliance with international regime, it lags behind in innovation. Though the number of patent applications is steadily increasing since 1995, but India has a very small share of patent applications in the world total. Most of the innovation/inventive activities are carried out by the public funded organizations and academic institutions. The role of the small scale industry is very minimal, although it is the backbone of the Indian economy, comprising more than 26 million enterprises, about 69 million persons employed, contributing 8% of the GDP, 45% of the manufactured output, and 40% of its exports. SMEs require a simple formal format of protecting their innovation. In order to encourage the universities/Research institutes to innovate and commercialize the patented invention, the government has prepared the 'Public Funded Research and Development (Protection, Utilisation and Regulation of Intellectual Property) Bill, 2007' which is currently undergoing scrutiny by a parliamentary select committee. It is drafted on the model of Bayh-Dole Act of the USA.

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<sup>57</sup> See more on TKDL available at : [www.tkdil.res.in/tkdil/langdefault/common/Abouttkdl.asp?GL=Eng](http://www.tkdil.res.in/tkdil/langdefault/common/Abouttkdl.asp?GL=Eng)

**Utility Models:** In order to create a nurturing legal environment to catalyze domestic Indian innovation and to encourage and support the start-ups and SMEs for the same, the Government is deliberating on the introduction of Utility Models system in the country, which has been recommended by the Prime Minister's Task Force in its Report (2010). As per WIPO, at present 55 countries, including Japan, China and Germany, provide some form of protection for utility models. Utility models are covered under Art. 1.1 of the Paris Convention and the PCT.

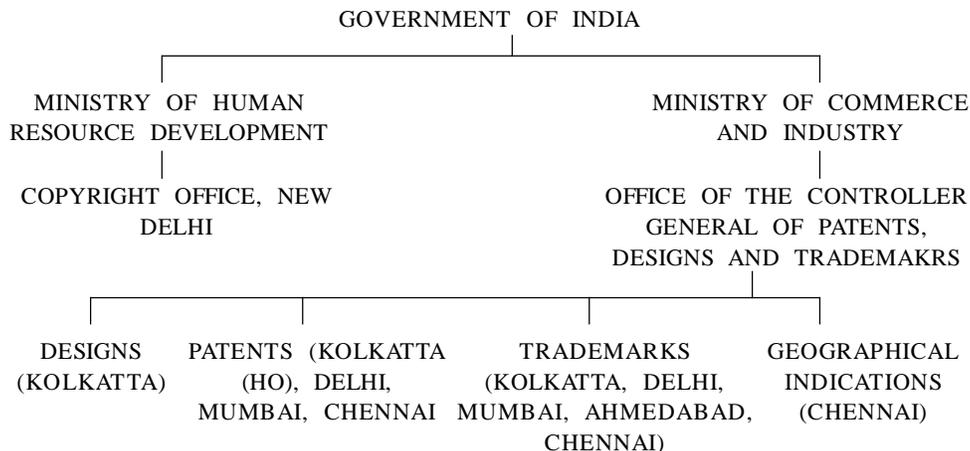
Utility model IP protection represents incremental inventions, falling short of the patentability criteria. The conditions for the registration of utility models are usually less stringent and are much cheaper to obtain and to maintain; acquisition and maintenance fees are generally lower than those applicable to patents. A lower threshold for protection would encourage more applications from Indians. In June 2011, the Department of Industrial Policy and Promotion (DIPP), Government of India, brought out a discussion paper on introducing UM system in India. a legislative framework (Draft Law) has also been prepared, which require some modifications before it takes the shape of law in India.

### III. IPR ADMINISTRATION

The government, since 1997 has embarked on the administrative measures to streamline the implementation of the IP laws.

#### Current Structure

The DIPP is responsible for the administration of patents, trademarks, designs and geographical indications. The Department of Higher Education, Ministry of Human Resource Development administers Copyright; the Department of Information Technology is concerned with the Semiconductor



Integrated Circuits Layout Designs, and Ministry of Agriculture is concerned with the Protection of Plant Varieties and Farmers' Rights. The figure below depicts the structure of various bodies and their role in IP administration.

### **Modernization of IP administration**

India was designated an ISA and IPEA in 2007 under the PCT and now a party to the Madrid Protocol. In this direction, all efforts are underway to meet the administrative and infrastructure requirements of the IP offices. The modernization of the physical infrastructure started in 1998 with the new IP offices, extensive computerization, re-engineering of procedures, human resource development and digitization of records to meet global standards. E-filing of patent and trademark applications started from July 20, 2007. In the 12th Five-year plan period (2012-2017) a sum of Rs. 500 crores have been earmarked for further modernization of IP offices to provide additional man-power in the IP offices and their training, higher level of computerization to support on-line processing, strengthening the database, improve the novelty search facility.<sup>58</sup> For training of patent examiners and professionals in IPRs, the government has established the National Institute of Intellectual Property Management (NIIPM) at Nagpur.

### **The statutory timeline for Examination/Search**

To speed up the processing of patent applications, the Patents Amendment Act 2005 and the Patents (Amendment) Rules 2006 have provided timelines for patent search/examination. Illustratively, patent applications are now to be mandatorily published within one month after expiry of the statutory period of 18 months and, in case of request for an early publication, the application is to be published within one month from the date of request. As for searches, on an average, it takes around 1 to 2 days to complete the search for a patent application, depending on the complexity of the area of technology involved.

The Rules also provide that a patent application now has to be referred to an Examiner within one month of a request for its examination. Further, the Controller will now be required to take a decision on the report of the Examiner within one month of its submission and the First Examination Report has also to be issued within six months of the date of request for examination of a patent application. The time for granting permission to file patents abroad has also been reduced to just 21 days. But despite this timeline, the patent-grant takes a minimum of five years, which is a long period.

## **IV. ENFORCEMENT OF IPRS**

The laws on IPRs incorporate necessary provisions on enforcement as per the mandate of TRIPS agreement. The law on trademarks, copyright, patents, GIs, semiconductor integrated circuits lay-out designs, and plant varieties have provisions for civil and criminal actions in cases of infringement of those rights. On the border measures, the Customs Act, 1962 has been suitably supplemented by the May 8, 2007 Notification, the Intellectual Property Rights (Imported Goods) Enforcement Rules 2007, issued under § 156 and 11 of the Act, which empowers the Customs official to stop IPR infringing goods at the borders. The notification is in compliance with the World Customs Organizations in this regard.

But in order to further strengthen the enforcement of IPRs, attempts are underway

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<sup>58</sup> available at: <http://www.hinduonnet.com/2003/04/27/stories/58>. available at: <http://www.hinduonnet.com/2003/04/27/stories/2003042703920900.htm>>.

to follow the best practices. The government has set-up an Inter-Ministerial Committee on Enforcement of IPRs under the chair of the DIPP to deliberate on the IPR enforcement issues. In the area of copyright, a Copyright Enforcement Advisory Council (CEAC-) exists with industry representatives, representatives of police forces and Ministries/ Departments concerned, as an apex advisory body, was set-up by the Ministry of Human Resources Development on November 6, 1991 for advising government on measures to improve the enforcement of the Copyright Act and for reviewing the progress of enforcement periodically. At the state government level, enforcement cells have been set up in the police headquarters and nodal officers have been appointed to handle copyright related offences. However, to improve the enforcement of IPRs, training of police, customs and judicial officers is conducted on a regular basis. But efforts are required to further improve the training of enforcement officers and create greater awareness about IPRs among the stakeholders and the general public against the IPR infringement/infringing goods.

The major concern in this context, however, is the expeditious disposal of IPR cases. There are presently more than 600 IPR cases pending before the various courts. In India, district courts and certain high courts (Bombay, Chennai, Delhi and Kolkata) have the original jurisdiction to try IP cases. But no separate IPRs courts exist. In certain Indian states, special IP courts are being established. The Government is now aiming at setting up of specialized IP courts, and a continued training programme for judges in the higher as well as lower courts in the next phase of upgradation of IPR machinery. The Commercial Division of High Courts Bill, 2009<sup>59</sup> seeks to do this to some extent by providing for special commercial benches that would also look into IP disputes. A number of Indian State governments have set up special intellectual property courts (viz. Delhi) and in certain high courts, special IP benches are constituted to decide IP cases expeditiously. In 2009, the Supreme Court of India, in *Bajaj Auto Limited v. TVS Motor Company Limited*, directed that all courts and tribunals in India must hear matters pertaining to trademarks, copyright and patents on a day-to-day basis and give their final judgment within four months from the date of filing of the suit.<sup>60</sup>

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59 available at: [www.prsindia.org/.../Division%20High%20Courts/](http://www.prsindia.org/.../Division%20High%20Courts/) . This Bill aims to constitute a commercial division to enable speedy disposal of high value cases, including IP cases.

60 Order dated September 16, 2009, Civil Appeal No. 6309 of 2009 arising out of S.L.P.(C) No. 13933 of 2009 available at: [www.indiankanoon.org/doc/1176027/](http://www.indiankanoon.org/doc/1176027/)

## HUMAN RIGHTS AND GENETIC ENGINEERING

B.C. Nirmal\*

**Abstract :** Science and Technology, which like human rights are the important tools of modernity with a huge potentiality to improve the quality of human life has not only played a pivotal role in the creation of public awareness about human rights and hastening of the process of realization of human rights like the protection of the rights to health care, universal education and international protection against genocide, but have at the same time also brought with it new challenges for the traditional framework of human rights by bringing to the fore new threats to the dignity of human beings. This also holds true for recent advances in the field of biotechnology, such as cloning, non-therapeutic genetic engineering, and genetic testing/genetic screening. As some of these technologies may take time to unfold themselves in their full form, human rights experts and organizations may use this time interval to explore, discuss and examine the possible human rights dimensions of genetic engineering. At the moment, some of the technologies are socially and ethically unacceptable but the possibility of acceptance of some of them in future, if not in all cultures at least in a few cultures, cannot be ruled out forever. The present paper examines the acceptability of the genetic engineering in the light of human rights concerns.

**Key Words:** Human Rights, Biotechnology, Genetic engineering, Cloning, Germ-line Therapy, Sale of gametes, Genetic Testing.

### I. INTRODUCTION

Human Rights are one of the great ideas of our time. Defined by the United Nations as the natural attributes of human dignity and with their worldwide acceptance as the only political, moral and legal ideal human rights now occupy a centre stage in contemporary international relations because of a spate of compelling reasons, including their recognition as the modern tool of revolution in the struggle for human dignity in our time. Human rights not only lay down universal standards to be achieved by all peoples and nations across the globe, they also provide a new vision to look at the perennial problems and new challenges facing the humanity and to address them in a meaningful and effective

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manner.<sup>1</sup> The increasing national and international acceptance of human rights as a universal secular ideology<sup>2</sup> with its attendant consequences for law, politics, and morality, along with such positive developments, as the development of an international human rights regime, proliferation of Domestic Bills of Rights and spread of democracy across the globe, especially after the collapse of the Berlin Wall have provided the needed impetus and support to the global human rights movement. Currently characterized by generalization, institutionalization, collectivization and internationalization, the human rights movement has also made human rights standards a yardstick for judging the legitimacy of national governments.<sup>3</sup> As a very powerful and predominant language in the contemporary moral discourse in today's globalized world<sup>4</sup> human rights are being continuously and constantly used by social and political movements and civil society institutions for the articulation of the needs, aspirations, expectations and demands of masses and classes.

Despite the increasing recognition of human rights at international, regional and national levels, the ongoing discourse on human rights finds itself in the midst of a variety of philosophical and theoretical challenges, including belief-pluralism, cultural relativism appropriation of the politics of human rights by powerful co-operations, lack of appropriate criteria for making a distinction between appropriate and inappropriate usages of human rights discourse, serious

1 For a partial list of literature on human rights see, H. Lauterpacht, *International Law and Human rights* (London:1950); M.S.Mc Dougal, H.Lasswell, et.al., *Human Right and World Public Order* (New Haven: 1980); W. Laquer and B. Rubin (eds.), *The Human Right Reader* (London:1977); A.H.Robertson and J.Merrills, *Human Rights in the World* (Manchester : 4th ed.,1996); A. Cassesse, *International Law* (Oxford, 2001); H. Hannum, *Guide to International Human Rights Practice* (Philadelphia: 2nd ed.1992); J. Donnelly, *International Human Rights* (Bouldere: 1993); D. R. Fortsythe, *Human Rights in the International Relations* (Cambridge, 2000); H. Steiner and P. Alston, *International Human Rights in Context* (2nd ed., Oxford, 2000); Mark Gibney, *International Human Rights Law: Returning to Universal Principles* (Rowman:Littlefield Publishers, 2008); H. Steiner, P. Alston, et.al., *International Human Right In Context: Law, Politics, Morals: Text and Materials* (US: Oxford University Press, US, 2008); V.R. Krishna Iyer, *The Dialectics and Dynamics of Human Rights in India: Yesterday Today and Tomorrow, Tagore Law Lectures* (New Delhi:Eastern Law House, 1999); Thomas Buergenthal, *International Human Rights Law and Institutions; Accomplishment and Prospectus* (1988) 1 *Washington Law Review* at 62; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon press,1989); Asbjorn et.al., *The Universal Declaration Of Human Rights- A Commentary* (Oslo: Scandinavian University Press,1992).

2 The term ideology can be differentiated from culture. Culture is practical and habitual, which makes it inconsistent and fuzzy. Ideology is, by contrast, a set of ideas that is generally related to a consistent utopia, which make it easier to categorize. Ideologies are "formal, explicit, and relatively consistent" and "articulated by political elites," whereas cultures are "informal, implicit, and relatively inconsistent" and "held by people within a given institutional setting." For details see Stephen E. Hanson, Review Article: From Culture to Ideology in Comparative Politics," (April 2003) 35 (3) *Comparative Politics* pp. 355-376 .

3 For details see B.C. Nirmal, Good Governance and Human Rights as Democratic Values (2009) 2 *Indian Journal of Federal Studie* pp.1-28 .

4 For details see Willim Twining, Law, Justice and Rights: Some Implications of a Global Perspective, available at: [www.ucl.ac.uk/laws/academics/profile/Law\\_Justice%20\\_Rights.pdf](http://www.ucl.ac.uk/laws/academics/profile/Law_Justice%20_Rights.pdf).

and severe implications of the globalization process for human rights, and the nearly exclusive focus of existing legal theories on anthropocentric as opposed to eco-centric views.<sup>5</sup>

Science and Technology<sup>6</sup>, which like human rights are the important tools of modernity with a huge potentiality to improve the quality of human life has not only played a pivotal role in the creation of public awareness about human rights and hastening of the process of realization of human rights like the protection of the rights to health care, universal education and international

5 B.C. Nirmal, Implementation of Economic Social and Culture Rights in India: Some Reflections (2008) 48 *Journal of the Indian Law Institute* pp. 491-507. On related aspects see, B.C. Nirmal, Right to Education: International and National Perspectives 2010 *Vidhi Chetana*; B.C. Nirmal, Implementing Human Rights of Women with HIV/AIDS: A Case Study of India (2009) *AALCO Quarterly Bulletin* 15-47; B.C. Nirmal, The Eradication of Poverty in the Era of Globalization : A Human Rights Perspective (2008) 48 *IJIL* pp. 587-618; B.C. Nirmal, Natural Law, Human Rights and Justice: Some Reflections on Finnis' Natural Law Theory (2006-2007) 35&36 *Banaras Law Journal* pp.52-84; B.C. Nirmal, Some Aspects of the Right to Leave, Right to Return, and the Question of the Rights to Remain with Special Reference to Indian Law (2007) 7 *ISIL Year Book on International Humanitarian and Refugee Law*, pp. 229-264; B.C. Nirmal, Counter Terrorism Legislations vis-à-vis Human Rights: A Comparative Study (2007) *Golden Jubilee Volume, Indian Law Institute*, pp. 246-261; B.C. Nirmal, Poverty and Human Rights: An Indian Context (2006) 46 *IJIL* pp 187-210; B.C. Nirmal, Ancient Indian Perspective of Human Rights (2003) 43 *IJIL* 445-478; B.C. Nirmal, Refugees and Human Rights (2001) 1 *ISIL Year Book of International Humanitarian and Refugee Law* pp. 94-117; B.C. Nirmal, Taking Violence Against Women Seriously, In Bimal N patel (ed) *India and International Law*, Vol.II, pp 413-452 (The Hague: Martinus Nijhoff, 2008); B.C. Nirmal, Sustainable Development, Human Rights and Good Governance, In J.L.Kaul *et al* (eds), *Human rights and Good Governance*, 2008, pp 1-31; B.C. Nirmal, The Legal Status of Refugees in India, In Bimal Patel (ed.), *India and International Law*, pp175-188 (The Hague: MartinusNijhoff, 2005); B.C. Nirmal, Human Rights and their Derogation Under the Indian Constitution, (2003) *Current Legal Issues* pp1-26.

6 The term 'science', as used in this paper, is inclusive of hard science, soft science, technology, engineering and medicine, taking into account the definition provided by UNESCO in 1974 as an enterprise wherein humankind "... acting individually or in small or large groups, makes an organized attempt, by means of the objective study of observed phenomena, to discover and master the chain of causalities; brings together in a co-ordinated form the resultant sub-systems of knowledge by means of systematic reflection and conceptualization ... and thereby furnishes itself with the opportunity of using, to its own advantage, understanding of the processes and phenomena occurring in nature and in society". See UNESCO *Recommendation on the Status of Scientific Researchers*, 18 C/ Res. 40, November 1974. Technology (from Greek, *techne*, "art, skill, cunning of hand"; and, *logia*) is the making, modification, usage, and knowledge of tools, machines, techniques, crafts, systems, and methods of organization, in order to solve a problem, improve a pre-existing solution to a problem, achieve a goal, handle an applied input/output relation or perform a specific function. It can also refer to the collection of such tools, including machinery, modifications, arrangements and procedures. Technologies significantly affect human as well as other animal species' ability to control and adapt to their natural environments. The term can either be applied generally or to specific areas: examples include *construction technology*, *medical technology*, and *information technology*, available on <http://en.wikipedia.org/wiki/Technology>.

protection against genocide, but have at the same time also brought with it new challenges for the traditional framework of human rights by bringing to the fore new threats to the dignity of human beings.<sup>7</sup> This also holds true for recent advances in the field of biotechnology<sup>8</sup>, such as cloning, non-therapeutic genetic engineering, and genetic testing/genetic screening. As some of these technologies may take time to unfold themselves in their full form, human rights experts and organizations may use this time interval to explore, discuss and examine the possible human rights dimensions of genetic engineering. At the moment, some of the technologies are socially and ethically unacceptable but the possibility of acceptance of some of them in future, if not in all cultures at least in a few

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7 The broadest human right concept invoked in the context of biotechnology is human dignity. This is a fundamental concept in international human rights law. The 1948 Universal Declaration refers to it in the Preamble as "... the foundation of freedom, justice and peace in the world" and incorporates it in Article 1, which states that "... human beings are born free and equal in dignity and rights". Subsequent human rights instruments have systematically referred to human dignity as the foundation and wellspring of specific human rights, for instance, the preamble to the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1956), UNTS, Vol. 266, at 3; the Preamble of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966), UNTS, Vol. 660, at 195; the Preamble of the two 1966 UN covenants on *human rights* (see *International Covenant on Economic, Social and Cultural Rights*, UNTS, vol. 993, at 3; *International Covenant on Civil and Political Rights*, UNTS, vol. 999, at 171); the Preamble of the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*, available at : <http://www.unhchr.ch/html/menu3/b/11.htm>; the preamble of the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 24 ILM, 535 (1985). In Europe, the value of human dignity constitutes the cornerstone of the 2000 Charter of Fundamental Rights (Article 1), now incorporated in the Treaty adopting a Constitution for Europe (Article II-61). In the well known case *Netherlands v. European Parliament and Council* (C-377/98, 9th October, 2001), Advocate General Jacobs stated that human dignity is "...perhaps the most fundamental right of all, and is now expressed in Article 1 of the Charter". In the field of biotechnology the concept of human dignity works as a threshold standard against which to test the different applications of genetic engineering techniques. In this role it performs a dual function: 1) on the one hand, it may provide the ethical and legal justification for the development and application of new biotechnologies; and, 2) on the other, it is the guiding principle in setting boundaries to the permissibility of the variety of policy options offered by biotechnologies in fields such as bio-medicine and agriculture.

8 For the sake of convenience the term 'biotechnology' is used in this paper in accordance with the definition provided in the Convention on *Biological Diversity* (see <http://www.biodiv.org/doc/legal/cbd-en.pdf>) : as any technological application that uses biological systems, living organisms, or derivatives from them, in order to make or modify products or processes for specific use. For details of biotechnology and genetic engineering see generally Willim H. Lesser, Anatole F. Krattiger, "What is 'Genetic Technology'?", 2 (2), *Biodiversity Letters*, 31-34 (Mar., 1994).; Zhu Chen, Hong-Guang Wang, et.al., *Life Sciences and Biotechnology in China*, 362 (1482), *Philosophical Transactions: Biological Sciences*, 947-957, (Jun. 29, 2007), pp. 947-957; Shiv Visvanathan, and Chandrika Parmar, *A Biotechnology Story: Notes from India*, (Jul. 6-12, 2002) 37 (27), *Economic and Political Weekly*, pp. 2714-2724; Philip W. Grubb, *Patents for Chemicals, Pharmaceuticals and Biotechnology* (Oxford, 1999 3rd ed.).

cultures, cannot be ruled out forever.<sup>9</sup>

As is well known human rights as universal norms transcend all barriers of territory, culture, descent, religion, ethnicity, nationality and are applicable to present and future generations alike, the million dollar question is whether the human rights language is appropriate to regulate the use of genetic engineering or only domestic legislation and treaties other than those related to human rights should be prescribed in service as an interim arrangement pending the resolution of issues this technology raises and substantial progress registered by scientists in the field of genetic engineering. It is not clear at the present juncture what advances will take place in genetic engineering and we also do not know how those advances will change our culture and understanding of human nature. Given our profound ignorance about the nature of the science of genetic engineering, ethical<sup>10</sup>, moral and religious issues it raises and the actual or putative impacts (beneficial as well as harmful) of these advances we need to devise and develop a regulatory framework which could address the concerns caused by this rapidly evolving technology without unnecessarily thwarting the progress of genetic research in this area. In this background, an attempt will now be made in this paper to give an account of cloning, germ-line therapy and genetic-testing from the perspective of human rights.

## II. GENETIC TECHNOLOGY: A BOON OR BANE FOR HUMANITY?

Known in the past as fermentation technology modern biotechnology began to develop in the 1970's with the birth of two basic techniques namely recombinant DNA technology<sup>11</sup> and

9 Studying biotechnology in the light of human rights will immediately entail the acknowledgment of the basic freedom of scientific research and the right "to enjoy the benefits of scientific progress and its applications", to use the words of article 15 of the International Covenant on Economic Social and Cultural Rights. But at the same time this freedom and this right are not absolute. They must be balanced against certain standards of bioethics whose respect is a condition of the legitimacy of the claim to freedom of scientific research.

10 See generally Boylan, M. and D. E. Brown, *Genetic Engineering: Science and Ethics on the New Frontier*. (Upper Saddle River, NJ: Prentice Hall, 2001).

11 Recombinant DNA technology is a technology that allows DNA to be produced via artificial means. The procedure has been used to change DNA in living organisms and may have even more practical uses in the future. It is an area of medical science that is just beginning to be researched in a concerted effort. This technology works by taking DNA from two different sources and combining it into a single molecule. That alone, however, will not do much. It only becomes useful when that artificially-created DNA is reproduced, in a process known as DNA cloning. There are two main types of cloning that recombinant DNA technology is used for: therapeutic cloning and reproductive cloning. Most people are familiar with reproductive cloning, which will produce an organism with the exact genetic information of one that already exists. This has already been done with some animals. Dolly, a sheep, was the first mammal to ever be reproduced as an exact genetic copy. Therapeutic cloning is used to reproduce certain tissues or organs, not an entire organism. Using recombinant DNA technology for therapeutic cloning purposes holds a great deal of potential benefit. For example, a cancerous organ could be replaced with a new one made from a patient's own DNA. This would likely help reduce the rejection of organs that sometimes happens when a tissue transplant is performed. If a heart is damaged, it could even be replicated using this technology. While these applications may be years away from practical use, they are possibilities, available on : <http://www.wisegEEK.org/what-is-recombinant-dna-technology.htm>.

hybridomatechnology<sup>12</sup>. In the first of these genetic materials from an external source is inserted into a cell in such a way that it causes the production of a desired protein by the cell. This technique or process is also referred to as gene-splicing or genetic engineering. Genetic engineering, also called genetic modification is the direct human manipulation of an organism's genomes using modern DNA technology. It involves the introduction of foreign DNA or synthetic genes into the organism of interest. In this technology the introduction of new DNA does not require the use of classical genetic methods; although traditional breeding methods are typically used for the propagation of recombinant organisms. As noted above, genetic engineering alters the genetic makeup of an organism. In the process recombinant nuclear acid (DNA or RNA) techniques are used to form new combinations of heritable genetic material. The genetic material so produced is then introduced into the organism of interest either indirectly through a vector system or directly through micro-injection, macro-injection, and micro encapsulation.

It is important to note here that genetic engineering does not include traditional animal and plant breeding in vitro fertilization, induction of polyploidy<sup>13</sup>, mutagenesis<sup>14</sup> and cell fusion techniques<sup>15</sup> that do not use recombinant nuclear acids or a genetically modified organism in the process. An organism that is generated through the introduction of recombinant DNA is called a genetically

- 12 Hybridoma technology is a technology of forming hybrid cell lines (called hybridomas) by fusing a specific antibody-producing B cell with a myeloma (B cell cancer) cell that is selected for its ability to grow in tissue culture and for an absence of antibody chain synthesis. The antibodies produced by the hybridoma are all of a single specificity and are therefore monoclonal antibodies (in contrast to polyclonal antibodies). The production of monoclonal antibodies was invented by Cesar Milstein and Georges J. F. Kohler in 1975. They shared the Nobel Prize of 1984 for Medicine and Physiology with NielsKaj Jerne, who made other contributions to immunology. The term hybridoma was coined by Leonard Herzenberg during his sabbatical in Cesar Milstein's laboratory in 1976/1977, available on: [http://en.wikipedia.org/wiki/Hybridoma\\_technology](http://en.wikipedia.org/wiki/Hybridoma_technology).
- 13 Polyploidy cells and organisms are those containing more than two paired (homologous) sets of chromosomes. Most eukaryotic species are diploid, meaning they have two sets of chromosomes-one set inherited from each parent. However polyploidy is found in some organisms and is especially common in plants. In addition, polyploidy also occurs in some tissues of animals that are otherwise diploid, such as human muscle tissues. This is known as endopolyploidy. Prokaryotes are haploid organisms, with only a single chromosome in each cell. Most eukaryotes have diploid cells, but produce haploid gametes by meiosis. Available on : <http://en.wikipedia.org/wiki/Polyploid>.
- 14 Mutagenesis is a process by which the genetic information of an organism is changed in a stable manner, resulting in a mutation. It may occur spontaneously in nature or as a result of exposure to mutagens. It can also be achieved experimentally using laboratory procedures. In nature mutagenesis can lead to cancer and various heritable diseases, but it is also the driving force of evolution. Mutagenesis as a science was developed based on work done by Hermann Muller, Charlotte Auerbach and J. M. Robson in the first half of the 20th century. Available on : <http://en.wikipedia.org/wiki/Mutagenesis>.
- 15 Cell-to-cell fusion (cell fusion) is a fundamental biological process that also has been used as a versatile experimental tool to dissect a variety of cellular mechanisms, including the consequences of cell fusion itself, and to produce cells with desired properties, such as hybridomas and reprogrammed progenitors. However, current methods of cell fusion are not satisfactory because of their toxicity, inefficiency, or lack of flexibility. For cell fusion see generally, Ogle, B.M., M. Cascalho, J.L. Platt., Biological Implications of Cell Fusion (2005) 6 (7) *Nat. Rev. Mol. Cell Biol*, pp. 567-575; Lu, X. and Y. Kang, Cell Fusion as a Hidden Force in Tumor Progression, (2009) 69(22) *Cancer Res* pp. 8536-8539 .

modified organism. Modified organism may be transgenic or cisgenic. Although, cloning and stem cell research are not generally considered as genetic engineering, they are closely related and genetic engineering can be used within them. Synthetic biology which is an emerging discipline has taken genetic engineering a step further by introducing artificially synthesized genetic material from raw materials into an organism.

Recombinant DNA technology should be distinguished from hybridoma technology in which different types of immune cell are fused together to form a hybrid cell. The techniques of genetic engineering are currently being applied to higher organisms to produce transgenic animals and plants and even to humans. Gene therapy attempts to replace missing or defective genes coding for a protein required by the body, or to introduce genes into cancer cells which will render them easier to kill them. Gene therapy holds out many promises for humanity. It can be used to prevent diseases or for influencing hereditary physical features such as hair, colour, eye colour, height, and athletic ability and also for altering genetically linked behavioural features, such as personality, talent, intelligence, and even sexual orientation.

For obvious reasons there is a fear that when it becomes successful in near future, gene-therapy can be used for producing designer babies. But till date much progress in the field of genetic engineering has been registered only in the area of somatic cell manipulation. This form of therapy is less controversial than germ line manipulation or germ-line engineering because this technique does not produce permanent genetic changes but stunts the defective gene only in the patient and the effects of genetic alteration die with the patient. By contrast, germ-line manipulation in which normal genes are inserted into the sex cells of a patient, or more feasibly, into the undeveloped cells of an early embryo that is fertilized in vitro, the effects of the genetic change, whether beneficial or harmful, are permanent as they pass on future generations and in the process a family's gene pool is altered permanently. As germ-line engineering involves consequences for future generations, it not only raises moral, ethical and religious issues but could also be seen as an affront to human dignity of future human beings.

It must be recognized that bio-technology like any other technology may be both boon and bane for humanity, if allowed to be developed and used in a regulated environment, gene-therapy holds out the promise of revolutionizing medicine by enabling patients to thwart disease<sup>16</sup>, but cloning and inheritable

16 Article 12 of the European Biomedicine Convention that took place on April 4, 1997, agrees that a genetic study of an individual's features can only be made for medical purposes or for purposes of scientific research. For approximately 10 years, the knowledge of the genes that are responsible for hereditary diseases increased a great deal and allowed the establishment of many genetic tests. The surfacing of *biochip* technology will increase it even more by making it easier to spread cheap and easy-to-use genetic tests. However, information provided by these genetic tests cannot be categorized, considering for example gene complexity, their interaction, or the influence that the environment can have on the links between a gene and a pathology. This advantage is obvious for some monogenic diseases that can benefit from a simple medical treatment. In other cases, a surgical solution has to be considered. The search for genetic mutations also has a great interest in the prevention field: it can avoid some demanding and laborious detections; it also allows the establishment of frequent preventative examinations for individuals who bear genetic mutations that are predispositions for a disease. These examinations can detect a tumour at the very stage of the cancerous process and can then increase the efficiency of a surgical operation.

alterations not only raise ethical questions about society's right to 'play good' but are shrouded by mystery and uncertainty and likelihood of grave consequences for humanity. It has been argued and rightly so that if geneticists become successful in using genetic technology for enhancing of human traits it would create troublesome inequalities and worries about changes in human nature itself. Along the same lines it may also be argued that reproductive cloning would violate cultural understandings such as about family relationships.

There is also a lurking apprehension that genetic information obtained from genetic testing may be used by employers, insurers and schools to discriminate against people predisposed to certain conditions. Gene-therapy may also result in a resurgence of eugenics and repression of socially undesirable physical or behavioral traits therein. It is a fear that genetic technology may exaggerate the influence of genetic factors on the development of the human personality and redefine social standards of health and normality in such a manner as would reinforce existing prejudices against individuals with disabilities or traits that do not satisfy the cultural ideal. That the danger of discrimination against persons carrying 'bad' genes is real is supported by the cases of withdrawal of disability benefits related to a genetic disease on the ground that the gene made it a 'pre-existing condition'. It is quite possible that in near future scientists succeed in finding genes which are responsible for a criminal behaviour. As a matter of fact the XYY chromosome abnormality has already been associated with criminality by some researchers. So days are not far away when all persons carrying genes associated with violent behaviour will be made liable to police surveillance. Already, in most states of the USA, DNA samples are compulsorily collected from convicted criminals; even of the crime was a non-violent one.

### III. INTERNATIONAL REGULATORY FRAMEWORK FOR GENETIC TECHNOLOGY

Responding to social, ethical and moral issues that the recent advances in the field of genetic technology raise some countries in the West and elsewhere have established a regulatory framework to guide decisions regarding these technologies.<sup>17</sup> Even treaties and conventions have been adopted at regional as well as international level to impose a complete ban on human cloning and germ-line engineering and purchase of gametes and embryos and to regulate research in these areas.<sup>18</sup>

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17 At the global level, the Cartagena Protocol on Biosafety was adopted in response to concerns that modern biotechnology may have adverse impacts on biodiversity. To this end, it provides for stringent risk assessment of "living modified organisms" and for advance consent by the importing state pursuant to a broad interpretation of the precautionary approach. In the field of agriculture, the 2001 Food and Agriculture Organization (FAO) Treaty on Plant Genetic Resources has established a framework of international cooperation for the conservation and sustainable use of plant genetic resources for food and agriculture. For details see B.C. Niramal, Overview of Biosafety Protocol (2004) 46 (3) *Journal of the Indian Law Institute* pp. 373-92.

18 At the global level UNESCO has been at the forefront of an ambitious programme aimed at setting legal and ethical standards applicable to the human genome. The results of this programme are, for the time being, four important soft law instruments: the 1997 Universal Declaration on the Human Genome and Human Rights (UDHG), the 1999 Guidelines for the Implementation of such Declaration, and the 2003 International Declaration on Genetic Data and the 2005 Universal Declaration on Bioethics and Human Rights (UDBHR). The

Recognizing the possibility of abuse and misuse of genetic testing/screening for non-therapeutic purpose such as pre-birth sex selection and human enhancement not only the international community but even national governments have taken certain meaningful initiatives. This article deals with these aspects but does not address in detail other important issues, such as privacy and access to information, data protection and identity of donors.

### GERM-LINE THERAPY

As noted earlier, germ-line therapy involves genetic alteration and germ-line alteration means and denotes 'altering the DNA of human sperms, eggs, or embryos such that the change can be transmitted, to the persons, children and all generations to follow'.<sup>19</sup> There is strong opposition to the use of germ-line gene modifications. This therapy is currently considered as socially and ethically unacceptable and also as contrary to human dignity.<sup>20</sup> The European Convention on Human Rights and Biomedicine, 1997 states that any intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if it does not aim to introduce any modifications in the genome of any decedents.<sup>21</sup> Article 24 of the UNESCO Universal Declaration on the Human Genome and Human Rights 1997, specifically refers to germ-line interventions as a practice contrary to human dignity. The 2000 Charter of Fundamental Rights of the European Union says that the prohibition of eugenic practices, in particular those among at the selection of persons should be respected.<sup>22</sup>

It must be recognized that opposition to germ-line therapy is based on safety concerns and public policy considerations.<sup>23</sup> It has been strongly argued

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UN General Assembly endorsed the UDHG in 1998 and in the past three years has been engaged in the negotiation of a new convention designed to restrict human cloning. The Council of Europe has, since 1997, adopted a variety of legal instruments setting ethical standards in the field of biomedicine and biomedical research, including the Oviedo convention on human rights and biomedicine, the additional protocol on the prohibition of human cloning, the 2002 Additional Protocol on transplantation of organs and tissues of human origin, and the 2005 Additional Protocol on biomedical research.

- 19 For details about germ-line therapy see generally E.T. Juengst, *Germ-line Gene Therapy: Back to Basics*, (1991) 16(6) *J Med Plulos* pp. 593-612; R. Moseley, *Commentary Maintaining the Somatic/germ-line Distinction: Some Ethical Drawbacks* (1991) 16(6), *J Med Plulos*, pp. 641-647; B.K. Zimmerman, *Human Germ-line Therapy : The Case of its Development and Use* (1991) 16 (6), *J Med Plulos* pp. 129-139 .
- 20 For ethical issues of germ-line therapy see generally L. Walters, J.G. Palmer, *Germ-line Gene Therapy, in The Ethics of Human Gene Therapy* pp. 80-89 (New York : Oxford University Press, 1997); N.A. Wivel, L. Walters, *Germ-line Gene Modification and Disease Prevention: Some Medical and Ethical Perspectives* (1993) 262 (5133) *Science* pp. 533-538.
- 21 Article 13 of the European Convention on Human Rights and Biomedicine, 1997.
- 22 Article 3(2) of the Charter of Fundamental Rights of the European Union of 7 December 2000.
- 23 For public policy aspect of germ-line therapy see generally, N. Schichor, J. Simonet, et.al., *Should We Allow Genetic Engineering? A Public Policy Analysis of Germline Enhancement*, available at: <http://10e.devbio.com/article.php?id=172>; Tony Mc Gleenan, *Human Gene Therapy and Slippery Slope Arguments* (1995) 21(6) *Journal of Medical Ethics*.

that the safety of germ-line alteration cannot be guaranteed without putting future generations at risk. Further, the germ-line therapy has the potential to lead to the 'designer baby' which if allowed would lead to a resurgence of eugenics by creating harmful conceptions of normality. Rejecting the argument that germ-line therapy may be useful for therapeutic purposes it has been said that germ line modification is not needed to save lives or alleviate the suffering of existing people but targets instead a population of prospective people.<sup>24</sup>

As for public policy arguments against germ-line therapy, it has been urged that this therapy instrumentalises and commodifies human's biological artifact. Opponents of germ-line therapy call for a permanent ban on germ-line gene modifications and for this purpose press human rights. Arguably, cloning and inheritable genetic alteration can be seen as crimes against humanity. The arguments stem from the apprehension that germ-line engineering may one day be able to alter human nature and hence to undermine the common human nature on which the system of human rights is based. To meet this situation an 'International Convention on the Preservation of the Human Species' that would outlaw cloning and germ-line engineering has been suggested by the opponents of germ-line therapy.<sup>25</sup>

Human rights based arguments against the germ-line therapy, it must be noted, find support in a 1998 resolution of the European Parliament, which in Article 1 proclaims that people have a human right to their own genetic identity and in the need to respect human dignity emphasized in all major international human rights treaties and regional human rights instruments. The principle of informed consent which is central to medical ethics and is now a widely accepted legal and moral principle is also sometimes invoked by the opponents of the germ-line engineering.

On a close analysis of objections advanced against germ-line engineering it appears that they are essentially based on doubts and moral fears. It is difficult to see why germ-line gene therapy should not be allowed for the treatment of genes-induced diseases like hemophilia or sickle-cell disorder which are passed from the parents to their descendants when available, therapies are either non-existent or not satisfactory.<sup>26</sup> The real reason for the complete ban on this

24 For useful aspect of germ-line therapy see generally Andrea L. Bonnicksen, National and International Approaches to Human Germ-Line Gene Therapy,(1994) 13(1) *Politics and the Life Sciences* pp 34-49 .

Nelson A. Wivel, Le Roy Walters, Germ-Line Gene Modification and Disease Prevention: Some Medical and Ethical Perspectives, (1993) 262(5133) *Science* pp. 533-538; Julie L. Gage, Government Regulation of Human Gene Therapy,(1987) 27 (2) *Jurimetrics* pp. 200-218.

25 The proposed Convention is based on giving effect to the Universal Declaration of Human Rights to affirm the dignity and equality of all people and the right not to be discriminated against. The draft Conventions main proposals are to prohibit inheritable genetic engineering and cloning of human beings with a requirement on all governments to put national laws into effect to achieve this in their respective countries. It is also proposed that there be a new UN body established to oversee the implementation of this Convention at both the national and international level.

26 Germ-line cell therapy involves the introduction of corrective genes into reproductive cells (sperm and eggs) or zygotes, with the objective of creating a beneficial genetic change that is transmitted to the offspring. When genes are introduced in a reproductive cell, descendant cells can inherit the genes. Gene therapy of somatic cells, those not directly related to

therapy is the fear that it could also be used for enhancement and eugenic purposes. But if this is the case, then the establishment of appropriate legal control mechanisms rather than imposition of a complete ban could be a proper way of preventing eugenic applications. In any case given the rapid evolution and unpredictability of science a flexible legal framework with strong supervision and control mechanisms rather than imposition of a complete ban on it through human rights treaties seems to be a pragmatic approach because the latter would thwart research in this science which is still in its infancy stages and stymie the ongoing debate on the feasibility, safety, and permissibility of germ-line interventions.

It is plausible to argue that the germ-line technology is justified on the basis of the consent or presumed consent of future generations but this is mired in the philosophical confusion. Not only the principle of consent but even the notion of individual autonomy fails to provide a reason for prohibiting germ line genetic some scholars argue.

Opinions of scholars on the appeal of human rights language to justify the imposition of a blanket ban on this engineering for both therapeutic and non-therapeutic purposes are divided. According to proponents of germ-line engineering effects on human rights in this regard provide no good reason to object genetic technology. The essence of their argument is that it would be a serious mistake to adopt human rights treaties that specifically prohibit all germ-line engineering or all genetic engineering for purpose of human enhancement on the grounds that genetic alterations violate human dignity or human rights. Interestingly, scholars taking their position are not against regulation of human genetic engineering through the adoption of international treaties as a temporary and transitional measure but are only opposed to their regulation by human rights treaties.<sup>27</sup>

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reproduction, results in changes that are not transmitted to offspring. An example of gene therapy in somatic cells is the introduction of genes in an organ or tissue to induce the production of an enzyme. This alteration does not affect the individual's genetic makeup as a whole and it is not transmitted to its descendants. With somatic cell gene therapy, a disabled organ is better able to function normally. This technology has many applications to human health. One variant of somatic cell gene therapy is DNA vaccines, which allow cells of the immune system to fight certain diseases in a method similar to conventional vaccines. Stem cell therapy involves the use of *pluripotent cells*, or cells that can differentiate into any other cell type. Stem cells are found in developing embryos and in some tissues of adult individuals. This therapy is similar to a conventional transplant, with the objective of regenerating or repairing a damaged organ or tissue. The procedure has a reduced probability of rejection because it uses the individual's own cells. For instance, stem cells differentiated into nerve cells could be used by patients suffering from paralysis, with the goal of helping them recovering movement; or in cases of heart stroke, muscle cells might be used to rejuvenate the cardiac muscles. Furthermore, the future may bring the growth of stem cells from an individual's body to produce certain tissues or organs in vitro. Stem cell research could eventually blend gene therapy with genetic engineering to create healthy stem cells that can be used to generate healthy organs and tissue. For detail see Aluizio Borem, Fabricio R. Santos, et.al., *Understanding Biotechnology*, (Prentice Hall, 2003).

27 For details see UNHCHR's Expert Group on Human Rights and Biotechnology, Expert Group on Human Rights and Biotechnology Convened by the UN High Commissioner for Human Rights: Conclusions on Human Reproductive Cloning, 6(1) *Health and Human Rights*, 153-159 (2002).

It is humbly submitted that there is much force in the arguments advanced by scholars against the use of the human rights language in the debate over germ-line engineering and the call for the adoption of a comprehensive international treaty on it. It must be recognized that due to its unique special features the traditional conception of human rights, their violators and the victims do not adequately address the ethical issues raised by genetic engineering. To the contrary, any discussion on the permissibility of genetic engineering from the perspective of human rights raises a lot of issues. To mention a few, when does life begin and whether a fetus has human rights? Whether future generations fall within the definition of personhood employed by most human rights agreements. Do future generations have a right to inherit an un-manipulated gene pool? Does the right to life encompass how that life is genetically expressed? Whether it is desirable that people pre-disposed to certain genetic conditions should receive group protection as do racial, ethnic or religious groups; Whether and to what extent the traditional conception of state responsibility in the context of human rights violations can be extended to human rights violations that are perpetrated not by the State and its organs but rather by private actors throughout the society the biotech companies that develop the genetic technology, the public that demands it and the health-care professionals that implement it.

Considering that the nature and scope of the proclaimed right to genetic identity is imprecise and vague, one may wonder whether it should be interpreted as a right to genetic privacy or genetic information or right to individual identity in the sense of the right to protection against any kinds of genetic alteration or manipulation. Can it be said that germ-line engineering that prevents a disease violates the identity of the individual? To say so will be unjustified because having a particular disease is not a part of individual's identity. By contrast every individual has a right to disease-free health.

## HUMAN CLONING

Human cloning is prohibited both under domestic legislation and regional as well as international human rights treaties. Human cloning is defined as 'the creation of human embryo having the same genetic make-up as another human being dead or alive, at any stage of its development from the moment of fertilization without any possible distinction as regards the method used'. Cloning is classified as reproductive cloning and therapeutic cloning.<sup>28</sup> A human cloning is defined in Section 3 of the Canadian Assisted Human Reproduction Act, 2004 as 'an embryo that, as a result of the manipulation of human reproductive material or an in vitro embryo, contains a diploid set of chromosomes obtained from a single living or deceased human being, fetus or embryo.

Two strong arguments are generally advanced against human cloning.<sup>29</sup> The

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28 For details on human cloning see generally J. B. Gurdon, A. Colman, *The Future of Cloning* (1999) 402 *Nature* pp. 743-776; J. Harris, *Stem Cells, Sex, and Procreation*, (2003)12, *Cambridge Quarterly of Healthcare Ethics*, pp. 353-371; R. P. Lanza, J. B. Cibelli, *et.al.*, *Human Therapeutic Cloning* (1999) 5 (9) *Nature Medicine*, 975-976; J. A. Robertson, *Posthumous Reproduction* (1994) 69(4) *Indiana Law Journal*, pp. 1027-1065.

29 For debate on human cloning see generally L. Kass, *The Wisdom of Repugnance: Why we should Ban Cloning* (1998) 32(2) *Valparaiso University Law Review* pp. 679-705; N. Agar, *Perfect Copy: Unravelling the Cloning Debate* (Cambridge: Icon Books, 2003).

first argument is derived from safety concerns. The fact that the scientific component of cloning still requires much improvement because frequent miscarriages, malfunctions, and early deaths are observed in animal clones and at present, the whole process puts the clone at risk of serious health goes against human cloning. The second objection emanates from the understanding that cloning should be viewed as a breach of human dignity and integrity since cloning uses human beings as objects for replication, instead of seeing them as unique persons having their own individual identity.<sup>30</sup> Human cloning is also sometimes objected on the ground that the very thought of creating a human being is problematic in view of the unforeseen and unforeseeable social and psychological consequences of human cloning. For the reasons stated above, countries like Canada and the UK have taken a serious view of human cloning. In UK, for instance, placing a human embryo that has been created otherwise than by fertilization in a woman has been made a criminal offence by the Human Reproductive Cloning Act, 2001.<sup>31</sup> At the same time, in a report of stem cell research of 13 February, 2002, the UK Select Committee on Stem Cell Research unreservedly endorsed the legislative prohibition of reproductive cloning stating however that therapeutic cloning and the use of cell continue to be allowed.<sup>32</sup> Furthermore, in the United States, a ban has been imposed on federal funding of research on the creation of any human embryos or the cloning of human embryos. So far as permission for research on embryos is concerned each state has discretionary power in this regard. According to available information nine states have enacted statutes forbidding human cloning (some forbidding just reproductive cloning and some both reproductive and therapeutic cloning).<sup>33</sup>

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30 See L. Sturges, Who Should Hold Property Rights to the Human Genome? An Application of the Common Heritage of Humankind (1999)13 (1) *American University International Law Review* pp. 219-249.

31 Section 1 of the Act says a person who places in a woman a human embryo which has been created otherwise than by fertilization is guilty of an offence. A person who is guilty of the offence is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or a fine or both.

32 For detail see House of Lords Stem Cell Research Report available on: <http://www.publications.parliament.uk/pa/ld200102/ldselect/ldstem/83/8301.htm>.

33 Fifteen states have laws pertaining to human cloning. The issue was first addressed by California legislature, which banned reproductive cloning, or cloning to initiate a pregnancy, in 1997. Since then Arkansas, Connecticut, Indiana, Iowa, Maryland, Massachusetts, Michigan, Rhode Island, New Jersey, North Dakota, South Dakota, and Virginia have enacted measures to prohibit reproductive cloning. Arizona and Missouri have measures that address the use of public funds for cloning, and Maryland prohibits the use of state stem cell research funds for reproductive cloning and possibly therapeutic cloning depending on how one interprets the definition of human cloning in the statute. Louisiana also enacted legislation that prohibited reproductive cloning, but the law expired in July 2003. Arkansas, Indiana, Iowa, Michigan, North Dakota and South Dakota laws extend their prohibitions to therapeutic cloning, or cloning for research purposes. Virginia's law also may ban human cloning for any purpose, but it may be open to varying interpretations because the law does not define the term "human being," which is used in the definition of human cloning. Rhode Island law does not prohibit cloning for research and California and New Jersey human cloning laws specifically permit cloning for the purpose of research, available at : <http://www.ncsl.org/research/health/human-cloning-laws.aspx>; G. J. Annas, L. B. Andrews, et al., Protecting the Endangered Human: Toward an International Treaty Prohibiting Cloning and Inheritable Alterations 2002(28) 2/3 *American Journal of Law and Medicine* pp.151-178.

Human cloning is not only prohibited under domestic legislations of certain countries, but also by Members of the Council of Europe (now EU) and UNESCO and WHO, the two important specialized agencies of the United Nations. It is worth recalling that the United Nations General Assembly, in resolution 56/93 of 12 December 2001 established an Ad Hoc Committee open to all Member States of the United Nations to work on the elaboration of an International Convention against reproductive cloning. Committees and Working Groups worked on this in search of a consensus on how to handle this highly contentious and controversial issue. After almost 4 years of discussion, by resolution A/RES/59/280 the United Nations General Assembly adopted by (vote) the UN Declaration on Human Cloning on 8 March 2005. The Declaration states in its paragraph (b):(a) Member states are called upon to adopt all measures necessary to protect adequately human life in the application of life Sciences; (b) Member States are called upon to prohibit all forms of human cloning in as much as they are incompatible with human dignity and the protection of human life. As is evident from the above, the Declaration leaves room for different interpretation of the text, which reflects, in part, the difference of position held by Member States on this issue.

In 2007, the United Nations University Institute of Advanced Studies (UNU-IAS) produced A Report entitled *Is Human Reproductive Cloning Inevitable?: Future Option for UN Governance*. The UNU- IAS Report not only summarized up to-date technical information on cloning, ethical issues accompanying it and the state of the art of international governance of these issues, but also described the following options available. The four options available for regulation of cloning described in the UNU-IAS report are: (a) total ban on all cloning research, (b) ban on reproductive cloning act, (c) ban on reproductive cloning and allow research on cloning for 10 years, and (e) place a moratorium on cloning research.

In response to the wish of the Director-General of UNESCO, the International Bioethics Committee considered beside other things the UNU-IAS Report and after consideration of the ethical issues related to human cloning in the light of new scientific, legal and social developments concluded that: there was at the present stage no need to engage in the collaboration of a need to have normative instruments aiming at humanizing both practices and principles in the area of human cloning.<sup>34</sup> Yet IBC underlined the needs for a focused dialogue

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34 For ethical issues related to human cloning see generally D. W. Brock, *Cloning Human Beings: An Assessment of the Ethical Issues Pro and Con*, In M. C. Nussbaum and C. R. Sunstein (eds). *Clones and Clones: Facts and Fantasies about Human Cloning* (New York: W.W. Norton and Company, 1998) pp. 141-164; H. P. Forster, *Law and Ethics Meet: When Couples Fight Over Their Frozen Embryos*, (2000) 21(4) *Journal of Andrology* pp. 512-514; A. W. Gardiner, *Massachusetts Court Holds Contracts Forcing Parenthood Violate Public Policy*, (2000) 28(2) *The Journal of Law, Medicine, and Ethics*, 198-199; J. B. Gurdon, A. Colman, *The Future of Cloning* (1999) 402 *Nature*, 743-746; J. Harris, *Goodbye Dolly? The Ethics of Human Cloning*, In H. Kuhse, P. Singer (Eds.), *Bioethics: An Anthology* (Oxford: Blackwell 2003) pp. 143-152 ; A. Kahn, *Clone mammals...clone man*, (1997) 286 (6621) *Nature* at 119; A. Kolers, *Cloning and Genetic Parenthood* (2003) 12 (4) *Cambridge Quarterly of Healthcare Ethics* pp. 401-410; T. F. Murphy, *Entitlement to cloning: a response to Strong*, In G. McGee (ed.), *The Human Cloning Debate* (California: Berkeley Hills Books, 1998 2nd Edition) pp. 212-220; U. Schuklenk, R. Ashcroft, *The Ethics of*

on the issues surrounding the international governance of human cloning and described UNESCO as the best forum for this purpose in view of the ethical mandate that remains unique in the United Nation systems and its normative achievements in the field of bioethics (Universal Declaration on the Human Genome and Human Rights, 1997, International Declaration on Human Genetic Data of 2003 and Universal Declaration on Bioethical and Human Rights 2005).

On the basis of deliberations and debate held in 2008-2009, IBC underlined the need to alter the terms of debates on human cloning by justifying the age old arguments based on the distinction between therapeutic cloning and reproductive cloning and reorient and reformulate the debates on human cloning in the light of new developments in human embryo research. It also noted the developments that had occurred in the last three years since the adoption of the 2005 UN General Assembly Declaration on Human Cloning and maintained that new scientific developments such as increased international exchange of embryos eggs and stem cells; increased public sensitivity and awareness together with the development of national regulations of human cloning and embryos research in general should inform the ongoing debates on human cloning. After noting that national regulations on human cloning display convergence of views on the refusal to adopt legislation or guidelines permitting reproductive cloning, and further that there is divergence in positions of national governments on the legitimacy of human cloning carried out as part of research agendas, it expressed the view that a clear and effective regulation of reproductive human cloning at the international level would greatly benefit the safeguarding of the interests of those countries which still lack specific regulations on human cloning.

Recent research in the area of human cloning suggests that "cloning" in the sense of producing identical human beings is impossible due to differences in developmental and environmental criteria, epigenetic modifications of the DNA involved etc. Further, in the current state of technology, reproductive cloning is associated with the serious health risks for both women and foetus. In addition, it is scientifically clear that it is impossible for scientists to create and use cloned embryos in the way they wish.

It needs to be noted that the traditional distinction between so called therapeutic and reproductive cloning is at best artificial in the sense that they both reproduce human individuals. The only difference is in the way the cloned individual would be treated. While in reproductive cloning the embryos would be allowed to live, therapeutic cloning means creating embryos in order to be used in research and destroyed; for this reason many people consider therapeutic cloning to be even more objectionable than reproductive cloning.<sup>35</sup>

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Reproductive and Therapeutic Cloning (research) (2000) 19(2) *Monash Bioethics Review*, pp. 34-45; L. M. Silver, S. R. Silver, *Confused Heritage and the Absurdity of Genetic Ownership* (1998) 11(3) *Harvard Journal of Law and Technology* pp. 593-618; P. Singer, *Making Laws on Making Babies* (1985) 15(4) *The Hastings Centre Report* pp. 5-6; R. Sparrow, *Cloning, Parenthood, and Genetic Relatedness*, (2006) 20(6), *Bioethics* pp. 308-318; B. Steinbock, *Cloning Human Beings: Sorting Through the Ethical Issues*; In B. MacKinnon (ed.), *Human Cloning: Science, Ethics, and Public Policy* (Urbana and Chicago: University of Illinois Press 2000) pp. 68-84.

35 See generally R. Sparrow, *Therapeutic Cloning and Reproductive Liberty*, (2009) 34(2) *The Journal of Medicine and Philosophy* pp. 102-118.

Turning to the regulation of human cloning at the regional level the Council of Europe (CE) prohibited the production of human embryos for research purposes in its 1997 Convention on Human Rights and Biomedicine. Article 13 of the Convention states that an intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants. This appears to ban reproductive cloning. Cloning is explicitly prohibited by Additional Protocol to the Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings 1998. Article 11 of the Protocol declares that any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited. For the purpose of this Article, the term human being "genetically identical" to another human being means a human being sharing with another the same nuclear gene set. The Protocol while explicitly prohibiting human cloning, is mindful of the progress that 'some cloning techniques themselves may bring to scientific knowledge and its medical application. It notes that embryo splitting may occur naturally and sometimes result in the birth of genetically identical twins and shows an awareness of the scientific developments in the field of mammal cloning particularly through embryo splitting and nuclear transfer. It also declares that "the instrumentalization of human beings through the deliberate creation of genetically identical human beings is contrary to human dignity and thus constitutes a misuse of biology and medicine." Also crucial to this position of the contracting parties to the Protocol is their common understanding of the serious difficulties of a medical, psychological and social nature that a deliberate biomedical practice (deliberate creation of genetically identical beings) might cause to the individuals involved.

Article 3 of the 2000 Charter of Fundamental Rights of the European Union explicitly prohibits the cloning of human beings. Again, Article 11 of UNESCO's Declaration on the Human Genome and Human Rights prohibits human reproduction cloning in these words: "Practices which are contrary to human dignity, such reproductive cloning of human beings, shall not be permitted" and invites states and competent international organizations to cooperate in identifying such practices and in taking, at national or international level, the measures necessary to ensure that the principles set out in the Declaration are respected. Article 12(b) of the Declaration explicitly rules out genetic engineering for purposes of human enhancement. "The applications of research, including applications in biology, genetics and medicine, concerning the human genome shall seek to offer relief from suffering and improve the health of individuals and humankind as a whole", the Declaration adds further.

It is interesting to note that while the UNESCO is Universal Declaration on the Human Genome and Human Rights unreservedly prohibits reproductive cloning, it does not comment on therapeutic cloning. But in its April 2001 report on the topic, the UNESCO International Bioethics Committee (IBC) did not condemn therapeutic cloning and recognized instead that human embryonic stem cell research is a topic of considerable interest requiring a debate at each national level. The IBC also expressed the view that each national authorities should carefully weigh the uses and advantages of new technologies keeping in mind that nuclear transfer should only be used for therapeutic research.

The general position of WHO on human cloning is different from that of UNESCO, Council of Europe and national governments. Thus, according to a resolution of 1998 of the WHO it is ethically unacceptable and contrary to human dignity and integrity to use cloning for the replication of human individuals. In a 1999 report, WHO noted that major chemical therapeutic benefits may come from the development of cloning techniques. With these techniques human tissues and organs can be produced from non-embryonic cells. The World Medical Association, in a 1997 resolution, called on researchers and doctors involved in research not to participate in the cloning of human beings until the issues involved had not been resolved and appropriate controls put in place.

From the foregoing emerges the following position on human cloning: complete ban on reproductive cloning support for therapeutic human cloning but under appropriate controls, and complete ban on therapeutic cloning. Opinions are also divided on the continuance of the human cloning research. Even those who are not hostile to reproductive cloning because of its usefulness as a facility treatment acknowledge that it also raises a major ethical problem, namely the need to create some cloned babies and their sacrifice in order to bring the techniques to appropriate safety levels.

#### **PURCHASE AND SALE OF GAMETES AND EMBRYOS**

After having considered the issues relating to permissibility and legality of human cloning and germ-line therapy, let us now consider the issues relating to purchase and sale of gametes and embryos, Consistent with the idea that the human body, its parts and elements, are inalterable, European countries like Switzerland and the UK have generally put a ban on the purchase and sale of gametes and embryos. The position is in accord with the idea of non-commercialization of blood, organs, plasma and other tissues. In Canada only the purchase of gametes, human cells, and genes is prohibited and their sale is not specifically banned. In the UK, on the other hand, the Human Fertilization and Embryology Act, while vesting considerable control in the hands of the gametes providers, particularly in respect of possible use and length of storage, prohibits payment for supplying gametes and embryos, unless authorized by directions from the Human Fertilization and Embryology Authority.<sup>36</sup> What is important to note here in this context is the practice in the UK which allows reimbursement of donor's expenses and in certain circumstances the allocation of services in compensation for the donation.

At the international level, the UNESCO IBC, in its report on the Ethical Aspects of Human Embryonic Stem Cell Research stated that case the transfer of human embryos should be allowed to be commercial transaction and further that measures should be taken to discourage any financial incentive. Now coming to the regulation of the purchase and sale of gametes and embryos, Article 21 of the Convention on Human Rights and Biomedicine declares that human body and its parts, should not, as such give rise to financial gain. The 2000 Chapter

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<sup>36</sup> For further details see L Bernier, D Grégoire, Reproductive and Therapeutic Cloning, Germ-line Therapy, and Purchase of Gametes and Embryos: Comments on Canadian Legislation Governing Reproduction Technologies (2004) 30(6) *J Med Ethics* pp.527-532.

of Fundamental Rights of the European Union also reaffirms that the prohibition on making the human body and its parts a source of financial gain must be respected. The Charter states: 'No one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity.'

### GENETIC TESTING

As already noted, two important objections are generally advanced against the use of genetic testing. First, it would lead to a resurgence of the theory and practice of eugenics by giving a new meaning to normality and disability and thereby encouraging discrimination against the child born with traits not considered as desirable by society. Secondly, it would lead to the practice of pre-birth sex selection and an immature abortion of fetus of fair sex. Before we proceed to discuss the issue that genetic testing raises, it is necessary to point out that international human rights law as it stands today forbid any form of discrimination against a person on grounds of his or her genetic heritage. In addition, the Convention on Human Rights and Biomedicine, 1997, in its preamble acknowledges the need to respect the human being both as an individual and as a member of the human species, shows awareness of the fact that the misuse of biology and medicine may lead to acts endangering human dignity and expresses its resolve to take such measures as are necessary to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology. The Convention in Article 12 states that tests which are predictive of genetic diseases or which serve either to identify the subject as a carrier of a gene responsible for a disease or to detect a genetic predisposition or susceptibility to a disease may be performed for health purposes or for scientific research linked to health purposes and subject to appropriate genetic counseling. The UNESCO Declaration on the Human Genome and Human Rights states that human genome underlines the fundamental unity of all members of the family as well as recognition of their inherent dignity and diversity. It goes on further to proclaim the right of everyone to respect for their dignity regardless of their genetic characteristics. The principle of human dignity makes it imperative not to reduce individuals genetic characteristics and to respect their uniqueness and diversity (Article 6). Now if the parents were allowed to use genetic engineering to select or design virtually every aspect of their child, from eye, colour and intelligence to athletic ability and even personality, then it would raise the question of compatibility of this practice with the rights of the child and raise the question of a violation of the right to genetic integrity and genetic diversity as an aspect of the right to human dignity.<sup>37</sup> This issue deserves serious consideration by the international community because genetic technology is likely to exaggerate the influence of genetic factors on the development of the human personality and encourage narrow socially determined standards of health and normality. This may increase the risk of stigmatizing the disabled as a genetically inferior sub-class.

It is sometimes argued that genetic selection has expanded the reproductive

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37 Isaac Rabino, Genetic Testing and Its Implications: Human Genetics Researchers Grapple with Ethical Issues (2003)28(4) *Science, Technology & Human Values* pp. 365-402.

autonomy of women, but in reality it limits their autonomy in respect of reproduction. Along the same lines it is also possible to argue that pre-birth selection is replacing infanticide, a practice which is repugnant to our conscience and involves a violation of the right to life, a supreme human right enjoying the status of *jus cogens* under international law. Pre-birth killing of a child on the ground of her sex alone warrants the enforcement of the relevant conventions to promote adherence to the principle of equality. Surely, not allowing a child to be born alive simply because of her sex alone is arguably a kind of gender-based discrimination which is forbidden under all major human rights treaties and conventions.

Modern pre-implantation genetic diagnostic testing which is already in use in many countries including the United States, the United Kingdom, Spain and India, is used in combination with in vitro fertilization tests for genetic predisposition to life threatening diseases. It enables parents to select embryos that are more likely to survive implantation and birth. This begs the question whether such selection falls within the parents' reproductive and family rights and whether using techniques to prevent the birth of a child with genetically induced disease can be justified under Article 27 of the Universal Declaration of Human Rights, 1948, which proclaims the right of everyone to share in scientific advancement and its benefits. The counter-argument is that the right to science is neither an absolute right nor does it override other rights. As aptly stated in Article 2 of the Convention on Human Rights and Biomedicine the interest and welfare of the human being shall prevail over the sole interest of society or science. In addition to this, Article 30 of the Universal Declaration of Human Rights forbids the interpretation of anything in the Declaration for engagement in any activity or performance of any act aimed at the destruction of any of the rights and freedoms set forth herein. The fact is that human rights treaties and declarations not only forbid human rights violations against individuals but are also against those perpetrated against humanity. So, if the use of science itself perpetrates human rights violations, any justification based on the right to access such science becomes untenable.

Turning to the problem that creation of 'designer babies' creates, it needs to be considered in light of the entitlement of a child to the full and harmonious development of his or her personality and the need that he/she should grow up in an atmosphere of happiness, love and understanding (See Art. 22 UDHR, and preamble to the Convention on the Rights of the Child, 1989).

Genetic testing and use of genetic information in employment, medicine and insurance raises a number of human rights issues like discrimination and may inhibit the enjoyment and realization of human rights such as rights to health, privacy and work. As mainstream human rights treaties do not explicitly forbid discrimination based on genetic characteristics, they have to be stretched to include genetic conditions in the list of prohibited grounds of discrimination. Fortunately, the regional system of protection of human rights as it exists today in Europe is already alive to the problem and the European Convention on Human Rights and Biomedicine in Article 11 explicitly prohibits any form of discrimination (by which it means unjustified discrimination) on the grounds of genetic heritage. Article 10 of the same instrument proclaims the rights of everyone to respect for private life in relation to information about his or her

health. But at the same time everyone is also entitled to know every information collected about his or her health. However, the wishes of individuals not to be informed shall be respected. The Convention however, allows imposition of restrictions by law on the exercise of the rights contained in paragraph 2 of article 10 in the interests of the patients in exceptional cases.

Mention should also be made of guidelines on genetic testing set out in the UNESCO Declaration on the Human Genome and Human rights, Article 6 of which provides thus "No one shall be subjected to discrimination (by which it means unjustified discrimination) based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity." Again, Article 7 of the UNESCO Declaration states: "Genetic data associated with an identifiable person and stored or processed for the purposes of research or any other purpose must be held confidential under the conditions set by law"

#### **IV. CONCLUDING OBSERVATIONS**

Germ-line and non-therapeutic genetic engineering including reproductive cloning not only pose risks of adverse effects but they are also likely to be abused and misused for immoral purposes. For obvious reasons, there is need for a robust and strong legal framework to address these risks. The only question that awaits a definite answer from the international community and national governments is whether regulations of genetic engineering should be left to national governments alone or they should also be complemented by international regulatory mechanisms. Many scholars endorse the second course of action but they feel that the treaties to be concluded for this purpose should not be stated in terms of human rights. The argument is that given the evolving nature of the science of genetic engineering with all uncertainty about its success and consequences (positive as well as negative), regulating this technology with the help of human rights will not serve the interests of humanity, while this view seems to be practical and pragmatic, we cannot ignore challenges that this technology presents for the traditional conceptions of human rights and human rights mechanisms that currently operate at the international, regional and national levels. We believe that sooner or later the international community will move forward and adopt a universal human rights treaty on the subject. But before this takes place efforts directed towards forging an international consensus on human rights issues genetic engineering raise should go on without any hindrance or diversion from any quarters.

## LIFTING OF THE BAN ON CONTRACTING OUT OF THE CHECK-OFF SYSTEM IN NIGERIA: AN ANALYSIS OF THE ISSUES INVOLVED

Andrew Ejovwo Abuza\*

**Abstract:** On 30 March 2005, the Trade Unions (Amendment) Act 2005 was enacted to further amend the Trade Unions Act 1990. It lifts the ban on contracting out of the check-off system in Nigeria, thus putting an end to automatic check-off system in Nigeria as a worker is allowed to relinquish trade union membership and thus stop check-off dues deduction from his wages. However, such a worker is allowed or continues to enjoy the benefits of collective bargaining engaged in by the trade union he refuses to be a member. This article examines the historical development of check-off system in Nigeria against the backdrop of relevant statutory provisions as well as case law. It is the view of the author that the provision which allows a worker to contract out of the check-off system is unsatisfactory being that it allows the worker to enjoy or continue to enjoy the benefits of collective bargaining engaged in by the trade union he refuses to be a member and denies his financial contributions. Without gain-saying it, the non-trade union member will be reaping where he did not sow. The writer suggests, amongst other things, the retention of the arrangement under the Trade Unions (Amendment) Act 1996.

**Key Words:** Check-off System, Trade Union, Collective Bargaining

### I. INTRODUCTION

On 30 March 2005, the Trade Unions (Amendment) Act (TUAA) 2005 was enacted by the civilian administration of Olusegun Obasanjo to further amend the Trade Unions Act (TUA)<sup>1</sup>. Its new section 12(4) enacts that:

*Notwithstanding anything to the contrary in this Act, membership of a trade union by employees shall be voluntary and no employee shall be forced to join*

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1 Note that the TUA which came into force on 1 November 1973 became Cap 437 Laws of the Federation of Nigeria (LFN) 1990. It is now Cap T14 LFN 2004.

*any trade union or be victimized for refusing to join or remain a member.<sup>2</sup>*

Furthermore, the TUA 2005 substitutes for section 16A of the TUA a new section 16A as follows : *Upon the registration and recognition of any of the trade unions specified in the third schedule to this Act, an employer shall- (a) make deductions from the wages of every worker who is a member of any of the trade unions for the purpose of paying contributions to the trade union so registered; and (b) remit such deductions to the registered office of the trade union within a reasonable period or such period as may be prescribed from time to time by the Registrar.*

Evidently, the provision above lifts the ban on contracting out of the check-off system in Nigeria, thus putting an end to automatic check-off system in Nigeria. The position now is that check-off dues can only be deducted by an employer from the wages of workers who are members of the trade unions for the purpose of paying contributions to the trade unions recognised by the employer. With this arrangement, a worker can contract out of the check-off system in Nigeria. As the law stands, a worker is allowed to relinquish trade union membership and thus stop check-off dues deduction from his wages. However, such a worker is allowed or continues to reap the fruits of collective bargaining engaged in by the trade union he refuses to be a member.

This article examines the historical development of the check-off system in Nigeria, analyses the relevant statutory provisions, identifies the shortcomings in the laws, highlights the practice in other countries and offers suggestions which if implemented will fast-track the growth of trade unionism in Nigeria as well as enable Nigerian trade unions and Federations of trade unions to realise quickly the expected benefits of collective bargaining engaged in by them.

## II. MEANING OF CHECK-OFF SYSTEM

Check-off is 'a collection of union dues by the employer, deducted from wages'.<sup>3</sup> check-off dues are union subscriptions collected by the employer deducted from employees' wages at source. While the check-off system is the procedure by which an employer deducts union dues directly from the employees' wages and remits same to the union.<sup>4</sup> It is in this sense that the expression 'check-off system' is used in this article.

### Check-off system in Nigeria: The Pre-1978 Period

A check-off system was not introduced into Nigerian legislation until 26

- 2 This is in tune with the practice in some other countries where membership of a trade union by workers is voluntary. For instance, section 71(b) of the Industrial Relations Act 1972 of Trinidad and Tabago guarantees the right not to be a member of any trade union or other organization of workers or to refuse to be a member of any particular trade union or other organization of workers. See Cap 88:01 laws of Trinidad and Tobago 1972.
- 3 DO Bolander *et. al.*, (eds.) *The New Lexicon Webster's Dictionary of the English Language* (Danbury CT: Lexicon Publications Inc., 1995) at 167.
- 4 BA Garner (ed.) *Black's Law Dictionary* (St Paul MN: West Publishing Co 2004) at 253.

January 1960 when the then Labour Code (Amendment) Act (LCAA) came into force. Nigeria was under colonial administration at the time. There were three laudable objectives, namely, to secure financial stability for the trade unions, to equip the trade unions to provide welfare schemes for their members and to reduce the dependence of trade unions on external funding.<sup>5</sup> The LCAA permits an employer with the consent of the worker to make deductions from the wages of the worker for the purpose of paying the worker's subscription to his trade union provided that the Commissioner for Labour has made a check-off order for that union. This is of doubtful utility.<sup>6</sup> And again, the requirement of a check-off order of the Commissioner for Labour offends the right to form or join a trade union of one's choice as guaranteed under the Constitution of the Federation of Nigeria 1960<sup>7</sup> and Article 2 of the International Labour Organisation (ILO) Convention 87.<sup>8</sup> Actually, Nigeria as a member of the 183 member ILO has ratified all the core ILO labour conventions<sup>9</sup>. It sounds rather bizarre that the LCAA makes payment of subscription to a trade union of an employee's choice subject to a check-off order of the Commissioner for Labour.

In 1974, the Labour Act (LA) 1974<sup>10</sup> was promulgated. Section 5(3) of the LA provides :

Upon the registration and recognition of a trade union, the employer shall-  
 (a) *make deductions from the wages of all workers eligible to be members of the union for the purpose of paying contributions to the trade union so recognized, and*

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- 5 EE Uvieghara Trade Union Law in Nigeria (Benin-City: Ethiope Publishing Co 1984) 79.
- 6 Note that under the general contractual principle, an employer would be in breach of contract to deduct union subscription from the wages or salary of an employee without his consent. See E. E. Uvieghara, *Labour Law in Nigeria* (Lagos: Malt house Press Ltd 2001) 348.
- 7 See Section 25 (1).
- 8 Convention concerning Freedom of Association and Protection of the Right to Organise, 1948. It came into force on 4 July 1950 and was ratified by Nigeria on 17 October 1960. Sunday Vanguard (Lagos) 9 November 2003 17-18. Article 2 of the Convention states that employees shall have the right to establish and subject only to the rules of the organisation concerned, to join organisation of their choosing without previous authorisation.
- 9 This implicates that Nigeria is bound by these instruments under international law. Thus, workers and trade unions in Nigeria have the right to lodge complaints with the ILO. For example, in the ILO Case No 2267/Nigeria (2004) the Academic Staff Union of Universities (ASUU) brought a complaint to the ILO concerning violations of freedom of association and gross infringement of trade union rights. See OVC Okene 'Curbing Interference in Workers Freedom of Association in Nigeria', Available at: [http://www.Icnlong. I KNOWLEDGE/ I JNL /vol 8 US4/art 2htm](http://www.Icnlong.I KNOWLEDGE/ I JNL /vol 8 US4/art 2htm), accessed 4 January 2009. These instruments do not, however, have the force of law in Nigeria. It's suggested that they should be made a part of national law for same to have force of law in Nigeria as required under section 12(1) of the Constitution of the Federal Republic of Nigeria 1999 as amended (CFRN). This would enable ordinary citizens and trade unions to derive full benefits of same as they may be able to enforce their provisions in Nigerian law courts where there is non-compliance. A domesticated convention in Nigeria enjoys a status higher than a mere international convention as it would now be part of the Nigerian 'corpus juris'. Abacha v Fawehinmi (2000) 6 Nigeria Weekly Law Reports (NWLR) at 660.
- 10 It became Cap 198 LFN 1990 (now Cap L I LFN 2004).

(b) *pay any sum so deducted to the union but a worker may contract out of the system, in writing, and where he has done so no deductions shall be made from his wages in respect of contributions mentioned in paragraph(a) of this section.*

The provisions above, allow the employer to deduct union dues from employee's wages but it, nonetheless, allow the employee to voluntarily contract out of the system in writing and thus stop further deductions from his wages for this purpose. The LA is narrow in scope and application, for it only covers and protects junior employees going by its definition of a worker in section 91. In this way, senior employees cannot seek sanctuary under same. This is unlike the position in the Workmen's Compensation Act (WCA),<sup>11</sup> TUA and the Trade Disputes Act (TDA),<sup>12</sup> where the definition of a worker appears to cover all grades of workers from cleaner to the managing director. To the extent that the definition of worker contained in the WCA, TUA and TDA is broad enough to encompass both junior and senior employees, the definition of a worker contained in these three statutes is preferable.

Nonetheless, an objection can be raised to the inclusion of persons under contract of apprenticeship and contract personally to execute any work or labour, that is, an independent contractor in the definition of a worker in the WCA, TUA and TDA. These persons cannot be said to be under a contract of service<sup>13</sup> to make them workers. The three enactments above, should be amended to exclude these persons in the definition of a worker.

And lastly, the provision which allows workers to contract out of the check-off system is unsatisfactory. For it allows a worker to benefit from the fruits of a union's labour whilst it denies the union of the financial contributions which should normally be made by the worker.<sup>14</sup>

### **Check-off system in Nigeria: The 1978 - 1995 Period**

There was compulsory re-organisation of trade unions on industrial lines under the military administration of General Olusegun Obasanjo. It was implemented by the TUA<sup>15</sup> 1978 and TUA<sup>16</sup> 1979 which dissolved all existing unions and substituted a new list of 70 registered and recognised trade unions in Nigeria.<sup>17</sup> The Registrar of Trade Unions was enjoined to register the NLC as

11. Cap 470 LFN 1990 (Cap W6 LFN 2004). This Act seems to have been replaced by the new Employees Compensation Act 2011.

12. Cap 432 LFN 1990 (now Cap T8 LFN 2004).

13. Three main tests have been formulated by the courts to determine whether a person is employed under a contract of service or contract for services. These are the control test, organisational test and the multiple test. For details, see SO Tonwe *Labour Law in Nigeria: Cases and Materials* (Lagos: Ampfitop Books Ltd 1998) at 3.

14. O Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (Lagos: Folio Publishers Ltd 2004, 2nd ed) at 485.

15. No 22 of 1978.

16. No 86 of 1979.

17. Forty-two of these unions were unions of junior employees, 18 unions of senior staff, 9 of employers and the Nigerian Union of Pensioners. E. E. Uvieghara, *Supra* note 6 at 330.

the only Central Labour Organisation (CLO) upon the coming into effect of the TUA 1978 on 3 August 1977.<sup>18</sup> Prior to this restructuring, there were over 1 000 trade unions, many of which were small, weak and divided by struggle for leadership. Worse still, there were no fewer than four CLOs<sup>19</sup> which were divided along ideological lines, namely, the 'Marxists' and the 'Democrats'. The resultant effect was that for about three decades, Nigerian trade unions had a divided house and could not speak with one voice.<sup>20</sup> Infact, Obasanjo's military administration had capitalised on the clamour by the various labour centres to unite into one and speak with one voice to decree the NLC into existence so that it could accomplish its desire to put labour under governmental control.<sup>21</sup>

A further re-organisation in 1986 classified the unions into two broad groups in the third schedule to the TUA, that is, the Workers Unions-comprising of forty-two unions and the Senior Staff or Employers Associations-comprising of thirty-five associations.<sup>22</sup> Under section 5(3) of the LA 1974 as amended by the labour (Amendment) Act (LAA) of 1978, upon the registration and recognition of a trade union, the employer is imbued with the authority to make deductions from the wages of all eligible union members for the purpose of paying contributions to the trade unions so recognised. A worker may, however, voluntarily contract out of the system in writing and thus stop further deductions from his wages for this purpose. This provision was augmented in 1989 by section 17 of the TUA which imposes a duty on every trade union to pay a part of the contributions received from members to the CLO. The sum payable is to be specified from time to time in the Constitution of the CLO.<sup>23</sup> The section above, also prescribes penal sanctions for non-compliance. The penalty is a fine of two times the sum specified in the Constitution of the CLO. As stated earlier, the law which provides for compulsory check-off for all registered and recognised trade unions and at the same time allows workers to contract out is

18 TUA, section 33(1). See also section I(I) of TUA 1978. Section 3 of the TUA 1978 gives the Act retrospective effect.

19 These were Labour Unity Front (LUF) Nigerian Trade Union Congress (NTUC), United Labour Congress of Nigeria (ULC) and Nigerian Workers Council (NWC). Section 37(1) & (2) of the TUA 1973.

20 E. E. Uvieghara, *Supra* note 17 at 226.

21 AR Danesi, 'The Trade Union (Amendment) Act, 2005 and Labour Reform in Nigeria: Legal Implications and Challenges' in *Nigerian Journal of Labour Law and Industrial Relations* (2007)1 (1) at 16.

22 See section 5(7) of TUA No 17 of 1986. The amendment came apparently because government was uncomfortable with the role of some of the senior staff associations which had affiliated with the CLO. Note that Part 'A' of the schedule, with the title, Workers' Unions, comprised only the 42 unions of supposedly junior employees and Part 'B', with the title, Senior Staff Unions, was made up of the unions of senior staff and employers. The unions in Part 'A' were deemed to be affiliated to the NLC and those in Part 'B' were prohibited from such affiliation.

23 This provision was introduced by the Trade Unions (Miscellaneous Provisions) Decree No 25 of 1989 (TUMPD).

24 No 17 of 1986.

25 EE Uvieghara, *Supra* note 6.

unsatisfactory for the reason given earlier.

The situation was made worse in the case of the senior staff associations by the provisions of the Trade Unions (Miscellaneous Provisions) Act (TUMPA)<sup>24</sup> which in section 7(4) states that no deductions shall be made from the wages of the senior staff unless he agrees to such deductions in writing (contract in). By this provision, there is no automatic check-off system for a senior staff unless he agrees to such deductions in writing. This provision is also of doubtful utility.<sup>25</sup> The provision of section 5(3) of the LA 1990 which provides for check-off system is substantially the same with the provision of section 5(3) of the LA 1974 discussed earlier. Therefore, the comments made in respect of section 5(3) of the LA 1974 apply mutandis mutandis to the provision of the former. Section 17 of the TUA 1990 is similar in verbiage to section 17 of the TUMPD 1989 discussed above.

#### **Check-off system in Nigeria: The 1996 - 2004 Period**

Trade unions in Nigeria were further re-organised in 1996 under the General Sani Abacha military administration. One of the enactments promulgated to give effect to the re-organisation was the TUAA<sup>26</sup> 1996. Section 16A provides for automatic check-off system in Nigeria as the employer is empowered, once it has recognised a registered trade union, to deduct at source the dues of every worker who is eligible to be a member of the relevant trade union. A worker is no longer to be consulted nor does he have a right to say no to the deduction of union dues from his wages. It can be deduced from the provision above, that if a worker does not want check-off dues deducted from his wages and be treated as such a union member, then he cannot continue to remain an employee of an employer who has recognised or is obliged to recognise a registered trade union. Thus, the TUA as amended by the TUAA 1996 effectively takes away the workers right to contract out of the check-off system.<sup>27</sup>

Section 17 of the TUA as amended by section 4 of the TUAA 1996 provides that ten percent of all collected check-off dues of a trade union are to be remitted to the CLO. Any trade union which fails to pay the ten percent shall be guilty of an offence and liable on conviction to a fine of two times the sum which the ten percent represents. Albeit, section 17 obliges every trade union to pay the aforesaid ten percent. All the same, the new section 16A (b) took

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26 No 4 of 1996. The other enactments were Trade Disputes (Essential Services Deregulation, Proscription and Prohibition from Participation in Trade Union Activities) Act No 24 of 1996, the TUAA (No 2) No 26 of 1996 and the Trade Unions (International Affiliations) Act No 29 of 1996. Note that some of the trade unions listed in part A of the TUA were restructured and the number of unions listed in that part became reduced to 29. Part B was also amended by completely omitting the list of trade unions of senior staff and employers and providing instead what was described as the jurisdictional scope of the 29 unions in part 'A'.

27 See also EOJ Abugu, *A Review of Trade Union Organization in Nigeria in Modus* (1997) (2) 3 *International Law and Business Quarterly*, at 75. Note that section 16A would seem to have impliedly repealed section 5(3) of the LA 1990 which makes similar provisions for compulsory check-off of union contributions.

away the actual responsibility of making the remittance of the ten percent, from the trade unions and places same on the employers. This development is commendable and certainly meant to check the powers of the unions over the CLO in the act of with-holding or remitting the payable percentage.<sup>28</sup>

Experience has revealed that some of the larger and powerful unions appreciated the value of their remittances to the funding of the CLO and would often with-hold remittances when they were not in agreement with the CLO on certain administrative or policy issues.<sup>29</sup> Furthermore, under the TUA as amended, before TUA 1996, union membership was still a voluntary affair and the worker may withdraw his union membership and demand the cessation of trade union dues deduction from his wages. Where this happens to be prevalent, it would undoubtedly reduce significantly expected union funds.<sup>30</sup> It can be seen clearly that the central objective of the amendment of the TUA by the TUA 1996 is to strengthen the finances of the CLO and the trade unions. This is certainly commendable.

Abugu states that section 16A which aims at strengthening trade union finances effectively makes a closed shop out of every establishment where the employer recognises a trade union a practice he considers unpopular these days in the liberalised economies and against international conventions as well as the Nigerian constitution's guaranteed right to freedom of association.<sup>31</sup> He maintains that 'if everyone has the freedom to join a union, he should also be free not to do so and have his wages without union deductions'<sup>32</sup>. Such liberalised economies include the economies of Britain, France, Germany, Italy and the United States of America (USA). Support for his viewpoint can be drawn from Article 1 of ILO Convention 98 and Article 2 of ILO Convention 87. The combined effect of these provisions is that it is not an employer's concern which union employees choose to join.<sup>33</sup>

Also, the provision of Article 10 of the African Charter on Human and Peoples' Rights 1981 (African Charter) one of the noteworthy regional human right systems can be called in aid. It states that 'every individual shall have a right to free association provided that he abides by the Law'. Finally, Article 11 of the European Convention on Human Rights 1950 (European Convention) another noteworthy human right system can also be employed to support Abugu's view - points. It guarantees the right of every-one to freedom of association with others, including the right to form and join trade unions for the protection of his interest.<sup>34</sup> The learned writer refers to the case of *Young*,

28 *Id.* pp 74-75.

29 *Id.* at 75.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 See also E Chianu, *Employment Law* (Akure : Bemicov Publication Nig Ltd 2004) at 268.

34 There are several other sources of the freedom of association as a fundamental right in international law. For instance, the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 proclaims that 'everyone has the right to freedom of peaceful assembly and association.' Article 23, paragraph 4 specifically states that 'every one has the right to form and to join trade unions for the protection of his interests.' The same principle is echoed in Article (1) (a) - (c) of the International Covenant

*James and Webster v. United Kingdom*,<sup>35</sup> where the right was construed by the European Court to include the right to choose not to belong to a trade union.

Without doubt, the right to freedom of association is promoted throughout the world. Abubakar Tafawa Balewa correctly postulates that freedom of association 'is one of the foundations on which we build our free nations.'<sup>36</sup> Abugu missed the point. First, section 16A does not prohibit the employment of a person unless he is a union member. In this way, the argument that the provision effectively makes a closed shop out of every establishment where the employer recognises a trade union went too far. The provision merely authorises the employer to deduct union dues from the wages of every worker who is eligible to be a member of any of the trade unions recognised by the employer. In other words, a person who is not a union member can be employed into an establishment by an employer. But once employed, the employer shall deduct union subscription from his wages where he is eligible to be a member of any of the trade unions recognised by the employer. The employer would not determine the employment of a worker merely because he relinquishes trade union membership. But the employer is under a statutory duty to continue with the deduction of union dues from the wages of such a worker whether he likes it or not.

Third, Abugu did not avert his mind to the fact that the situation in the liberalised economies is quite different from that of Nigeria. For instance, the CLO and trade unions in Nigeria, unlike their counter-parts in the liberalised economies, need to spend so much money to generate electricity and pump water in their offices due to failure of Power Holding Company of Nigeria Plc (PHCN), to acquire many vehicles on a regular basis to convey staff due to the sordid state of Nigerian roads, to make several telephone calls in mobilising Nigerian workers for labour activities and to pay higher staff wages due to substantial devaluation of the naira against the World's major currencies. On the contrary, electricity supply, drinkable water supply, transportation and telecommunication are affordable and superb in these liberalised economies. Fourth, Abugu failed to appreciate that the fundamental right to freedom of association guaranteed under section 40 of the CFRN is not absolute but a qualified right which can be derogated from in accordance with section 45 of the CFRN<sup>37</sup>. The point comes out well in section 45(1) of the CFRN which states that:

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on Economic, Social and Cultural Rights (CESCR) and Article 22(1) of the International Covenant on Civil and Political Rights (ICCPR) both of 1966. Further, the right to freely associate is guaranteed under Part 1, paragraph 5 and Article 5 of the European Social Charter (ESC) of 1996, Article 16 of the American Convention on Human Rights (ACHR) 1969 and Article II of the Community Charter of Fundamental Social Rights of the EU Charter of Fundamental Rights (EUCFR) 2000.

35 (1981) *IRLR* 408.

36 GA Johnson, *The International Labour Organization* (London: Europa Publications 1970) 150.

37 See Supreme Court of Nigeria (SCN) decisions in *Osawe v. Registrar of Trade Unions* (1985) 1 NWLR (part 4) 755,756 and *The Registered Trustees of National Association of Community Health Practitioners of Nigeria v. Medical and Health Workers Union of Nigeria* (2008) 2 NWLR (part 1072), 575,584. See also *Damayani v. Union of India* AIR (1971) SC 966. See Further, Uvieghara Labour law in Nigeria.

*Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society -*

*(a) in the interest of defence, public safety, public order, public morality or public health; or*

*(b) for the purpose of protecting the rights and freedom of other persons.*

In summary, the legislature in Nigeria can enact laws which have the effect of revoking some fundamental rights in the circumstances mentioned in section 45(1)(a) and (b) of the CFRN.<sup>38</sup> Arguably, the TUA 1996 is reasonably justifiable in a democratic society in the interest of public order, public safety, public health, public morality and for the purpose of protecting the rights and freedom of other persons. Why should an employee, who is allowed to relinquish trade union membership and thus stop union dues deduction from his wages be allowed to reap the fruits of collective bargaining engaged in by the trade union he refuses to be a member? We do not think it should be so as it is certainly unfair and or against public morality. And lastly, the right to free association guaranteed under the African Charter is made subject to law. A relevant law in Nigeria, which can be pinpointed on the point, is the TUA 1996. Perhaps, if Abuga had adverted his mind to the points above, he would have come to a different conclusion.

A further re-organisation of trade unions was carried out in 1999 under the military administration of General Abdusalami Abukakar. This was accomplished by the enactment of the TUA<sup>39</sup> 1999 which further amended the TUA. Section 16A of the TUA as amended by the TUA 1999 provides that:

*Upon the registration and recognition of any of the trade unions specified in the third schedule to this Act, the employer shall make deduction from the wages of every worker<sup>40</sup> who is eligible to be a member of any of the trade unions for the purpose of paying contributions to the trade unions so registered (sic) recognised; and pay any sum so deducted directly to the registered office of the trade union.*

38 It has been correctly posited that a restriction should be held to be in the interest of public order only if the connection between the restriction and the public order is proximate and direct. Thus, indirect, far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression 'in the interests of public order' in section 45(1) of the CFRN. Chianu, Op Cit 274. Actually, the terms - defence, public safety, public order, public morality and public health are elastic and could be misused. It will be helpful if these terms are defined in the CFRN so as to guard against unforeseeable and unreasonable restrictions of the fundamental rights envisaged under section 45 (1) of the CFRN.

39 No 1 of 1999. Parts A and B of the TUA were again amended and a Part C created. Part A with the title 'list of Re-structured Trade Unions Affiliated to the Central Labour Organisation' has 29 trade unions listed. Part A also includes 'Any other workers' trade union registered under this Act and publish (sic) from time to time, in the Federal Gazette'. Part B still contains the jurisdictional areas of some of the unions in Part A with some amendments made in the jurisdictional areas of some of the unions, while Part C is a relisting of the unions of senior employees and employers under the heading 'Senior Staff and Employers' Association'.

40 The term worker is, under the Act, more or less synonymous with the common law concept of employee and so much wide in scope than under the LA from which the provision is derived. Worker in section 52 of the TUA seems to include both junior and senior employees.

The latter part of the provision was not helpful to the NLC. It was susceptible to abuse by the trade unions affiliated to the NLC. For, as stated already, they would withhold their remittances to the CLO when they were not in agreement with the CLO on certain administrative or policy issues. Perhaps, the military government took this position in order to weaken the NLC financially due to its tough stance on major policies of the government. At this time, the FGJ was fast losing its control over labour due essentially to the radical leadership of Adams Oshiomhole who was President of the NLC.<sup>41</sup> The position under the TUA 1996 is better and preferable to the position under the TUA 1999. Section 16A will also appear to have impliedly repealed section 5 (3) of the LA 1990 which makes similar provisions for compulsory check-off of union contributions.<sup>42</sup> If this is accepted, then the statutory right to contract out of the check-off system has been taken away under the TUA 1999. As stated already, the removal is certainly commendable since in practice both the union and non-union members usually enjoy the benefits of collective bargaining.

In any event, the TUA 1999 declares that compliance with section 16A, that is, operating the check-off by an employer is 'subject to the insertion of a "No Strike" and "No Lock-out" clauses' in the relevant collective bargaining agreements between the workers and their employers.<sup>43</sup> The purpose of this provision is not readily discernable, especially as strikes and lock-outs are, in effect, banned in Nigeria.<sup>44</sup> Nevertheless, it would seem that some meaning is intended to be given to the provision by section 17(4)(d) of the TUA which provides that the system of automatic check-off must, in respect of any particular union, cease to operate forthwith upon 'a strike action embarked upon by a union in breach of the collective bargaining agreement between the workers union and the employer'.<sup>45</sup> Furthermore, automatic check-off ceases to operate

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41 Prior to the emergence of Oshiomhole as NLC President most NLC leadership did not object to the policies of the government of the day. Even during the annulment of the 12 June 1993 presidential election results, the NLC refused to bow under pressure to call out Nigerian workers on strike under the leadership of Pascal Bafyau. Therefore, for a long time government was comfortable with the NLC.

42 Note that section 5 (3) of the LA 1990 applies to worker as defined in section 91 of the LA 1990. While section 16A of the TUA as amended by the TUA 1999 applies, it appears intended, to worker as defined in section 52 of the TUA where it is more embracing as it seems to include both junior and senior employees.

43 Section 5. See also proviso to section 16A of the TUA as amended by the TUA 1999.

44 See TDA 1990, section 17. See also TUA 2005, section 30(6). *In Eche v. State Education Commission* (1993) 1 Federation of Nigeria Law Reports (FNR) 386 Araka, CJ drew attention to the fact that section 17 (1) uses 'or' rather than 'and'. He stated that in essence where employees have taken any of the steps in section 3 or 4 they may proceed on strike to press for their claims and such strike shall be considered lawful. However, the prevailing view remains that any form of strike is prohibited under the TDA. Indeed, almost all the leading labour writers concede that workers in Nigeria have lost the right to strike.

45 See section 6 of TUA No 26 of 1996. Clearly, the central objective of the insistence on the 'No Strike' clause is to deny a trade union of its funds if same embarks on a strike. This is contrary to ILO Convention 98 - Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively 1949 which guarantees

forthwith upon the dissolution of a recognised union, the revocation of the certificate of registration of a union or the cancellation of the registration of a union by the Registrar of trade unions.<sup>46</sup>

And lastly, section 5(4) of the LA 1990 which provides that no deductions shall be made from the wages and salaries of persons who are eligible members of any of the trade unions specified in Part B of Schedule 3 to the TUA except the person has accepted in writing, to make voluntary contributions to the trade union, would seem to have been rendered otiose by the amendment of Part B, Schedule 3 of the TUA.<sup>47</sup> Part B contained the names of the registered trade unions of senior employees and of employers. The new Part B lists what is referred to as the jurisdictional scope of each of the restructured trade unions contained in Part A and none of which was contained in the old Part B. Be that as it may, it is submitted that such a statutory provision is unnecessary.<sup>48</sup>

#### **Check-off system in Nigeria: The Post -2004 Period**

On 30 March 2005, as earlier stated, the TUAA 2005 was enacted under the civilian administration of Olusegun Obasanjo to further amend the TUA. Both sections 12(4) and 16A of the TUA as amended by the TUAA 2005 impliedly repealed section 5(3) of the LA 1990. To be specific, section 12(4) uses the expression 'employees'. This is wide enough to include junior and senior employees unlike section 91 of the LA 1990 which restricts the meaning of worker to junior employee. Also, the expression 'worker' as used in section 16A refers to both junior and senior employees in view of the definition of a worker in section 52 of the TUA which is wide enough to cover both types of employees. A similarity shared by the new section 16A and section 16A of the TUA as amended by TUAA 1999 is that the employer is under a statutory duty to remit trade union deductions to the registered office of the trade union.

Contrary to the views expressed by Danesi<sup>49</sup>, it is submitted that the TUAA 2005 deviated from the principal Act on the issue of trade union deductions. She maintains that the old practice is left intact by TUAA 2005 and that a trade union member could contract out of the check-off system prior to the enactment of TUAA 2005. The learned writer is not correct. There are obvious differences between the old practice as reflected in section 16A of TUA as amended by TUAA 1999 and the current practice as encapsulated in section 16A of the TUA as amended by the TUAA 2005. First, the old section 16A empowers the employer to make deductions from the wages of every worker who is eligible to be a member of any of the trade unions recognised by the employer. Thus, dues deductions are automatic for every worker who is eligible to be a member of any of the trade unions as aforesaid. Section 16A of the TUA as amended

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voluntary collective bargaining. Workers and employers should be free to collectively bargain. Government is therefore not right to insist on 'No Strike' and 'No Lock-out' clauses in their collective agreements.

46 Section 17 (4) (a),(c) of TUA as amended by TUAA No 26 of 1996.

47 See TUAA 1996, section 10 and TUAA No 2 of 1996.

48 EE Uvieghara, *Supra* note 6.

49 Danesi, *Supra* note at 111.

by TUA 1996 and TUA 1999 impliedly repealed section 5(3) of the LA 1990 which permits a worker to contract out of the check-off system. In this way, the statutory right to contract out of the check-off system has been taken away under the TUA 1996 and TUA 1999.

In the new section 16A of the TUA as amended by the TUA 2005 the employer is empowered to make check-off dues deductions from the wages of only members of a trade union. And lastly, whilst the old section 16A suggest that remittance of such deductions to the registered office of the relevant trade union is forthwith the new section 16A as aforesaid provides that the remittances as aforesaid should be within a reasonable period or such period as may be prescribed from time to time by the Registrar of trade unions. This power may be misused. It is submitted that the position under the old section 16A of the TUA as amended by TUA 1996 is preferable. The TUA 2005 removes from the TUA the NLC as the only CLO in Nigeria.<sup>50</sup> Federation of Trade Unions is put in the place of CLO in the TUA.<sup>51</sup>

The Federal Government of Nigeria (FGN) while presenting a position paper to the National Assembly (NA) stated that the bill which crystallised into the TUA 2005 was meant to promote the democratisation of labour, and to further strengthen it.<sup>52</sup>

Obasanjo posits that the TUA 2005 is in line with ILO Convention 87.<sup>53</sup> The impression created by the former President is that he is a true 'lover' of the fundamental right to freedom of association. The retired military General can be criticised. It was his military regime, as earlier indicated, that decreed the NLC into existence as the only CLO in Nigeria to which 42 so - called industrial unions of employees in Nigeria were automatically affiliated through the enactment of the TUAD 22 of 1978. At the time of the said regime, the ILO Convention 87 which guarantees freedom of association was already in effect having come into force on 4 July 1950 and been ratified by Nigeria on 17 October 1960, as earlier stated. In addition, many provisions enure in Nigerian labour statutes which constitute serious violations of ILO conventions which the former President did not deem imperative to expunge. It is submitted that if the motive is to respect conventions, then the former President cannot apply the logic selectively. The first provision as aforesaid is section 2 of the TUA which provides for compulsory registration of a trade union. Actually, without registration a union, its officials and members commit an offence if they carry out any act in furtherance of the purposes of the union.<sup>54</sup> Arguably, this provision offends the fundamental right to freedom of association guaranteed under Article 2 of the ILO Convention 87.<sup>55</sup>

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50 Section 33 of the TUA was deleted. See TUA 2005, section 7(1).

51 See TUA 2005, section 7 (2).

52 S Olukoya 'A union bill still gives cause for concern' in Inter Press Service News Agency Labour - Nigeria: Modified: 11 September 2004. Quoted in Danesi, *op cit* 97.

53 Sunday Vanguard, *supra* note 8.

54 TUA 1990, section 2 (1).

55 Note that in *Osawe v. Registrar of Trade Unions*, the SCN seems to have held that the requirement of compulsory registration is not against the Constitution of Nigeria.

Second, section 3(1) of the TUA sets the excessively high requirement of 50 workers to form a workers' trade union. The Committee of Experts on the application of ILO conventions frowns at section 3(1) of the TUA and has actually demanded its amendment in order to ensure full compliance with Article 2 of ILO Convention 87.<sup>56</sup> Third, under section 3(3) of the TUA, no staff recognised as a projection of management within the management structure of any organisation shall be a member of or hold office in a trade union (whether or not the members of that trade union are workers of a rank junior, equal or higher than his own) if such membership of or the holding of such office in the trade union will lead to a conflict of his loyalties to either the union or his employer.

Clearly, there is no blanket prohibition of membership of trade unions of all management staff.<sup>57</sup> It is only where such membership will lead to conflict of loyalties to either the union or management that a management staff is prohibited from union membership. Union membership by management staff should to be allowed whether or not it will lead to conflict of loyalties to either the union or management since every employee has a fundamental right to freedom of association guaranteed under Article 2 of ILO Convention 87. The Committee of Experts above has equally demanded the amendment of section 3(3) of the TUA in order to ensure full compliance with Article 2.<sup>58</sup>

Fourth, under section 7(9) of the TUA, the Minister of Employment, Labour and Productivity is given broad authority to revoke the certificate of any registered trade union due to over-riding public interest. The ILO has requested the FGN without success to repeal this broad authority so as to bring the TUA in full conformity with Article 4 of ILO Convention 87.<sup>59</sup> Fifth, section 11 of the TUA provides that persons employed in certain establishments, including the Nigerian military, Nigeria Police Force and Central Bank of Nigeria (CBN) cannot join, form or be members of a trade union. Arguably, this provision offends the fundamental right to freedom of association guaranteed under Article 2 of ILO Convention 87. The ILO has rightly demanded its amendment in order to ensure full compliance with Article 2.<sup>60</sup>

Sixth, section 16A of the TUA as amended by the TUA 1999 makes check-off payments to unions conditional upon the inclusion of a 'No strike' and 'No lock - out' clauses in collective bargaining agreements. ILO's position is that such a legislative requirement hinders the right of workers' organisation to formulate their programmes and activities without interference of public authorities.<sup>61</sup> Seventh, section 17(1) of the TDA imposes compulsory arbitration for trade disputes whether or not they involve cases of essential services.<sup>62</sup> ILO

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56 Sunday Vanguard, *supra* note 8.

57 *National Union of Petroleum and Natural Gas Workers v. Nigerian National Petroleum Corporation (NNPC)* (Unreported) Suit No LD 13/83 High Court of Lagos State, per Ayorinde, J.

58 Sunday Vanguard, *Supra* note 8.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 Essential services have been defined as the public service of the federation or of a state

frowns against this provision and has indicated to the FGN that it can tolerate compulsory arbitration only in cases of essential services in the strict sense of the term.<sup>63</sup> In fact, it considers compulsory arbitration by way of Industrial Arbitration Panel (IAP) and the National Industrial Court (NIC) as a violation of the principle of free collective bargaining.<sup>64</sup> The ILO Committee on freedom of association considers essential services as only those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.<sup>65</sup> Its definition in section 232(1) of the Lesotho Labour Code 1992 is in tune with the view of the ILO Committee above.

We, however, submit that it would not be desirable or even possible to attempt to draw up a complete and universally applicable list of essential services. Account must be taken of the special circumstances which enure in the various ILO member - states since the interruption of certain services which in some countries might at worst cause economic hardship could prove disastrous in other countries and rapidly lead to conditions which might endanger the life, personal safety or health of the population.<sup>66</sup> To be specific, a strike in the port or marine transport services might more rapidly cause serious disruptions for island countries such as Trinidad and Tobago, Taiwan, Sri Lanka, Singapore, Sao Tome and Principe, Philippines, Mauritius, Japan, Jamaica, Carpe Verde and Cuba, which are heavily dependent on such services to provide basic supplies to their population than it would be for countries on a continent such as Nigeria, Chad, Ethiopia, India, Iran, Iraq, Austria, Belgium, United Kingdom and the USA. Besides, a non-essential service in the strict sense of the term may become essential if the strike affecting same exceeds a certain duration or extent so that the life, personal safety or health of the population are endangered.<sup>67</sup> Examples include house hold refuse collection services. Rather than a total ban on strikes, which should be limited to essential services in the strict sense of the term, the said Committee suggests the establishment of a system of minimum service by authorities in other services which are of public utility subject to workers' organisation participation in the definition of such a service and the service being such which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service.<sup>68</sup> Needless to recall that on 2 August 2007 the NA of France passed a new law requiring striking public transport workers to maintain a minimum level of service.<sup>69</sup> The example of France is worthy of emulation by Nigeria and other countries.

And lastly, sections 17(1) of the TDA and 30(6) of the TUA as amended by TUAA 2005, respectively have the net effect of banning strikes in Nigeria.

which shall include service, in a civil capacity, of persons employed in armed forces. For details, *see* TDA, section 47.

63 Sunday Vanguard, *supra* note 8.

64 *Ibid* 19.

65 Available at : <http://itcilo.it/259.htm>, accessed on 14 July 2009.

66 *Ibid*.

67 *Ibid*.

68 *Ibid*.

69 Available at: <http://www.wsws.org/.sark-a/shtm>, accessed on 14 July 2009.

It is a criminal offence to embark on strike under the TDA and TUA as amended by the TUAA 2005.<sup>70</sup> True, section 42(1) of the TUA which guarantees the right of workers to peaceful picketing remains intact. Regardless, section 30(6) of the TUA as amended by the TUAA 2005 has by implication banned peaceful picketing in Nigeria. Picketing is a conduct engaged in by workers in contemplation or furtherance of a strike. Workers certainly do not picket while working conscientiously. They picket only in furtherance of a strike.<sup>71</sup> The provision of section 30(6) of the TUA, to the extent that it prohibits 'any conduct in contemplation or furtherance of a strike or lock-out', is inconsistent with the provisions of sections 39 and 40 of the CFRN which guarantee the fundamental rights to freedom of expression and peaceful assembly and association, respectively. The TUA is therefore void to the extent of its inconsistency with the CFRN. This contention is grounded on an insightful provision in section 1(3) of the CFRN. The expression in quote above, should be expunged from the TUA. The FGJ has no right to prohibit or unnecessarily restrict the right to strike under Article 3 of ILO Convention 87.

From the foregoing, it is obvious that the decision to enact the TUAA 2005 was neither prompted by the desire to adhere to the provisions of ILO conventions nor the provisions of the Nigerian Constitution. It is conceded that the right to join a trade union as guaranteed under section 40 of the CFRN also includes the right to choose not to belong to a trade union, thus to have one's wages without union deductions. Nevertheless, it can be argued that the reason for the amendments was the desire by the civilian administration of Obasanjo to weaken the NLC and the trade unions due to their tough stance on the economic policies of the FGJ. From 2000 to 2005, labour had engaged it on issues related to pricing of petroleum products four times. The NLC had organised the trade unions to embark on nation - wide 'protest strikes' for three times, that is, June 2000, January 2002 and July 2003 - over increment in the prices of petroleum products.<sup>72</sup> In 2004, the NLC embarked on two major 'protest strikes'.<sup>73</sup>

The June 2000 'protest strike' had irritated the former President so much that he told Oshiomhole that he was ready to leave the Presidential villa and return to his Otta farm, if labour would not let him run Nigeria's economy.<sup>74</sup> The January 2002 'protest strike' was total. Government's response was rather shameful and irresponsible.<sup>75</sup> The July 2003 'protest strike' was also total. Oshiomhole and the trade unions had worked assiduously and clearly defeated the FGJ.<sup>76</sup> The incessant strike actions by the NLC an existing platform of

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70 The penalty is a fine of 100 naira (N) or imprisonment for 6 months in the case of an individual and a fine of N1 000 in the case of a body corporate. See TDA, section 17(2). The penalty under the TUA is a fine of N10 000 or 6 months imprisonment or both. See TUA as amended by TUAA 2005, section 30(7).

71 Chianu, *Supra* note 33 at 284.

72 Sunday Vanguard, *supra* note 8 pp.15-16.

73 The first one took place in January 2004 over the imposition of fuel tax of N1.50 on every litre of refined petroleum products. The Guardian (Lagos) 5 November 2004 15. While the second one took place between 11 and 14 October 2004 over increases in the prices of petroleum products to over N50 per litre in the case of fuel. The Guardian (Lagos) 11 October 2004 1 and 4.

popular struggle in Nigeria compelled former President Obasanjo in Radio and Television broadcasts to the nation to accuse the NLC of constituting itself as an opposition government and engaging in subversive activities.<sup>77</sup>

Oshiomhole maintains correctly that the TUAA 2005 was initiated by the FGN to suppress labour and silence any voice of dissent. The NLC increasingly became the only strong voice of opposition to the FGN's policy of deregulating the downstream oil sector<sup>78</sup> and other anti-people policies including retrenchment of workers, commercialisation of education and devaluation of the naira.<sup>79</sup> For his part, Dipo Fashina canvasses correctly the view that government wants to weaken the NLC and the trade unions in order to impose International Monetary Fund (IMF) and World Bank Programmes on the Nigerian people. 80 The point has been well made elsewhere<sup>81</sup> that:

*The government should not deceive itself that Nigerians do not understand that it seeks to castrate the NLC in order to continue the imposition of harsh policies on the populace*<sup>82</sup>.

*It has been aptly stated:*<sup>83</sup>

*The management of contrary opinion has become the achilles heel of this administration (Obasanjo's administration) as the leadership becomes increasing*

74 Sunday Vanguard, *supra* note 8 at 15.

75 Security operatives of the FGN in Abuja arrested Oshiomhole and several other Labour leaders, including Dipo Fashina, former President of ASUU. 16 other union leaders were arrested in Port Harcourt, Rivers State while the Police in Ogun State locked up 25 persons, including the state Secretary of NLC, Wale Olaniyan. In the course of the Abuja arrests, the Police exhibited excessive brutality. They seized Oshiomhole's car and savagely beat up his driver, Dara Agbaje. Fashina had his shirt torn and one of his fingers broken by the Police. Throughout a 24 hour stint in detention, these unionists were not allowed to receive medical attention. See 2002 Annual Report on the Human Rights situation in Nigeria (Nigeria: Committee for the Defence of Human Rights (CDHR), 2002) 131, quoted by Okene, *loc cit*.

76 Sunday Vanguard, *supra* note 8 at 19.

77 Senator Wabara, former Senate President of Nigeria, in his first ever public comment on the bill which crystallised into the TUAA 2005 actually betrayed part of the *raison d'être* for the said bill when he stated that the NLC was the main obstacle to Nigeria securing debt relief as the country's creditors, the international financial institutions had been complaining over the incessant strikes and protests led by labour. Danesi, *Supra* note 21 at 108.

78 The NLC, under the leadership of Abdulwaheb Omar, continued its opposition to the FGN's policy of deregulating the downstream oil sector. For instance, in May 2009, the NLC in conjunction with civil society organisations started nation-wide protest rallies in Lagos to force the FGN under the leadership of late President Umaru Musa Yar'Adua to reverse, amongst other things, its decision to embark on full scale deregulation of the downstream oil sector of Nigeria. See Vanguard (Lagos) 16 June 2009 25.

79 Senator Wabara, *Supra* note 77.

80 Vanguard (Lagos) 4 December 2003 at 30.

81 *The Guardian* (Lagos) 11 December 2003 at 2.

82 Little wonder many Nigerians and representatives of 54 African labour unions had opposed the amendment contained in the TUAA 2005 *The Guardian* (Lagos) *Supra* note 81 at 4

*intolerant of opposition. The attack on the NLC is only part of a growing apprehension.*

No wonder, Afenefere a Pan - Yoruba socio-political organisation warned that steps taken by the FGn during the last days of Obasanjo's first term in office on the political and economic fronts portend 'rapid movement to a one party fascist dictatorship' in Nigeria.<sup>84</sup> The truth of the matter is that NLC and the trade unions had become too powerful as the government could no longer control the same. The weakening of the labour movement became a top priority of the FGn. The original bill actually sought the proscription of the NLC and total banning of strikes but the NA reasoned differently.<sup>85</sup>

The FGn sought to realise its objective of weakening the NLC and the trade unions by reducing the financial strength of same. First, it de-registered the NLC as the only CLO in Nigeria to which 29 workers' trade unions were automatically affiliated.<sup>86</sup> It made membership of the NLC by the unions voluntary. The thinking was that NLC would be denied of the ten percent contributions of the check-off dues required to be paid by each affiliated trade union to the NLC. This was the main funding of NLC. It was reasoned that if revenue accruing to NLC was diminished significantly by reason of limited membership of the congress, it would be starved of the necessary funds it required to organise and mobilise workers and other Nigerians for a strike against the FGn.

Second, trade union membership has been made voluntary and a stop has been put to automatic check-off.<sup>87</sup> The thinking was that only a few workers would be union members and thus a reduced revenue would accrue to the trade unions, which may not be sufficient to organise and mobilise for a strike against FGn. And thirdly, remittances by the employer to the trade unions are now to be made as at when it is convenient to the employer or the Registrar of trade unions.<sup>88</sup> This is aimed at denying the unions of check-off dues as at when they are most required. Thus, the union may be incapacitated financially to organise itself against anti-workers or people policies. The FGn seems to be comfortable in allowing the trade unions or federations of trade unions to affiliate with any international labour centre,<sup>89</sup> in view of the demise of the cold war fueled by the East-West ideological rivalry.<sup>90</sup>

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83 The Guardian (Lagos) 2 December 2003 at 22.

84 The Guardian, *Supra* note 81.

85 For instance, the NA decided to allow the NLC to continue to exist but not as the only CLO in Nigeria. The NA allowed a total ban on strikes in the case of essential services but allowed strikes in the case of non-essential services subject to certain conditions. As already stated, the net effect of section 30 (6) of TUAA 2005 is the ban on strikes in Nigeria. See TUAA 2005, section 30 (6) - (8).

86 TUAA 2005, section 7(1).

87 *Ibid* sections 12(4) and 16A.

88 Section 16A.

89 See Trade Unions (International Affiliations) Act No 29 of 1996 as amended by the Trade Unions (International Affiliations) (Amendment) Act No 2 of 1999, section 1 (1) (now Cap T15 LFN 2004).

90 Before the setting up of the famous Adebisi Tribunal of Inquiry in 1977 to look at trade

Be that as it may, certain obvious weaknesses of the TUA as amended by the TUAA 2005 can be discerned. To start with, the right to voluntary trade union membership guaranteed by section 12(1) of the TUA as amended by the TUAA 2005 may lead to the proliferation of trade unions in the work place and the establishment of multiple labour centres as they enured in pre -

1978 days. This may mean more strikes and that the employer may have to deal with many unions. Perhaps, it is this problem that the drafters of the TUAA 2005 had in mind when they enacted in section 24(1) of the TUA that 'for the purpose of collective bargaining all registered unions in the employment of an employer shall constitute an electoral college to elect members who will represent them in negotiation with the employer.'

Second, the introduction of voluntarism in union membership as encapsulated in section 12(4) of the TUA as amended by the TUAA 2005 may encourage militancy in unionism. Oshiomhole contends rightly that the battle field for contest for membership of the NLC and the trade unions to earn the confidences of workers would take place in the factories and government offices and not in their offices.<sup>91</sup> Workers and the trade unions would readily be prepared to join a labour organisation that is militant in its approach to issues.

Third, section 16A(a) of the TUA as amended by TUAA 2005 is unsatisfactory. Our problem is with the words 'who is a member of any of the trade unions.' The TUA states that 'member of trade union means a person normally engaged in a trade or industry which the trade union represents and a person either elected or appointed by a trade union to represent workers' interest.'<sup>92</sup> Arguably, there is no difference between eligible member of a trade union and member of a trade union. This is so because a person normally engaged in a trade which the trade union represents is also an eligible member of the trade union. It will be helpful if the words used in section 16A (a) are 'make deduction from the wages of every worker who is a registered member of a trade union.'

It is submitted that only persons who have registered themselves as members of a trade union should be treated as members of same for which check-off dues deductions shall be made from their wages by the employers. The view that only registered members of the trade union are the actual members seems to have been embraced in section 30(6)(c) of the TUA as amended by the TUAA 2005 which requires a simple majority vote of all registered members of a trade union before same can proceed on a strike. And lastly, section 12 (4) of the TUA as amended by the TUAA 2005 which

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unions, all the trade union organisations in Nigeria were affiliated to overseas bodies. Some were with International Confederation of Trade Unions (ICTU) based in Brussels while some were in World Federation of Trade Unions (WFTU). Adebisi stated that 'it was thought that one of them was a communist thing and the FGN was not comfortable with the situation'. Little wonder the FGN restricted the international labour centres that NLC and the trade unions could become affiliated to the Organisation of African Trade Union Unity and the Organisation of Trade Unions for West Africa. Sunday Vanguard, *Supra* note 8 at 19.

91 Sunday Vanguard, *Supra* note 8 at 16.

92 TUA as amended by the TUAA 1999, section 52 (now section 54 of TUA Cap T14 LFN 2004).

purportedly introduces voluntarism in trade union membership in Nigeria is inconsistent with some other provisions of the TUA.<sup>93</sup>

In closing on the issue of membership of unions and check-off system a pertinent question to be posed is: can an employer refuse to pay a non-union member increased wages and allowances arising from collective bargaining engaged in by the union he refuses to be a member? The answer is in the negative for the ensuing reasons. The employer would certainly breach the contract of employment where he refuses to pay the increased wages and allowances as stated above. The employer has an implied duty to pay to the employee his wages as may be reviewed from time to time. Besides, the employer would contravene the principle of equal pay for equal work done enshrined in section 17(3)(e) of the CFRN where he refuses to pay the increased wages and allowances as stated above. Furthermore, we reiterate here the provisions of section 12(4) of the TUA as amended by TUA 2005. Thus, an employee continues to enjoy the benefits of collective bargaining or struggle engaged in by the union he refuses to be a member and denies his financial contributions. This is unfair to the union members. As the non-union member will be reaping where he did not sow.

It might be wise to suggest that the TUA should be amended to provide for Agency-shop Agreement. This is in tune with the practice in some other countries including South Africa<sup>94</sup>, USA<sup>95</sup> and Britain<sup>96</sup>. The agreement is a type of collective agreement that requires employers to deduct an agreed agency fee (usually equal to union dues) from the wages of workers who are not members of the trade union. The aim is to ensure that non-union workers who benefit from the union's bargaining efforts make a contribution towards those efforts. A point to note is that permission of the non-union worker is not required for

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93 For instance, section 2 (1) of the TUA which enjoins compulsory registration of a trade union is against voluntarism in trade union membership. Also, section 20 (1) of the TUA which forbids a person under the age of 16 years from membership of a trade union is against voluntarism in trade union membership. Further, section 11 (1) of the TUA which forbids some Nigerians working in certain establishments, including Police and Armed Forces from membership of a trade union is against voluntarism in trade union membership. And lastly, section 5(4) of the TUA which empowers the Registrar of trade unions to refuse union registration on the ground that another union sufficiently represents the interests of the intending members is against voluntarism in trade union membership.

94 See Basic Guide to Agency Shop Agreement, Department of Labour, Republic of South Africa (retrieved on 24 June 2006). See also Available at: [http://en.wikipedia.org/wiki/trade\\_union](http://en.wikipedia.org/wiki/trade_union) (accessed on 14 July 2009). See further Greathead, Brian Courtney v South African Commercial Catering and Allied Workers Union, Case No 290/98, Judgment of the Supreme Court of Appeal of South Africa delivered on 29 September 2000, quoted Available at: <http://www/saflit-org/content/rss-feeds-o> (accessed on 29 February 2010).

95 See USA Supreme Court decision in *Abood v. Detroit Board of Education* 431 US 209, 235 (1977), quoted by R Miller, *Union Dues Objections: A Twisted Path to Endless Litigation* (2007) *Labour Law Journal*. See also Available at: <http://www.britannica.com/bps/additionalco>, accessed on 21 July 2009.

96 See Agency Shop (2009) Encyclopedia Britannica, (retrieved 21 July 2009 from Encyclopedia Britannica on line), Available at: <http://www.britannica.com/EBChecked/topic/726315/Agency-shop>, accessed on 21 July 2009.

deductions to be assessed.<sup>97</sup> True, this arrangement takes care of financial contributions of the non-union member. All the same, it does not take care of the physical contributions of the non-union member in terms of participation in meetings and other activities of the union like strikes, picketing and other forms of industrial actions. These activities are equally as significant as the financial contributions in the collective bargaining process. Mere payment of union dues cannot win concessions from the employers. It is the physical contributions of union members that can compel the employer to meet such demands of union members as better conditions of service, safety and good health as well as improved living conditions of embattled workers. Perhaps, the best thing is to stick to the position under the TUAA 1996.

We must also not gloss over the need for Nigeria's municipal laws to conform with international labour standards (ILS). It must show respect for international law and treaty obligations as enjoined by section 19(d) of the CFRN.<sup>98</sup> Furthermore, the NLC must be retained as a rallying point for organised labour. It must be supported and enabled so that it can continue to advance the cause of Nigerian workers. However, it should not exist as the only CLO or Federation of trade unions in Nigeria since that would offend ILO Convention.

The distinction between junior and senior workers should be abolished as it offends ILO Convention. In this way, all workers may have right to join any federation of trade unions or union of their choice in line with Article 2 of the Convention above.<sup>99</sup> Needless to aver that the scrapping of the NLC as the only CLO in Nigeria would not solve the problem of incessant strikes. Similarly, the ban on and criminalisation of strike and other conducts in contemplation or furtherance of a strike would not solve the problem of incessant strikes.<sup>100</sup>

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97 See, for example, section 25(4)(a) of Labour Relations Act of South Africa as amended by Amendment Labour Relations Act 2002. Note that contributions from such non-union member must be used only for collective bargaining purposes.

98 Prior to TUAA 2005 there was a tripartite Committee consisting of Government, NECA and NLC examining Nigeria's Labour Laws and how to make same address the current realities on the ground by complying with the ILS. This was in compliance with the principle of tripartite consultation. The Committee must be allowed to complete its work. The FGN and its officials must begin to take the ILO seriously. It should be recalled that the 98th Conference of the ILO was held in Geneva, Switzerland from 3 to 19 June 2009. It adopted the Global Jobs Pact designed to overcome job losses. Two representatives of the FGN, Senator Wilson Ake and Honourable Ibrahim Dogo both leaders of their respective House Committees on labour only showed up on the last day of the Conference. This does not show seriousness on the part of the NA members. Vanguard (Lagos) 2 July 2009 39.

99 Note that currently NLC and the Trade Union Congress (TUC) are the two notable Federations of trade unions in Nigeria.

100 Several trade unions have embarked upon a strike or picketing since the enactment of the TUAA 2005. It should be recalled that on 30 June 2008 members of the Nigeria Union of Teachers (NUT) embarked on a nation-wide strike to compel the government to implement a new Teachers Salary Structure (TSS). The teachers had to picket institutions whose teachers did not join the strike. Also, on 22 June 2009 ASUU embarked on a nation-wide strike to force the FGN to sign and implement an 'Agreement' it purportedly reached with the university teachers. Vanguard (Lagos) 30 June 2008 at 8, Vanguard (Lagos) 10 July 2008 pp 32-33, Vanguard (Lagos) 14 July 2008 at 7, Vanguard (Lagos)

Consequently, picketing and strike should be debanned and decriminalised forthwith. These are pivotal to the success of the industrial relations system in Nigeria.

The practice in some other countries is worthy of emulation. For example, in Zimbabwe, South Africa, USA and Britain,<sup>101</sup> the right to peaceful picketing is guaranteed under the law. Furthermore, the right to strike is constitutionally guaranteed in South Africa, France, Argentina, Burkina Faso, Portugal, Romania, Rwanda, Ethiopia, Angola, Poland, Brazil, and Sao Tome and Principe.<sup>102</sup>

In the words of Kahn Freund and Hepple<sup>103</sup> 'workers will go on strike whatever the law says about it... no government however strong can suppress concerted stoppages of work.' Akpan's expression is even more pungent. He declares that :<sup>104</sup>

*Let the punishment be capital, workers will continue to exercise (the right to go on strike), after all (sic), the freedom of workers to even combine was acquired through toil and blood bath. Let the workers who exercise this right be tied to the stakes and burnt, the right to strike will always arise from the ashes of their own holocaust.*

It is submitted that what would reduce significantly the menace of incessant strikes in Nigeria is for the employers in particular and the government in general to formulate and implement pro-workers and or people policies and programmes that would bring smiles to the faces of workers and the Nigerian

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16 July 2008 32, Vanguard (Lagos) 26 July 2009 6 and Vanguard (Lagos) 1 July 2009 10. And lastly, on 1 September 2011 workers in Plateau and Gombe States began an indefinite strike to protest government's failure to commence implementation of the new national minimum wage of N18 000 as enjoined by the new National Minimum Wage (Amendment) Act 2011. Vanguard (Lagos) 2 September 2011 113.

101 See Zimbabwean Labour Relations (Amendment) Act 2003, section 38, Available at: <http://www.answers.com/topic/picketing>. (accessed on 14 July 2009), Constitution of Republic of South Africa 1996, section 17, *Thornhill v. Alabama* 310 US 88 (1940), Available at: <http://www.answers.com/topic/picketing>. (accessed on 14 July 2009), British Trade Union and Labour Relations (Consolidation) Act 1992, section 220(1)(a) and (b) and Available at: <http://www.absoluteastronomy.com/picketing> (accessed on 14 July 2009).

102 See Constitution of the Republic of South Africa, 1996, section 23 (2)(c), Preamble to the Constitution of the Republic of France 1946 affirmed in the Preamble of the Constitution of the Republic of France 1958, Constitution of the Argentine Nation, 1853 as amended in 1994, section 14 bis (2), Constitution of Popular Democratic Republic of Burkina Faso, 1991 as amended in 2000, Article 22, Constitution of Portugal 1976 as amended in 1997, Article 57, Constitution of Romania 1991 as amended in 2003, article 43; Constitution of Rwanda 1991, Article 32, Constitution of Federal Democratic Republic of Ethiopia 1995, Article 42 (1) (a) and (b), Constitution of Republic of Angola 1992, Article 34(1), Constitution of Republic of Poland 1997, Article 59(3), Constitution of Federal Republic of Brazil 1988 as amended, Article 9, and Constitution of Democratic Republic of Sao Tome and Principe 1990, section 6 a.

103 OK Freund and P Hepple, *Law Against Strikes* (London: Fabian Research Series 1972), quoted in H Ijiaiyi 'The Legal Rights and Obligations of Doctors in Nigeria' (2003) 1(4) *Nigerian Bar Journal* at 582.

104 Akpan, 'Right of Workers' 71 quoted in Chianu, *Supra* note 33 at 285.

people in general. Policies such as incessant increases in the prices of petroleum products, retrenchment of workers, commercialisation of public enterprises and deregulation of the downstream oil sector being carried out under the subterfuge of the capitalist philosophy of private sector-driven economy bring hardship and untold sufferings to the workers and the citizenry in general. All hands must be on deck to pursue the Poverty Alleviation and Food Security Programme of President Jonathan's administration to its logical conclusion. Economic empowerment of Nigerians in general must be the central objective. The point has been well made elsewhere<sup>105</sup> that:

*Strikes are merely symptoms of more fundamental adjustments, injustices and economic disturbances; treating symptoms rarely reaches the roots of the disease. Suppressing strikes will not cure social unrest, but will probably increase it.*

### III. OBSERVATIONS

It is clear from the foregoing examination of the historical development of check-off system in Nigeria that the decision of the FGn to enact the TUA 2005 was neither prompted by the desire to adhere to the provisions of ILO conventions nor the provisions of the CFRN. Instead, the reason for the amendments was the desire by the civilian administration of Obasanjo to weaken the NLC and the trade unions in Nigeria due to their tough stance on the economic policies of the FGn.

There are many provisions in Nigeria labour statutes which constitute serious violations of ILO conventions and section 40 of the CFRN but were not deemed imperative by the Obasanjo's civilian administration to expunge. For example, the provision of section 11 of the TUA which prohibits persons employed in certain establishments including the Police and CBN from joining, forming or being members of a trade union offends the fundamental right to freedom of association guaranteed under Article 2 of ILO Convention 87 and section 40 of the CFRN.

### IV. RECOMMENDATIONS

The bane of most organisations is inadequate finance. Trade unions and federations of trade unions are no exceptions. The issue of inadequate finance of trade unions and federations of trade unions should be seriously and urgently addressed by the Nigerian government. The needs to secure financial stability for the trade unions, to equip the trade unions to provide welfare schemes for their members and to reduce the dependence of trade unions on external funding which informed the introduction of a check-off system by the LCCA 1960 cannot be dispensed with. They are still critical for the survival and growth of trade unions and federations of trade unions in Nigeria. It needs to be emphasised that the main source of funding of the NLC, TUC and the trade unions in Nigeria is check-off dues. Aside from financial contributions which members of trade unions and federations of trade unions are expected to make

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105 CW Doten, quoted in JP Cassey *The Injunction in labour disputes in fire* (1968) 18 *International and Comparative Law Quarterly* at 347, quoted in Chianu, *Ibid* 276.

toward running of these organisations, the physical contributions of the members of trade unions or federations of trade unions in terms of participation at meetings and other activities of the unions or federations like strikes and picketing are equally as significant as the financial contributions in the collective bargaining process. Consequently, it might be wise to recommend that Nigeria should stick to the arrangement under the TUA 1996.

**Conclusion**

This article has examined the historical development of the check - off system in Nigeria and has also identified shortcomings in the various labour statutes considered. It has equally made suggestions and recommendations, which if implemented would go a long way toward fast - tracking the growth of trade unionism in Nigeria as well as enabling Nigerian trade unions and federations of trade unions realise quickly the expected benefits of collective bargaining.

## ANALYZING JUDICIAL TREND ON MITIGATING CIRCUMSTANCES OF COMMUTAL OF DEATH SENTENCE INTO LIFE IMPRISONMENT

Bibha Tripathi\*

*The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence.*

*Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc....<sup>1</sup>*

**Abstract :** New millennium leads the principle that life-imprisonment is a rule and death sentence is an exception. While absolutely agreeing with the principle in principle, the paper attempts to critically analyze the grounds on which it is held that on the basis of mitigating circumstances the death sentence is commuted to the life imprisonment. The paper is written with two objectives. First, to advocate firmly about the statutory recognition of structurally indicated mitigating circumstances. Secondly, Section 53 of Indian Penal Code should be amended to provide, one more category of punishment - life imprisonment without commutation or remission.

After the infamous 'Nirbhaya' case, consequently constituted Justice J.S. Verma Committee leading towards Criminal Law Amendment Act, 2013, ensuring swift, severe and certain punishment in rape cases, courts are showing arbitrary and whimsical attitude while commuting the death sentence into life imprisonment. It has also been submitted in the article that apart from various mitigating circumstances courts are still governed with gendered notions of patriarchy and male hegemony. The verdict of Supreme Court in *Susheel Sharma v. The State of N.C.T of Delhi* smells hangover of male hegemony in which still a woman is treated as a commodity and property which cannot be taken away without the permission of the owner. The apex court should not pass sweeping

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<sup>1</sup> *State of Rajasthan v. Jamil Khan* MANU/SC/0989/2013, also available at 2013(12)SCALE 200

statements, while commuting death sentence into life imprisonment. Time has come to settle down the controversy and to defeat the obfuscation. The paper attempts to understand the various penological purposes of sentencing too.

**Key words :** Mitigating Circumstances, Commutal, Death of Sentence, Life Imprisonment.

## I. INTRODUCTION

New millennium leads the principle that life-imprisonment is a rule and death sentence is an exception, reiterating the dictum, honorable Supreme Court commutes the death sentence awarded to an accused into life imprisonment in number of cases,<sup>2</sup> along with the reasons on which the commutation should appear proper, intending thereby to advocate de-facto abolition of death sentence and strictly jacketing the 'rarest of rare' category. While absolutely agreeing with the principle in principle, the paper attempts to critically analyze the grounds on which it is held that on the basis of mitigating circumstances the death sentence is commuted to the life imprisonment. The paper is written with two objectives. First, to advocate firmly about the statutory recognition of structurally indicated mitigating circumstances. Secondly, to propose amendment under section 53 of Indian Penal Code to provide, one more category of punishment - life imprisonment without commutation or remission.<sup>3</sup>

After the infamous 'Nirbhaya' case, consequently constituted Justice J.S. Verma Committee leading towards Criminal Law Amendment Act, 2013, ensuring swift, severe and certain punishment in rape cases, courts are showing arbitrary and whimsical attitude while commuting the death sentence into life imprisonment. It has also been submitted in the article that apart from various mitigating circumstances courts are still governed with gendered notions of patriarchy and male hegemony. The verdict of Supreme Court in *Susheel Sharma v. The State of N.C.T of Delhi*<sup>4</sup> smells hangover of male hegemony in which still a woman is treated as a commodity and property which cannot be taken away without the permission of the owner. The apex court should not pass sweeping statements, while commuting death sentence into life imprisonment. Time has come to settle down the controversy and to defeat the obfuscation. The paper attempts to understand the various penological purposes of sentencing too.

The paper, deliberately leaves certain very important and complicated issues relating with death sentence viz; disposal of mercy petitions or delay in disposal of mercy petitions, other emerging capital offences etc. because, it is intended to focus on uniformity in and consistency of Judicial trend regarding basic penological purpose of sentencing.

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<sup>2</sup> *Infra*, Note 6.

<sup>3</sup> The Hindu, Friday, Nov. 29, 2013

<sup>4</sup> Justice V. S. Malimath in the Report on "Committee of Reforms of Criminal Justice System", submitted in 2003, had made such a suggestion but so far no serious steps have been taken in that regard. There could be a provision for imprisonment till death without remission or commutation.

## II. DEBATE ON DEATH SENTENCE

An intensive debate<sup>5</sup> on the issue of death sentence will ever remain ongoing till the punishment is prescribed in Criminal Law of the land ie; The Indian Penal Code, 1860(hereinafter referred as IPC)and other penal statutes. As Prof. Singh has rightly pointed out; “In a time frame continuum, different political communities have dealt with it differently and its have and have not depends on the socio economic conditions, state structure and political milieu of a particular society. A proper treatment to capital punishment depends also on the degree of scientific approach with human content of the societal reaction towards this diabolic penalty.”<sup>6</sup>

Though death sentence, in India, has been held Constitutionally valid in *Jagmohan v. State of U.P.*<sup>7</sup> The court observed that “... Deprivation of life is constitutionally permissible if that is done according to procedure established by law.”<sup>8</sup> The Constitutional validity of section 302,IPC,was considered by the Constitution Bench in *Bachan Singh v. State of Punjab*<sup>9</sup> where Sarkaria J. opined that, “To sum up,...It is sufficient to say that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue,...The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2) of the Criminal Procedure Code 1973, (hereinafter referred as Cr.PC) Article 19.”<sup>10</sup>

A very infamous case, popularly known as ‘*NainaSahani Tandoor Murder case*’ was finally disposed of by the three judges bench of honorable Supreme Court, consisting, chief justice of India P. Sathashivam, Ranjana Prakash Desai and Ranjan Gogoi. In the instant case the Susheel Sharma filed an appeal in the Supreme Court challenging the judgment given by Delhi High Court in which death sentence passed by the sessions court was confirmed. The appellant was the President of Delhi Youth Congress and NainaSahani was the General Secretary of the Delhi Youth Congress. The appellant and the deceased got married secretly. The deceased continued to live in the said flat as the wife of the appellant till she was murdered. After completion of investigation, the prosecution came to the conclusion that the deceased was killed by the appellant since he was suspecting that she was having some relationship with PW-12 MatloobKarim. The appellant despite of several requests by the deceased did not make her marriage public because it could have affected his political carrier, establishes

<sup>5</sup> MANU/SC/1024/2013 : 2013 (12) SCALE 622.

<sup>6</sup> See, *James V. Bennett*, “Of Prison and Justice”, Chapter 1, Penology a Realistic Approach, Edited by, Clyde B. Vedder & Barbara A. Kay, 4<sup>th</sup> edn, 1973, Charles C. Thomas, Publisher. USA, See also, The Law Commission of India 35<sup>th</sup> report on Death Penalty, See also, Dr. S. Murlidhar, “India’s Travails with the Death Penalty”, JILI, 1998, P.143 available at <http://www.ieirc.org/content/a9803.pdf>, visited on Feb.05,2013. “The State of Death Penalty in India”, Asian Center For Human Rights, New Delhi, 14<sup>th</sup> Feb.2013, available at, [www.achrweb.org](http://www.achrweb.org). visited on 21<sup>st</sup> feb,2013. See also “Terror and Horror of the Death Sentence”, V.R.Krishnaiyer, The Hindu, 16<sup>th</sup> feb,2013

<sup>7</sup> Mahendra.P.Singh, “*Capital Punishment : A Political Compromise*”, Vol., *Ban. L.J.* (1981), 92.

<sup>8</sup> (1973) 1 SCC 20

<sup>9</sup> *Ibid.*

<sup>10</sup> (1980) 2SCC 684.

that the appellant was more carrier oriented than the deceased as alleged by the apex court. Emphasis added. So far as her relationship with MatloobKarim was concerned, it is noticeable that the appellant, knowingly the fact, married with the deceased in anticipation that she will be a chaste wife, leaving all the other relations, personal or political. If, at all it is accepted that he was in deep love with the deceased than, without any proposed criminality, for the sake of argument, it is submitted that he would have not killed her, as *K.M.Nanavati*<sup>11</sup> did not killed Salvia, rather PremAhuja<sup>12</sup> because he was deeply in love with Salviya. Appellant's killing is not a sign of possessiveness rather deep rooted patriarchal mindset in which a wife is not supposed to have contact or extra marital affair with any one. After killing her, the appellant with the help of A-2- Keshav burnt her dead body in the tandoor of Bagia Bar-be-Que. The appellant was harboured to save him from punishment from the crime by three persons, namely, A-3-Jai Prakash.A-4-Rishi Raj and 5-Ram Prakash.

The appellant was suspecting her fidelity and had put restrictions on her movements. It is submitted here that paper never intends to advocate extra marital affair rather suggests that there are various other civil law mechanisms to deal with such situations. Aggravating and Mitigating Circulstances<sup>13</sup>, referring to the recent decisions (of about fifteen years), Supreme Court has summarized the mitigating factors and aggravating factors. Young age of the accused, the possibility of reforming and rehabilitating the accused, the accused having no prior criminal record, the accused not likely to be a menace or threat or danger to society or the community, the accused having been acquitted by one of the courts, the crime not being premeditated, the case being of circumstantial evidence, etc., are some of the mitigating factors indicated therein. The cruel, diabolic, inhuman, depraved and gruesome nature of the crime, the crime result in public abhorrence, shocks the judicial conscience or the conscience of society or the community, the reform or rehabilitation of the convict is not likely or that he would be a menace to society, the crime was either unprovoked or that it was premeditated, etc., are some of the aggravating factors indicated in the said decision.

Since sentencing in murder cases mainly governed by the judgment of the Constitution Bench in *Bachan Singh, etc.v. State of Punjab, etc.*<sup>14</sup> where the Constitution Bench has given the principle of 'rarest of rare' for death sentence and in *Machhi Singh and Ors. V. State of Punjab*<sup>15</sup> a three judge bench of the apex court has made an attempt to cull out certain aggravating and mitigating circumstances and observed that relative weight must be given to them. It is submitted in this paper that while analyzing the mitigating circumstances the court must follow the grounds mentioned in the above mentioned case. There are number of cases in which court has commuted the death sentence into life imprisonment, and in other cases, imposed death sentence, even then the facts remained almost similar. Therefore, it is submitted that, the Judges should not forward circumstances on their whims. The *Ratio Decidendi* forwarded in the case of

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<sup>11</sup> 1962AIR 605.

<sup>12</sup> Though it could have heardly affected the conviction and sentencing.

<sup>13</sup> *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546.

<sup>14</sup> (1980) 2 SCC 684.

<sup>15</sup> (1983)3SCC470.

Susheel Sharma is questioned through the paper. The paper seeks to defeat the obfuscation by advocating, structural indication and clear definition of mitigating and aggravating circumstances towards which the courts<sup>16</sup> shall be duty bound to consider them before awarding the death penalty as advocated by Justice A.K. Ganguli<sup>17</sup> after his retirement in an interview with Frontline.

It is submitted here that, aggravating circumstances are separately mentioned and mitigating circumstances, separately, meaning thereby, while commuting the death sentence into life imprisonment court must take cognizance of mitigating circumstances only.

In *Susheel Sharma v. The State of N.C.T of Delhi*<sup>18</sup> the learned solicitor general, submitted that the appellant deserved no sympathy. The crime committed by the appellant is horrendous and warrants death penalty. Counsel submitted that the deceased was a hapless lady; qua her, the appellant was in dominating position; he always ill treated her and refused to acknowledge her as his wife though she was residing with him;...he tried to destroy the evidence in a most barbaric manner. Thus there were no mitigating circumstances.

Whereas, commutation was argued on the grounds of circumstantial evidence, criminal history of the accused, probability of becoming ardent criminal or menace to society and probability of reformation and rehabilitation along with liberal and expansive construction by the court. It was submitted by the counsel of appellant that there is long lapse of time since the imposition of capital sentence and consideration of sentence by the court<sup>19</sup>. The court had every opportunity to commute the death sentence on other mitigating circumstances, but in spite of relying only upon gender neutral reasons the court relied on grounds as under;

“The deceased was a qualified pilot and she was also the General Secretary of Youth Congress (Girls Wing), Delhi. She was an independent lady, who was capable of taking her own decisions. From the evidence on record, it cannot be said that she was not in touch with people residing outside the four walls of her house....she was not a poor illiterate helpless woman....it would be difficult to come to the conclusion that the appellant was in a dominant position qua her. The appellant was deeply in love with her and knowing full well that the deceased was very close to PW-12 Matloob Karim, he married her hoping that the deceased would settle down with him and lead a happy life. The evidence on record shows that the appellant suspected her fidelity and the murder was the result of his possessiveness.”<sup>20</sup> Not only this but the court pertinently noted a fact against the deceased that no member of the family of the deceased came forward to depose against the appellant. The poorness and helplessness is clearly established with the fact that she was such an unfortunate lady whose parents even left her to her fate.

<sup>16</sup> Trial Court, High Court and Supreme Court. As to experience on the basis of case laws shows that it is the apex court which examines the mitigating circumstances in more liberal manner than High Courts and Trial Courts.

<sup>17</sup> J.A.K. Ganguli, “*Criminal Justice System needs Overhaul.*” Cover Story, Frontline, Sept, 7, 2012

<sup>18</sup> Supra note, 7

<sup>19</sup> The appellant has already undergone more than 18 years imprisonment in the jail.

<sup>20</sup> Supra note, 7

The court further opined that murder was the outcome of strained personal relationship. It was not an offence against the Society. The appellant has no criminal antecedents. He is not a confirmed criminal and no evidence is led by the State to indicate that he is likely to revert to such crimes in future. It is, therefore, not possible in the facts of the case to say that there is no chance of the appellant being reformed and rehabilitated. The court did not think that the option is closed. While admitting the fact that though it may not be strictly relevant, the court mentioned that the appellant is the only son of his parents, who are old and infirm. As of today, the appellant has spent more than 10 years in death cell. Undoubtedly, the offence is brutal but the brutality alone would not justify death sentence in this case. The above mitigating circumstances persuade them to commute the death sentence to life imprisonment. It is submitted here, that for committal, only one mitigating condition is sufficient, thus the court could have restricted itself on gender neutral mitigating circumstances.

It is also submitted that in spite of such expectations, strangely agreed by the apex court too, it would have been a better condition if the appellant had not been married with the deceased, because the reason which has already been known to the appellant, can never be a ground of murder. Actually, the appellant has neither let her free by not marrying her nor giving social recognition to their marriage, ending the story with murder of the deceased, made a typical case of patriarchal notion and male hegemony. Against this backdrop, the committal seems highly objectionable on the basis of reasons relied by the court.

Whereas, in *State of Rajasthan v. Kheraj Ram*<sup>21</sup>, suspecting infidelity on the part of his wife, the accused-Kheraj Ram killed her, his two children and brother-in-law. The trial court convicted him under Section 302 of the IPC and sentenced him to death. The High Court noted that the case rested on circumstantial evidence. The circumstances were not proved and, therefore, the accused was entitled to acquittal. On appeal, this Court held that the prosecution had established its case; that the murder was committed in a cruel and diabolic manner; the accused did not act on any spur-of-the-moment provocation; the murder was deliberately planned and meticulously executed and after the incident, the accused smoked *chilam* with calmness, which indicated that he had no remorse and he was satisfied with what he had done. This Court observed that the victims were two innocent children and a helpless woman. They were done to death in an extremely gruesome and grotesque manner. In such circumstances, the Court set aside the order of acquittal and confirmed the death sentence awarded by the trial court. Despite of following the above mentioned judgment the court had taken a different stand in Naina Sahni case.

### III. CASES OF RAPE AND INCONSISTENT APPROACH OF JUDICIARY

While dealing with cases of wife's infidelity or rape along with murder, the unsettled position has shown that the Supreme Court has opted a pick and choose method widely affected by concerned bench and judge particular. The cases of rape with murder, through which the unsettled position can be discerned, are;

*Dhananjay Chatterjee alias Dhana v. State of West Bengal*<sup>22</sup>, though no one has forgotten, but it is reminded through the paper that in the instant case the appellant had raped and murdered a young 18 year-old girl in her flat in a society where he was working as a security guard. The trial court found him guilty, inter alia, under Sections

<sup>21</sup> (2003)2SCC224.

<sup>22</sup> (1994)2SCC220.

302 and 376 of the IPC. The High Court confirmed the sentence of death. This Court also confirmed the death sentence by observing that the case falls in the category of rarest of rare cases. This Court observed as “The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear. 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. The savage nature of the crime has shocked our judicial conscience. There are no extenuating or mitigating circumstances whatsoever in the case. 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 defenceless young girl of 18 years, by the security guard certainly makes this case a “rarest of the rare” cases which calls for no punishment other than the capital punishment and we accordingly confirm the sentence of death imposed upon the appellant for the offence under Section 302 IPC”.

In *Molai & Anr v. Kheraj Ram*<sup>23</sup>, a 16 year-old girl was preparing for her class 10th examination at her house. Both the accused took advantage of her being alone in the house and committed rape on her. Thereafter, they strangled her by using her undergarment and took her to the septic tank along with the cycle and caused injuries with a sharp-edged weapon. Then, they threw the dead body into a septic tank. The trial court awarded death sentence to the accused which was confirmed by the High Court. The Supreme Court confirmed the death sentence observing that there was no mitigating circumstance, which could justify the reduction of sentence of death penalty to life imprisonment.

In the light of above mentioned cases, some cases are discussed in the paper to highlight the inconsistency of judicial trend with the help of some recent cases. In *Mohd. Chaman v. State (NCT of Delhi)*<sup>24</sup>, the appellant had raped a 1½ year old girl. In the process of committing rape, injuries were inflicted on liver which resulted in death of the child. The trial court sentenced him to death. The High Court confirmed the death penalty. This Court observed that the crime was undoubtedly serious and heinous and the conduct of the appellant was reprehensible. It revealed a dirty and perverted mind of a human being who has no control over his carnal desires. However, after treating the case on the touchstone of the guidelines laid down in *Bachan Singh*<sup>25</sup> and *Machhi Singh*<sup>26</sup>, this Court was of the view that the appellant was not such a dangerous person that to spare his life will endanger the community. It was further observed that the circumstances of the crime were not such that there was no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. It was observed that the case is one in which a humanist approach should be taken while awarding punishment. The capital punishment imposed against the appellant was set aside and the appellant was sentenced to life imprisonment.

Further, in *Sebastian alias Chevithayan v. State of Kerala*<sup>27</sup>, the appellant had trespassed into the complainant's house and kidnapped his two year-old daughter. He

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<sup>23</sup> (1999)9SCC581

<sup>24</sup> (2001)2SCC 28

<sup>25</sup> Supra note 7

<sup>26</sup> Supra note 17

<sup>27</sup> (2010)1 SCC58

then raped and killed her. The trial court sentenced him to death. The death sentence was confirmed by the High Court. This Court considered the fact that the appellant was a young man of 24 years of age at the time of incident and that the case rested on circumstantial evidence, and substituted the death sentence by life sentence. It was, however, directed that the appellant shall not be released from prison for the rest of his life.

Further, In *Amit V. State of Uttar Pradesh*<sup>28</sup>, the complainant lodged FIR alleging that while his mother and wife were present in the house, the appellant came there, took away his 3 year-old daughter on the pretext that he would give her biscuits. However, neither the appellant nor the complainant's daughter returned. Investigation disclosed that the appellant had kidnapped the girl. She was subjected to unnatural offence and rape. She was hit on the head and was strangled. The trial court convicted the appellant, inter alia, under Section 302 of the IPC and sentenced him to death. The High Court confirmed the death sentence. On appeal, this Court set aside the death sentence. This Court observed that the appellant was a young person aged about 28 years. There was no evidence to show that he had committed such offences earlier. There was nothing on record to show that he was likely to repeat similar crimes in future. This Court expressed that given a chance, the appellant may reform over a period of years. This Court sentenced the appellant to life imprisonment and observed that life imprisonment shall extend to the full life of the appellant, but subject to any remission or commutation at the instance of the Government for good and substantial reasons.

In a very gruesome case of *Mohinder Singh v. State of Punjab*<sup>29</sup>, where the appellant, who was serving 12 years' rigorous imprisonment for having raped his own daughter was released on parole. While on parole, he murdered his wife and the daughter, whom he had raped earlier, by giving repeated axe-blows on their heads. His other daughter saved herself by hiding in a room and bolting the same from inside. The trial court convicted him under Section 302 of the IPC and sentenced him to death. The High Court confirmed the death sentence. This Court observed that the appellant was a poor man and was unable to earn his livelihood since he was driven out of his house by the deceased-wife. It was his grievance that the deceased-wife was adamant that he should live outside and that was the reason why the relations were strained. The appellant was feeling frustrated because of the attitude of his wife and children. This Court also took into consideration the fact that the appellant did not harm his other daughter who was there even though he had a good chance to harm her. This Court observed that after balancing the aggravating and mitigating circumstances emerging from the evidence on record, it was not persuaded to accept that the case can appropriately be called the rarest of rare case warranting death penalty. This Court also expressed that it was difficult to hold that the appellant was such a dangerous person that he will endanger the community if his life is spared. The possibility of reformation of the appellant could not be ruled out. In the circumstances, this Court converted the death sentence into life imprisonment.

In *State of Rajasthan v. Jamil Khan*<sup>30</sup>, Pooja, a tiny girl below five years of age was brutally raped and thereafter murdered by the Respondent. He packed the dead

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<sup>28</sup> (2012)4SCC107.

<sup>29</sup> (2013)3SCC294.

<sup>30</sup> supra note 1.

body in a sack and further in a bag and secretly left it in a train. By judgment dated 15.04.2004, the Sessions Court, having regard to the overwhelming evidence, convicted the Respondent under Section 302 of the I PC and sentenced him to death. He was also found guilty under Section 376 of Indian Penal Code and was sentenced to imprisonment for life with a fine of Rs. 2,000/-. Under Section 201 of Indian Penal Code, he was convicted and sentenced to rigorous imprisonment for three years and a fine of Rs. 500/-. The Sessions Court mainly relied on the decision of this Court in *Kamta Tiwari v. State of Madhya Pradesh*<sup>31</sup>. In that case, a seven year old child was raped, murdered and the body was thrown into a well. This Court awarded death sentence. In the instant case, the Death Reference was considered by the High Court of Rajasthan along with the Appeal leading to the impugned judgment dated 09.11.2004.

The case law on sentencing has been extensively referred to by the High Court. But without reference to the aggravating or mitigating circumstances or to the special reasons, the High Court held that the case does not fall in the category of rarest of rare cases warranting death sentence. Thus, the High Court declined to confirm the death sentence and awarded life imprisonment under Section 302 of Indian Penal Code. The conviction and sentence under Sections 376 and 201 of Indian Penal Code was maintained.

The State came in appeal contending that it is a fit case where punishment of death should be awarded to the Respondent. The Supreme Court opined that a balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In order to apply the guidelines mentioned *Bachan Singh*<sup>32</sup> and *Machi Singh*<sup>35</sup> the court considered following questions to be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime, such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

While quoting *Mahesh s/o. Ram Narain and Ors. v. State of Madhya Pradesh*<sup>33</sup> the court mentioned:

"...it will be a mockery of justice to permit these Appellants to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the Appellants would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformatory jargon...."

In the present case, the Respondent has been awarded life imprisonment under Section 302 of Indian Penal Code. Under Section 376 of Indian Penal Code also he has been awarded life imprisonment. The third substantive sentence is under Section 201 of Indian Penal Code. All these sentences are ordered to run concurrently. The sentence of life imprisonment is till the end of one's biological life. However, in view of the power of the State under Sections 432 and 433 of Code of Criminal Procedure, in the

<sup>31</sup> (1996) 6 SCC 250.

<sup>32</sup> supra note.

<sup>33</sup> supra note 18.

present case, Court was of the view that the sentences shall run consecutively, in case there is remission or commutation, it shall be granted only after the mandatory period of fourteen years in the case of offence under Section 302 of Indian Penal Code.

Section 433A of the Code of Criminal Procedure has imposed a restriction with regard to the period of remission or commutation. It is specifically provided that when a sentence of imprisonment of life, where death is also one of the punishments provided by law, is remitted or commuted, such person shall not be released unless he has served at least fourteen years of imprisonment. In the case of the Respondent herein, second life imprisonment is under Section 376 of Indian Penal Code.<sup>34</sup> A minimum sentence under Section 376 of Indian Penal Code is seven years. Death is not an alternate punishment. However, the sentence may even be for life or for a term which may extend to ten years. of the three options thus available, in view of the brutal rape of a minor girl child, the Sessions Court has chosen to impose the extreme punishment of life imprisonment to the Respondent.

Punishment has a penological purpose. Reformation, retribution, prevention, deterrence are some of the major factors in that regard. Parliament is the collective conscience of the people. If it has mandated a minimum sentence for certain offences, the Government being its delegate, cannot interfere with the same in exercise of their power for remission or commutation. Neither Section 432 nor Section 433 of Code of Criminal Procedure hence contains a non-obstante provision. Therefore, the minimum sentence provided for any offence cannot be and shall not be remitted or commuted by the Government in exercise of their power under Section 432 or 433 of the Code of Criminal Procedure. Wherever the Indian Penal Code or such penal statutes have provided for a minimum sentence for any offence, to that extent, the power of remission or commutation has to be read as restricted; otherwise the whole purpose of punishment will be defeated and it will be a mockery on sentencing.

Having regard to the facts and circumstances of the present case, the court made it clear that in the event of State invoking its powers under Section 432 or 433 of Code of Criminal Procedure, the sentence under Section 376 of Indian Penal Code shall not be remitted or commuted before seven years of imprisonment. In other words, in that eventuality, it shall be ensured that the Respondent will first serve the term of life imprisonment under Section 302 of Indian Penal Code. In case there is any remission after fourteen years, then imprisonment for a minimum period of seven years under Section 376 of Indian Penal Code shall follow and thereafter three years of rigorous imprisonment under Section 201 of Indian Penal Code. The sentence on fine and default as awarded by the Sessions Court are maintained as such.

*Prem Kaur v. State of Punjab and others*<sup>35</sup> is a case in which most important twist could be seen regarding the approach of lower judiciary on an issue of vital importance. The appellant, a married woman was brutally raped by her father and two brothers. The trial court acquitted all the accused giving reasons that it is not possible that father and son will commit the rape at the same time. When the matter came up before the High Court, the High Court also did not show any sensitivity, and did not consider the gravity of the charges leveled against the accused persons. While dealing with the case in appeal, the Supreme Court, observed the findings by the courts below

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<sup>34</sup> (1987) 3 SCC 80.

<sup>35</sup> AIR 2013 SC 2083.

as perverse.<sup>36</sup> Therefore, the court opined that the view taken by the courts below is manifestly unreasonable and has resulted in miscarriage of justice. The courts ought not to have given the defective and cryptic judgment... Whether the allegation is correct or not, has to be examined on the basis of the evidence on record..." The case was remanded to the trial court to decide afresh on the basis of the evidence/material on record.

#### IV. JURISPRUDENTIAL DIMENSION OF SENTENCING

The whole development of penology, leads towards justification of punishment.

Therefore, the last part of the paper deals with some cases and references dealing with jurisprudential dimension of sentencing. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.<sup>37</sup>

In *Shailesh Jasvantbhai and another v. State of Gujarat and others*<sup>38</sup>, the Court has observed thus:

"Friedman in his Law in Changing Society stated that: "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration".

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<sup>36</sup> See, *H.B. Gandhi & Ors. V. Gopi Nath & Sons*, 1992 Supp (2) SCC 312, *Triveni Rubber & Plastics v. Collector of Central Excise, Cochin*, AIR 1994 SC 1341 See also, *State of Punjab v. Jagir Singh Baljit Singh & Karam Singh*, AIR 1973 SC 2407 the court observed that "A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy...".

<sup>37</sup> *Shyam Narain v. NCT Delhi*, AIR 2013 SC 2209, J. Dipak Mishra

<sup>38</sup> (2006) 2 SCC 359.

In *State of M.P. v. Babulal*<sup>39</sup> it was observed that : -

Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it is the duty of the court to impose on him such sentence as is prescribed by law. The award of sentence is consequential on and incidental to conviction. The law does not envisage a person being convicted for an offence without a sentence being imposed therefore.

The object of punishment has been succinctly stated in Halsbury's Laws of England, (4th Edition: Vol.II: para 482) thus:

“The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided”.

(emphasis supplied)”

In *Gopal Singh v. State of Uttarakhand*<sup>40</sup>, while dealing with the philosophy of just punishment which is the collective cry of the society, a two-Judge Bench has stated that just punishment would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors.

## V. CONCLUDING OBSERVATIONS

On the basis of cases referred in the paper, it appears that, there is an immediate need of legislative intervention through proper amendment in law dealing with death sentence, because the death penalty is unconstitutional if randomly imposed on a handful of people.<sup>41</sup> Some important questions raised through the paper are as under

<sup>39</sup> AIR 2008 SC 582

<sup>40</sup> 2013 (2) SCALE 533

<sup>41</sup> Death sentence haphazardously meted out, says Connecticut study. The Hindu, Jan 9, 2012. The Connecticut study, conducted by John Donohue, provides powerful evidence that death sentence are haphazardly meted out, with virtually no connection to the heinousness of the crime.

- 1) Why wife's infidelity leads towards her murder?
- 2) Why rape by father and brother is seen as impossible?
- 3) Why a security guard is hanged and a father does not receive the same sentence, who has been considered as a security guard of his daughter since time immemorial?
- 4) The economic dimension of death sentence vis- a vis life imprisonment.
- 5) Whether time has come to think over on daily wages of prisoners.

In the end it is submitted that crime free society is an utopian concept. Sociologists, like Emile Durkhiem have very bluntly and boldly made it amply clear. Thus, we are confronted by the dilemma of penology, viz; which of the punishment will serve the ends of justice? Towards this end it is observed through the paper that right from Death Sentence to mild and lenient sentence, depending upon the fact and circumstances of the case in general and Judges' Bench particular shall be awarded discriminately, unless a fixed and certain mechanism is evolved. Apart from legislative mechanism, a sensitized court is also demanded right from the level of Trial Court to High Court. Judge must be free from personal biases and pre-occupied mindset. Then only we can proceed towards the ends of justice in a just maner.

## OWNERSHIP AND MORAL RIGHTS ISSUES IN OPEN SOURCE SOFTWARE

Rajnish Kumar Singh\*

**Abstract:** It is believed that the growth of open source software is opposed to proprietary software as it allows its users to have access to its source code and do the modification if it is desired for enhancing the performance. The above object seems to face problems in the context of copyright law. It is in this context that the present paper makes an attempt to discuss the role of copyright law in open source software with the help of two issues viz. ownership of software and moral rights. The paper also briefly identifies the deficiencies in the existing protection for proprietary software which provides justification for open source movement.

**Keywords:** Open Source software, OSS, GPL, Copyright, Copyleft, Ownership, and Moral Right.

### I. INTRODUCTION

A computer program is a set of instructions, which the computer executes to achieve the result desired by the programmer. Although a program is stored within a computer as a long string of ones and zeros, the so-called binary code, the program itself is written in easily understood high level languages, which are later translated into the object code that will operate the computer. Software written in this format is known as source code.<sup>1</sup> Thus, Software possesses two natures, the "literary" one, the source code written by the programmer using one or more programming languages that can, albeit with some difficulties, be associated with the "traditional" written text, and the "technological" one, which provides functionality and industrial application.<sup>2</sup>

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1 Tumbraegel K and de Villiers R, Copyright Protection for the Non Literal Elements of a Computer Program (2004) *Computer and Telecommunications Law Review* at 34.

2 Guarda P, Looking for a Feasible Form of Software Protection: Copyright or Patent, is that the Question?(2013) *European Intellectual Property Review* at 445.

The laws relating to protection of proprietary computer programs include copyright and patent. Patenting computer programmes is a practice which has its own deficiencies. This is reflected in the terminology that is being used in relation to patenting of computer programme viz. computer related/based/implemented/implementable inventions. These expressions make it clear that software is not patentable "as such". For the purpose of copyright law, a computer program consists of both literal and non-literal elements. The literal elements are the program's source and object code, whereas the non-literal elements may be described as those features of a computer program which a user perceives and enables him to execute the program with ease and comfort. It is important to note that preventing access to the source code of software is the main concern of both the mechanisms of patent and copyright protection i.e. in traditional proprietary software, the source code is closely guarded by its owner, and access is only given to a licensee in specific and narrowly-defined circumstances, usually for maintenance purposes. In contrast to the above, the non-proprietary software or Open Source software, or OSS, is software in which the source code is made publicly available on certain licence terms.<sup>3</sup> It is in this context that the present paper makes an attempt to examine the difficulties associated with the application of the law of copyright to open source software. The phenomenon of open-source software, and especially the exponential growth of its most successful project, the Linux operating system, has spawned one of the most hotly debated topics in technical and legal communities.<sup>4</sup> It is important to note that open source licensing and development approaches have been challenging and transforming software development and related protection regime for decades. These are built on solid, traditional legal foundations; including the rights granted by copyright. The paper examines the copyright protection to computer programs and identifies the deficiencies in the system and the justification for OSS. The paper brings to fore the discussion on important issues of ownership of copyright and moral rights in the context of OSS.

## II. COPYRIGHT PROTECTION FOR COMPUTER PROGRAMME

Copyright is a creature of statute. In essence it is a negative right to do certain acts and control or prevent others from copying or adapting the copyright work. Computer programs (software) are only recently recognised in legislation as being amenable to copyright protection. Indian law provided for the scheme of protection for computer programmes by way of amendment done in 1994. The intellectual property rights (IPR) protection that is available is argued by some to be insufficient, consisting of a "patchwork of traditional copyright, and patent" law. Owners are arguing for the adoption of new and wider intellectual

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3 Scrimshaw W and Harris M, Open Source Software - An Overview of the Main Legal and Commercial Implications of its Use (2005) *Computer and Telecommunications Law Review* at 222.

4 Hass D A, Uneasy de'tente : Strengthening the Market's Adaptation of the GNU General Public License in Common Law Jurisdictions, (2007) 2 (6) *Journal of Intellectual Property Law & Practice* at 382.

property rights. The prevalence of copying, exchanging, distribution and reverse-engineering has also motivated software manufacturers to seek to strengthen proprietary protection. The informality, quality and immediacy of copying on the internet serve to emphasise these concerns.<sup>5</sup>

The principle of copyright is directed at all expressions and manifestations of computer programs as individual and physical objects, in whatever form their existence is made manifest. In practice, because these are what describe the program's features, it is the program listing or source code and the actual ready-to-run program, the machine code, that constitute the object of the protection given by copyright. Section 2(ffa) of the Copyright Act, 1957 provides that a computer programme means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result. The threshold of labour required to create an original literary work is very low which means that even run-of-the-mill computer programs enjoy copyright protection. Copyright does not require the computer program to be unique or even particularly individual. Furthermore, copyright exists from the very moment the program has been created, as copyright protection is not subject to any formalities including registration. It follows that virtually every computer program is copyright, whether or not the creator wishes this to be the case. The law entails a ban on all translations, editing or modification, reproductions and reverse engineering of a computer programme. Computer programmes are usually written, sold and distributed in binary code, a machine language incomprehensible to the common man. The source code which is the key to the programme and makes it intelligible and checkable outside its own data-processing unit by professionals is, in almost every case, kept secret. The idea is to prevent competitors and users alike from learning how the program has been put together; and the reasons they must be prevented are several. Copyright alone is not an adequate protection against imitation; there is always the risk that the program writers themselves could be accused of using other people's work; also, the program creator wishes to be in exclusive charge of further development and improvements to the program. The source codes, especially of successful market leaders, are therefore kept as industrial secrets.<sup>6</sup>

A copyright is not valid if it lacks originality. Although the originality concept defies exact definition, courts generally agree that originality for copyright is something less than the novelty or uniqueness necessary for patent protection. One of the strongest defences which can be raised in a copyright infringement case is the idea/expression dichotomy. It is always difficult to separate idea from expression. In this regard, the "levels of abstraction test", developed by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*,<sup>7</sup> is the most useful tool. According to this test, the movement from the expression of

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5 Lambert PB, Copyleft, Copyright and Software IPRs : Is Contract Still King? (2001) *European Intellectual Property Review* pp.165-166.

6 Weyand J and Haase H, Patenting Computer Programs : New Challenges (2005) *International Review of Intellectual Property and Competition Law* at 652.

7 45 F.2d 119 (2d Cir. 1930).

the idea, wherein copyright may vest, to the idea itself is expressed in terms of levels of abstraction, expression being less abstract and the idea being more abstract. Moving from the expression to the idea, one reaches a point where the copyright can no longer vest. Computer Programmes contain many levels of abstraction, namely the code, the structure of the computer program, and the input and output formula. Therefore, it may be difficult to reduce the programme to its highest level of abstraction. Another closely related doctrine is that of merger. It maintains that the copyright holder should not be able to obtain protection for a work which can only be expressed in extremely limited ways, so that the idea and its expression have merged. The doctrine of *scenes a faire* is another supplementary doctrine. It denies protection to any expression that is either indispensable or standard to the idea being expressed. The copyright protection is limited to the expression that is necessary to express a given idea.<sup>8</sup> The recent decision of American court in the case of *Oracle America Inc v. Google Inc*<sup>9</sup> substantiates the point. The main questions in the case revolve around Google's use of APIs - application programming interfaces - or a set of tools through which developers utilise the Java software language, and whether they can be copyrighted like software code. The court ruled that the Java APIs were unprotectable methods<sup>10</sup>:

"[A]nyone is free under the Copyright Act to write his or her own code to carry out exactly the same function or specification of any methods used in the Java API. It does not matter that the declaration or method header lines are identical. Under the rules of Java, they must be identical to declare a method specifying the same functionality-even when the implementation is different."

In *Computer Associates International v. Altai Inc*,<sup>11</sup> the court recommended the utilisation of a three-stage test-the abstraction-filtration-comparison test ("the AFC test"), in order to identify the elements of a work which were entitled to protection, as well as to determine whether infringement had occurred. In ascertaining substantial similarity under this approach, the work must be first dissected into its structural components. Those components must then be filtered in order to separate ideas from the copyrightable expression. Finally, the core of protectable expression found must be compared with the material within the structure of the allegedly infringing program to determine whether the programs at issue are substantially similar. The court remarked that certain elements are uncopyrightable if they are "dictated" by "certain" factors including public domain software, program efficiency, computer specifications, compatibility with other programs, and customer and industry demands. The *Altai* test is gaining wide acceptance, and the used approach has been universally adopted by the courts since 1992. *Altai's* test recognised that ideas could exist at multiple levels of a computer program and not solely at the most abstract level. It also emphasised

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8 Tumbraegel K and de Villiers R, *Supra* note 1, pp. 35-36.

9 Unreported May 7, 2012 (D (US)) cited from Nayak M., McCormick GE, Orr B. and Orlofsky S, United States: Intellectual Property - Copyright Infringement - *Oracle America Inc v. Google Inc*, *Computer and Telecommunications Law Review* (2012)18 (7) N182-N183.

10 Samuelson P, *Oracle v. Google : Are APIs Copyrightable?*, Available at: <http://ssrn.com/abstract=2171447>.

11 982 F. 2d 693 (1992).

that the ultimate comparison is not between the programs as a whole but must focus solely on whether protectable elements of the program were copied.<sup>12</sup> *Altai* test takes the scope of protection for computer programme beyond the literal part and paves way for protection of non-literal part also. On this issue the American courts<sup>13</sup> have taken the view that structure, sequence and organization (SSO) are the non-literal elements of a computer programme but are protected and can be the subject matter of infringement. In the traditional copyright law it is believed that minor variations in a work cannot create a new work.

Under Indian law, copyright in computer programs has been expressly recognized in the Copyright Act, 1957, under the category of literary works, but so far it has not been a subject matter of litigation in Indian courts. The Indian law on infringement of copyright as contained in the decision of *R.G. Anand v. Delux Films*<sup>14</sup> suggests that the court seems to approve the "look and feel" approach to decide cases of infringement. The court also seems to employ Abstraction test from *Nichols*, which is evident from the fact that the judge identified various levels of generality in the script of the play. However, there does not seem to have been any Indian case where the Abstraction test has been expressly followed or applied. This certainly casts doubt on whether the AFC test of *Altai* has a firm footing as far as Indian law is concerned.<sup>15</sup> In the same context a reference of *Anil Gupta v. Kunal Das Gupta*<sup>16</sup> is not out of context. The case involved copying of the script of a television show. The case indicates that in future Indian courts may move towards clearer pronouncement on the aspect of protection of non-literals of a literary work.

Despite the expanding scope of protection discussed above, there are two important observations about computer programs which need special mention, firstly, the proprietor tends to keep the source code secret so as to maintain the monopoly, and secondly, except probably the case of use of a computer program for testing its inter-operability<sup>17</sup>, the law generally prohibits reverse engineering. The exception of inter-operability is evident from the second step of *Altai* test which filters those facets that are dictated by external constraints, such as

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12 Tumbraegel K and de Villiers R, *Supra* note 1, at 37

13 *Computer Associates v. Altai*, 982 F. 2d 693; *Whelan Associates v. Jaslow Dental Laboratories*, 797 F. 2d 1222; *Lotus Development Corporation v. Paperback Software*, 740 F. Supp 37.

14 *MANU/SC/0256/1978*.

15 Krishnan A, Testing for Copyright Protection and Infringement in Non-Literal Elements of Computer Programs, *Journal of Intellectual Property Rights* (2005)10 pp.15-16.

16 AIR 2002 Del 279.

17 The function of a computer program is to communicate and work together with other components of a computer system and with users. For this to happen a particular piece of software must interoperate with other pieces of software. One way of achieving this is to "read" the interface of the software; however, the software user cannot see the rules and codes of the software in the same way that the reader of a book can see the text of the book. To gain this information he needs to take steps which would otherwise be reserved to the rightholder. Most of the national legislations identify an exemption to enable this to happen. The exceptions include the right to make a back-up copy and "to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program (reference may be made to Section 52 (1) (ab), Copyright Act, 1957 of India). This latter exception is known as "black box" analysis and is not limited to interoperability. When black box analysis is insufficient to achieve interoperability, reverse engineering is permitted if, in order to achieve interoperability of

compatibility with other programs, as not copyright protected. It is argued that this general ban on reverse engineering of the source code into a programming language intelligible to ordinary people is the biggest barrier on the road to higher software quality and greater security. It is important to note that the programmer/owner has the exclusive control over the source code thus if any error is identified by any user the same will have to be communicated to the owner and any correction etc. is completely left to the desire and wisdom of the owner.

Openness of software shall ensure effectiveness of quality and security checks. Unless the source is made open it becomes difficult to decide the issue of blame in case of damage if any caused by the software. The foregoing suggests that selling software in binary form and using copyright to prevent recompilation is hindering the growth of software quality and utility. Given that computers are increasingly linked in networks and the solutions sought to problems are increasingly software solutions, the risks inherent in faulty programs are escalating, they have the potential to cause damage on a scale hitherto unknown.<sup>18</sup> Sensitive areas such as space travel, cryptography, or health services may be affected because of ignorance of how exactly a program functions or operates. It is not out of context to mention that Patent law also admits exemptions in relation to protection of software in cases of private use and research,<sup>19</sup> thus allowing reverse engineering, whereas the same is prohibited in copyright. At the same time the exemption under copyright in cases of testing inter-operability comes in conflict with the patent law as reverse engineering for the purpose of inter-operability may be done by business organizations which go beyond the research exemption. The conflict seems apparent. The solution is proposed in the form of open source software.

### III. OPEN SOURCE AND RELATED COPYRIGHT ISSUES

When software was first developed, it was financed partly by public funds and most source code was shared among computer programmers as a community resource.<sup>20</sup> Software for which the source code is available for use,

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an independently created computer program with other programs, it is necessary to reproduce the code and translate its form. This converts the machine readable object code, which is the version normally supplied to the public, back into a higher level language, resembling the original source code which can be read by humans. See, Weston S, Software Interfaces - Stuck in the Middle : The Relationship Between the Law and Software Interfaces in Regulating and Encouraging Interoperability (2012) *International Review of Intellectual Property and Competition Law* at 427.

18 Weyand J and Haase H, *Supra* note 6 at 653.

19 Section 47, the Patent Act, 1970, Grant of patents to be subject to certain conditions: The grant of a patent under this Act shall be subject to the condition that -

(3) any machine, apparatus or other article in respect of which the patent is granted or any article made by the use of the process in respect of which the patent is granted, may be made or used, and any process in respect of which the patent is granted may be used, by any person, for the purpose merely of experiment or research including the imparting of instructions to pupils...

20 O'Sullivan M, The pluralistic, evolutionary, quasi legal role of the GNU General Public Licence in free/libre/open source software (FLOSS), *European Intellectual Property Review*, (2004) at 340.

copying, modification, distribution and re-use is referred as "free software". The ambiguity of this term led in 1998, to the adoption of a new term for free software by some software developers called "open source". Stallman explains that the "central idea of copyleft<sup>21</sup> is that we give everyone permission to run the programs, copy the program, modify the program, to distribute modified versions ... but not permission to add certain restrictions of their own. Thus, the crucial freedoms that define 'free software' are guaranteed to everyone who has a copy; they become inalienable rights".<sup>22</sup>

In the case of *Jacobsen v. Katzer*<sup>23</sup>, the Federal Circuit observed that even though open source licenses have broad and nonexclusive copyright terms, violation of their terms may be recognized as copyright infringement. The court stated:

"Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material. . . . The choice to exact consideration in the form of compliance with the open source requirements of disclosure and explanation of changes, rather than as a dollar denominated fee, is entitled to no less legal recognition."<sup>24</sup>

Thus, one may conclude that open source license can be prepared in such a manner it can protect the integrity of the original work and avoid inappropriate copying, and at the same time allow public access and use in permitted manners.

As discussed before it is wrong notion to say that a computer programme is uncopyrighted, there is no such concept as uncopyrighted. Same applies to open source software and these cannot be termed as uncopyrighted. If a work is copyrightable the protection starts *ab initio* and without formality. Thus one may not avoid copyright issues associated with the open source software. Further, the fact that most of the open source licences contain prohibition from linking with GPL-licensed programs. The prohibition is base on the concept of the copyright holder's exclusive right to prepare derivative works granted by the law. The above also indicates that the questions regarding copyright need to be answered.

An important character of copyleft is that it was developed from copyright law and relies on it for enforcement. Breach of copyleft terms initially implies revocation of the licence, but in some circumstances - somebody using copyleft resources to develop and commercialize his own content without making it available again through copyleft, for instance - former licensees may end up in court facing charges of copyright infringement.<sup>25</sup> The interface of copyright and copyleft with the specific issues of ownership and moral rights has been examined below.

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21 The words 'open source' and 'copyleft' have been used interchangeably in the paper.

22 Lambert PB, *Supra* note 5 at 167.

23 *Jacobsen v. Katzer*, No. 2008-1001, US Court of Appeals for the Federal Circuit, 13 August 2008.

24 *Ibid*

25 Posse RI, The Legal Status of Copyleft before the Spanish Courts, (2009) 4 (11) *Journal of Intellectual Property Law & Practice* at 815.

## Ownership

In copyright law author is the person who creates the work, and in relation to literary work 'author' is the author.<sup>26</sup> In Section 2(z) the law also provides for the concept of joint authors. When more than one author contributes towards the originality of the work in collaborative manner such that the contributions do not remain distinct, it becomes a work of joint authorship.<sup>21</sup> Further, in Section 17 the law provides that author of the work is the first owner. The combined reading of the above provisions indicates that the issue of authorship and thus, ownership in open source software will raise difficult questions such as: Who or how many people may retain copyright in open source software? Can each person have copyright of their own contribution or is it licenced/assigned to somebody else? What of those contributing new patches or developments to the overall program? Can rights exist in persons unknown, from places unknown, at times unknown?<sup>27</sup> Various parts of Linux or GNU/Linux are incorporated by various people. Hundreds of authors are recognised for their contributions and thus questions about who has the ownership and thus the standing to sue may lack a clear answer.<sup>28</sup> The "work for hire"<sup>29</sup> provision of copyright may provide the solution where each improvement comes back to the original author but the same may have its own difficulties *viz.* the lack and understanding of a detailed working model for "work for hire" arrangement and also the aspect of moral right contained in civil law countries including many common law countries such as India.

It is also important to note that one of the defining characteristics of copyright is that they are national or territorial in nature. That is, it does not operate outside of the national territory where it is granted.<sup>30</sup> Given the presence of the internet, any would be violator of the open source license could take the code, for instance from government administrations, modify it and copyright it in a country in which the particular development model used is unlikely to be recognised under local law.<sup>31</sup> The above may also add to the problem.

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26 Section 2 (d), Copyright Act, 1957.

27 Lambert PB, *Supra* note 5 at 170.

28 O'Sullivan M, *Supra* note 20 at 342.

29 Section 17, the Copyright Act, 1957: First owner of copyright.-Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein. Provided that-

(a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work....

30 Bently L and Sherman B, *Intellectual Property Law*, ( New Delhi : Oxford University Press 2003) at 3.

31 Weston S, *Supra* note 17 at 342.

A brief mention of difficulties associated with the definition of derivative work is useful. The legal question of when two interacting programmes form a derivative work will determine how broadly the GPL applies, and whether it can help preserve the cooperative values of FOSS development. If copyright law does not recognize a derivative work where two programs interact in common ways, the GPL copyleft regime may contain an enormous loophole for proprietary exploitation.<sup>32</sup> The exact factors that make a dynamically loaded module a derivative work are unclear. Ultimately, whether a given module that enhances a GPL program must itself be covered by the GPL will have to be decided in court. If a module is not a derivative work, it is considered a separate, independent creation under copyright law, and the module author is free to apply any distribution terms she desires, including terms that oppose the GPL's goals. This creates an enormous potential problem for the GPL.<sup>33</sup> A derivative work may be defined as a work which is based on some pre existing work. A minor variation in the original work may not be sufficient to create an original work and that becomes a useful tool in the hands of the software owners to prohibit linking. The extent of variation upto which the derivative may be considered as infringement is a subjective question. The issue further becomes problematic in the light of various tests prevalent for the determination of originality in a work viz. sweat of brow and modicum of creativity.<sup>34</sup>

### **Moral Rights**

When an author creates a work, it is possible to conceive of many rights which may flow. The first and foremost right is the "Paternity Right" in the work, *i.e.* the right to have his name on the work. It may also be called the 'identification right' or 'attribution right'. The second right is the right to disseminate his work *i.e.* the 'divulgarion or dissemination right'. It would embrace the economic right to sell the work for valuable consideration. The third right is the right to maintain purity in the work. There can be no purity without integrity. It may be a matter of opinion, but certainly, treatment of a work which is derogatory to the reputation of the author, or in some way degrades the work as conceived by the author can be objected to by the author. This would be the moral right of "integrity". Lastly, right to withdraw from publication ones work, if author feels that due to passage of time and changed opinion it is advisable to withdraw the work. This would be the authors right to "retraction".<sup>35</sup> Out of these four rights, the right of paternity and right of integrity of the work are expressly provided in section 57 of the Indian copyright law.<sup>36</sup>

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32 Stoltz ML, The Penguin Paradox: How the Scope Of derivative Works in Copyright affects the Effectiveness of the GNU GPL (2005) 85 *Boston University Law Review* at 1442.

33 *Ibid.*

34 Apart from sweat of brow and modicum of creativity the Canadian case of *Law society of Upper Canada v. C.C.H Canadian Company*, 2004 FSR 871 suggests a deviation from the above two tests by holding that an original work must be the product of a author's exercise of skill and judgment. The exercise of skill and judgment require to produce the work must not be so trivial to be characterized as a purely mechanical exercise. Indian Supreme Court in the case of *Eastern Books v. D.B. Modak*, 2008 (36) *PTC* 1 takes the same view.

35 *Amar Nath Sehgal v. Union of India and Another*, 2005 (30) *PTC* 253.

36 Section 57, Copyright Act, 1957.

In the Judgment No. 128/2007 on 20 June, Valencia Commercial Court No. 2 said it is important to note that with regard to collective works, consent of all the co-authors is needed for the exercise of the right of disclosure and the right of withdrawal and modification. Anyone making use of a copyleft work should credit its authorship or quote its source or, if this is unknown, it should be clearly stated at least that he is not the author of the work in question.<sup>37</sup>

Moral rights are conferred on authors in addition to copyright. The special protection of the intellectual property is emphasised by the fact that the remedies of a restraint order or damages can be claimed "even after the assignment either wholly or partially of the said copyright." Moral rights thus clearly override the terms of the Contract of Assignment of the copyright. To put it differently, the contract of assignment would be read subject to the provisions conferring moral rights and not the vice versa.<sup>38</sup> In the similar fashion licensing a work under a copyleft scheme implies neither that the rights holders have renounced their interest in those rights nor that they have conceded moral rights.<sup>39</sup>

In the context of right of the author to retract his work from public domain, where on one hand, right holders can withdraw a work from copyleft, on the other, former licensees can keep on copying, distributing, or making modifications to that work independently of that withdrawal and as long as they comply with the initial licensing conditions. This raises the difficult task of balancing rightsowner's will and former licensees' rights. Fortunately the situation does not seem to arise in Indian context as the law does not recognize the right. The fact that the list of moral rights is not same in different countries also makes it challenging for the copyright to evolve any solution for the same.

#### IV. CONCLUSION

Licensing of open source software is beyond the scope of the present paper, however it seems that the manner of drafting a licence agreement is the only way to solve the above problems to some extent. The issue of ownership cannot be dismissed because the ultimate liability determination depends on the ownership. Various types of licences are in use including those which consider users contribution to be their distinct work. Further, because the meaning of 'derivative work' varies from country to country and harmonization of meaning at global level is missing, any immediate solution seems difficult. In relation to moral rights it is felt that if an owner decides to license the software again as copyleft, former licensees should get the option to retake previous rights under similar conditions. Affirming that moral rights remain in open source software implies that any right owner can claim recognition and protection of his moral right over open source software. The right of integrity may find difficult to co-exist with the basic notion of OSS, i.e. that the user is allowed to modify and distribute the modified version of the software. The question of extent of such modification shall always remain. One tentative conclusion may be that in order to promote open source we cannot afford to dismiss the growth of proprietary software industry. Both need to coexist and society must benefit from the coexistence. The linkage of non - GPL software to GPL software needs to be tolerated till the time the uncertainty prevails.

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37 Judgment 128/2007, 20 June, Valencia Commercial Court No.2, Second legal ground cited from Robe'n Iglesias Posse, *The Legal Status of Copyleft before the Spanish Courts*, (2009) 4 (11) *Journal of Intellectual Property Law & Practice* at 823.

38 *Smt. Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*, AIR 1987 Del. 13.

39 Robe'n Iglesias Posse, *Supra* note 37, at 823.

## SYNERGING IPR AND HUMAN RIGHTS IN A GLOBALISED WORLD : WHO GETS WHAT?

Utkarsh Verma\*

**Abstract :** This paper endeavors to discuss the interplay between IPR on one side and human rights on the other. The IPR regime, although having something positive effects such as recognition of community right in form of geographical indication largely impacts negatively when it comes protecting human rights. The IPR lawyers while contending the case of IPR pleads the system to be socially conscious, citing the periodical limits of the monopoly as well as the 'fair use' clauses to evade the larger responsibility towards the mankind. In this era of growing commercialization and globalization when every aspect of mankind, right from information to medicine is getting influenced by the IPR arrangements, it becomes imperative on the part of the welfare state to take a balanced approach to produce maximum happiness for maximum number of people employing the social engineering methods. To achieve this, a very cautious approach is required so that it might not hinder the research projects along with availing the opportunities to the have-nots of the society. Human rights although appearing by now to be anti-IPR are actually not so in toto. Actually the IPRs are also protected under the article 15 of the ICESCR in conjunction with the guarantee it provides to wider masses. The distribution of benefits of IPR(s) becomes all the more important in the wake of development of third and fourth generation of human rights, which are community as well as humanity centric instead of being focusing on individual as a person. Actually the need is to make the IPR regime more and more compatible with the human rights movement in order to take forward the mankind as a whole rather than moving with the idea of segregated growth of a handful of people. The Indian IPR framework which needed to be changed in order to be in consonance with the TRIPS, signed and ratified by India, was met up with the required changes by the Indian establishments for the same. The TRIPS framework apart from guaranteeing the intellectual property rights to the holders also includes the protection of human rights which can be looked at for the guidance of development of a more human rights friendly framework by the developing countries in general and in particular India.

**Key words:** Intellectual property rights, human right, globalization IPR versus human right,

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## I. INTRODUCTION

Rights, range from to The acquired ones such as Intellectual Property Rights to those which we are entitled by our status as a human being i.e Human Rights. The intellectual property rights are the rights which are granted by the legal system of a state in contrast to the human rights which are not so granted but merely acknowledged by the state. Whereas one got its ceremonial throne under the clouds of the war after having first implicit recognition in 1215<sup>1</sup> the other that is intellectual property rights had its beginning in 1474<sup>2</sup> when Venetians instituted first properly developed patent law. While one has the function of ascertaining the worth of being human, other recognizes the hard work put in by an individual. The human right jurisprudence values the existence of a human being and considers her ipso facto eligible for all generations of human right for the same. While on the other hand the IPR has its foundational edifice on recognizing the intellectual labor of the innovators and creators. These two legislative frameworks which are historically considered adversaries have their own share of controversies. Both are considered dangerous for each other and have conflicting fields to be won.

This paper endeavors to discuss the interplay between intellectual property rights on one side while human rights on the other. There has been an ongoing debate about the conflicting claims of precedence by one over another, apart from the opinion suggesting intellectual property rights to be a part of the human rights framework. Rather than completely focusing on the disagreement between the two regimes it seeks to put in front the mutual benefits produced by both IPR and human right for each other. The focal point of the paper will be on how to move ahead in the direction of a synergized framework to produce maximum happiness for the maximum number especially without subverting the minority. Emphasis also will be laid on to the impact of globalization on the IPR and human right regimes in different cultural and economic setups.

## II. THE RELATIONSHIP BETWEEN IPR AND HUMAN RIGHTS

The two frameworks of rights i.e human right and intellectual property rights have been historically seen as having an antagonistic relationship. Both are considered to be raising difficulties for the legal systems of the world as to which one of them should be prioritized. Having dipolar approaches both have generated never-ending debates about themselves. Need today is to have a relook at the relationship so as to find out what can be done so as to bury the differences if any and move ahead in order to have a better world while realizing interests on both sides.

Different approaches have been adopted regarding the relationship of the intellectual property rights and human rights. The first one is focusing upon the

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1 In 1215, after King John of England violated a number of ancient laws and customs by which England had been governed, his subjects forced him to sign the Magna Carta, which enumerates what later came to be thought of as human rights.

2 Audrey R. Chapman, "Approaching intellectual property as a human right: obligations related to Article 15 (1) (c) (July-September 2001) XXXV (3) *Copyright Bulletin* at 7.

traditional conflict between the two, where strong intellectual property protection is seen as posing serious threats to the case of human rights. The solution suggested is that of recognition of normative primacy of human rights law over intellectual property law in the situation of conflict arising from specific treaty obligations.<sup>3</sup> Whereas the second approach considers the two regimes as essentially compatible provided the disagreement over to arriving at an equilibrium. Here both the intellectual property rights as well as human rights focus on how to satisfy the demands on both the sides rather than showing primacy over the other.<sup>4</sup>

While it is considered so, the intellectual property rights framework is not completely hostile towards the human right fabric. Actually the intellectual property rights are based on the premise of speaking for the human rights. Therefore to accuse the IPR of being absolutely anti-human rights would be an argument blindly made. Apart from this the IPR also have other positive effects such as recognition of community rights in the form of geographical indications and farmers' rights. Intellectual property rights also helps indirectly in the promotion of human right by the way of encouraging science (by giving due protection) which does its bit by helping the cause of humanity in fighting against diseases, hunger, and several other uncountable threats.

Whereas there is an other side of the coin too. All above positives about intellectual property rights appears minuscule when we look at the harms produced by the administration. The same intellectual property rights plays villain when it comes to the right to health of millions due to restricted access to life-saving drugs due to the highly insensitive attitude adopted by the patent law regime in this regard. Moreover intellectual property rights also curbs the right to unrestricted flow of information as well as freedom of speech and expression by the capitalistic sort of approach taken by the copyright framework rather than the author- protectionist point of view. That is it appears much more focused on the economical insecurities of the publishers rather than the moral rights of the authors.

Looking at the role of the human rights with respect to the intellectual property rights it can be said that the human right regime has always been recognizing and supporting the existence of intellectual property rights administration. Time and again human rights instruments have acknowledged the presence of intellectual property protections in their texts for example The American Declaration on the Rights and Duties of Man in its Article 13<sup>5</sup> provides for it. Moreover, the UDHR in Article 27<sup>6</sup> has explicitly accorded recognition

3 Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?* (2003) 5 *MIPR* at 48.

4 *Id* at 49.

5 Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

6 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.  
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

to intellectual property rights wherein intellectual property rights are comfortably associated with human rights provisions. The same is contained in ICESCR in Article 15<sup>7</sup> has This has resulted into raising the standard of a state granted concession to level of a non-voidable inherent human right. Also if looking from the point of view of ascertaining moral and economic rights of the innovators and authors, it can be said that this zeal for the protection of human right of such individuals has resulted into the expansion of the present day intellectual property rights umbrella.

But when it comes to the ill-effect of the human right on the intellectual property rights it appears more or less to be a conflict of interests sort of a thing more than anything else. In the garb of accusing human right regime of being hazardous to the economic and moral interests of the innovators, the intellectual property rights advocates want to secure the economic interests of the publishers, funding agencies etc who want to mint money from the innovations of others without engaging themselves in any social responsibility. The intellectual property rights supporters only want to get away from the responsibility by citing the 'fair use' clauses as well as periodical limits of the monopoly. On the one hand they try to appear angel by so called concessions, whereas their actions speaks otherwise when they try to adopt deceitful methods to obviate the liability, such as trying to extend the periodical limits by adopting the means of ever greening. Actually the objection of the intellectual property rights framework against the human right regime has a very shaky foundation and whereas vice-versa is not true.

### III. EVOLUTION OF THE CONFLICT

The irony is that the origin and evolution of intellectual property rights happened to prevent the unauthorized duplication of intellectual property of a person by others such as one's copyrighted work not to be reproduced etc without the original creator's permission, one's trademark not to be copied by another etc; but rather than sticking to this realm the intellectual property rights goes ahead to infringe the human right of the people in the garb of protecting the intellectual properties of the creators. Although intellectual property rights were born so that one cannot claim other's intellectual property but it had the

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1. The States Parties to the present Covenant recognize the right of everyone:
    - (a) To take part in cultural life;
    - (b) To enjoy the benefits of scientific progress and its applications;
    - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
  2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
  3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
  4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

byproduct of subverting the human rights of others. Actually the reasons for the encouragement of IPR were to give statutory expression to the economic and moral rights of the authors and innovators on the one hand whereas assuring the public access to the knowledge on the other. It was also meant to stimulate innovation by providing justified compensation for the same but it went ahead from its realm and started interfering with the human rights of the people.

Historically intellectual property rights and human rights have always tried to shy away from each other. Although human rights instruments such as UDHR and ICESCR recognized the identity of intellectual property rights, these were not considered equal to the other rights which were considered proper to be falling under the purview of human rights.<sup>8</sup> Not surprisingly the intellectual property conventions have not even bothered to mention anything about the human rights. The reason for this appears to be the preoccupation of the two about their own concerns as well as no reasonable threat from each other.<sup>9</sup>

But the situation was not going to be the same for always. Two important phases in time proved to be the vanishing points of non-interference by one against the other. As the international human rights machinery's attention grew in towards the claims made by the indigenous communities about their traditional knowledge, it posed a challenge to the intellectual property arena which had been increasingly trying to exploit the same given the legal void regarding the same.<sup>10</sup> Ascribing to the legal void on the subject as well as absence of awareness about the same among indigenous communities, the intellectual property regime first made that knowledge available without any protection for all and later granted intellectual property rights to those entrepreneurs who claimed an innovation.<sup>11</sup> All this resulted into movements for the rights of the indigenous communities which resulted into showing intellectual property administrations in bad light.

Moreover with the beginning of association of intellectual property rights with trade, starting from the TRIPS, started a new era of antagonistic relationship between human rights and intellectual property rights. TRIPS mandated high minimum standards for all WTO members, irrespective of the development attained. Also unlike other intellectual property instruments this agreement had much stricter enforcement measures including trade sanctions. Therefore the possibility of hostility between the implementation of the agreement on the one side and economic social and cultural rights on the other arose. This necessitated increased attention of the United Nations human rights mechanism to assure minimum interference of the said agreement into the human rights arena. Ultimately what have come out over the years are some common goals for the intellectual property rights and human rights along with the realization of adoption of a human rights approach to fulfill the commitments arising from TRIPS, apart from the strict condemnation of the intellectual property framework on some occasions.

Furthermore developed nations led by the USA and other have laid much more emphasis on the intellectual property regime rather than the human rights framework. There have been much more work done for the realization of intellectual property rights in comparison to that of human rights. The coming

<sup>8</sup> Laurence R. Helfer, *Supra* note 3 at 50.

<sup>9</sup> *Id.* at 51.

<sup>10</sup> *Id.* at 52.

<sup>11</sup> *Id.* at 53.

into existence of WTO in 1994 and TRIPS in 1995 can be said to a proper example of it. It is not that there have not been instruments related specifically to human rights but it can be undoubtedly said that such documents are toothless in comparison to the above which mandatorily bind the state into international intellectual property obligations.

#### **IV. INTERESTS IN CONFLICT AND THE CLAIM TO BE A PART OF HUMAN RIGHTS FRAMEWORK**

This whole debate of IPR versus human right. can be seen from diverse jurisprudential angles. From the utilitarian point of view it can be seen as an issue involving conflict of interests wherein individual economic interests most of the times collide with the societal interests with regard to health, food, information etc. Therefore a proper balancing has to be made so as to reach a point where maximum happiness of maximum number can be ascertained with minimum friction and waste.

Taking the case of constitutional development of the Indian democracy that is the times of drafting of the Indian constitution the makers had envisaged a picture of an egalitarian setup in which everyone was supposed to be having equal access to justice, social, economical, and political. But due to the inability of the union at that time the said goal was postponed for a future when it would be within the capacity of the union to make it a reality. When I say justice, social, economical and political, it definitely indicates towards first and second generation of human rights spread out in part III and part IV of the constitution depending upon the enforceability aspect. In the course of time several constitutional cases have arrived in the highest of the courts of the country in which justice have been provided with depending upon legality as well as equity. Looking at part III of the constitution the presence of Article 19<sup>12</sup> unequivocally recognizes the freedom of speech and expression which comes in conflict with the copyright law. Whereas Article 21<sup>13</sup> which has been expanded unimaginably protects right to life, medical care, health etc which can very well come in the path of the realization of intellectual property protection. Also coming at the part IV of the constitution it mandates the state to move ahead in order to minimize the inequalities and establish a social order<sup>14</sup> along with the objective of ownership and control of the material resources of the community for the

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12 Protection of certain rights regarding freedom of speech, etc.-

- (1) All citizens shall have the right-  
(a) to freedom of speech and expression...

13 Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

14 Article 38. State to secure a social order for the promotion of welfare of the people.-  
(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.  
(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

common good<sup>15</sup>. The state is also constitutionally obliged to fulfill the international intellectual property rights as well as human rights commitments.<sup>16</sup> Therefore all this clearly indicates towards attaining a balance between the two set of rights to fulfill the justified demands of all.

There is a very clever argument raised by the IPR advocates when they contend IPR to be a species of human right. They contend the economic and moral rights of the creator to be a part of the human right framework. For proving their stand they point their fingers at the human right documents containing intellectual property guarantees. By doing this they want to achieve two goals. First they want to raise the standard of the IPR to the level of human right and thereby achieve non-negotiability and as a result create a situation of conflict of generation of human rights. By doing all this their prime concern is to raise the case of IPR in a vociferous manner. But this argument by default moves into the area of the conflicting claims made inside the purview of human right. The internal conflict of precedence among the generations of human right is very well known. Both first as well as second generation of human right contest for the primacy, joined by the third and fourth generation of human rights. Therefore only a simple posturing of IPR as a human right is not going to help the case of IPR in a larger way, although it might help up to some extent. On the contrary their case becomes weaker by adopting such an approach. By forwarding economic and moral rights of the creators to contest for a seat in the domain of human right, the IPR advocates have indirectly played into the hands of the human right supporters. The economic and moral rights at best can be associated to the second generation of human rights that is economic, social and cultural rights. Also then there is an inter-generational conflict among the generations of human right as to precedence in enforceability. The first generation of human right i.e civil and political rights are considered to be enforceable from the outset in contrast to the second generation which are to be enforced depending upon the practicability factor taken into account by the state. Therefore it leads to the conclusion that if the position of the IPR is to be taken vehemently by the state on the ground of human right then need is to tread carefully so that it might not lead to further subordination of the said framework. Otherwise being a second generation human right, the protection of intellectual property will have to be postponed until the attainment of feasibility by the state. Whereas some of the scholars who suggested intellectual property rights to be a part of the human rights regime have even gone to extent of terming the efforts of weakening the intellectual property protection to be an 'anti-human rights' one. Although the modification in the

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15 Article 39 Certain principles of policy to be followed by the State.- The State shall, in particular, direct its policy towards securing- (...) (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (...)

16 Article 51 Promotion of international peace and security.- The State shall endeavor to- (...) (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and (...)

intellectual property legislations to resolve the conflict with human rights has been considered good enough by them they are not ready to view the case of intellectual property protection from the prism of human rights.

## V. IMPACT OF GLOBALIZATION

In this era of globalization nothing on this planet remains unaffected by the effects of it. Likewise the areas of IPR and human right could not have been any exceptions. Globalization had both positive as well as negative effects on the two. Contrary to the popular views the impact globalization does to a set up is based mostly upon the reactionary approach adopted by the internal factors of the place. It all depends more or less on the type of economic, social and cultural inter alia other factors of a region. For example in a society which is basically capitalistic in nature, communistic inroads are bound to arise given the insignificance of human rights in it. Whereas in a socialist society, demands of capitalistic approach are also understandable given the clamor for economic rights. All this is happening more and more, given the coming together of different economic systems and cultures and improved modes of communication

Intellectual property rights were developed as part of municipal laws in different countries with different nature and stringencies. With the growth of international trade and commerce bilateral and later multilateral agreements were formulated concerning intellectual property protection. Later with the impact of globalization TRIPS came into existence which was the product of Uruguay Round of Trade talks and was binding on all WTO members. It consisted of trade sanctions in case of failure of fulfilling minimum intellectual property standards. The relationship of human rights and intellectual property rights has not been left untouched by the affects of globalization. Globalization has affected the intellectual property regime and consequently the human rights framework in several ways. Today the world is getting more and more aware about the intellectual property rights and they are not restricted to the territorial boundaries of the developed nations. Apart from the globalization of the intellectual property regime the scope of its subject-matter has also been expanded. Today even those things are capable of getting intellectual property protection which were earlier not even considered fit enough to qualify of getting such a protection. For example biological entities which were earlier considered to be 'products of nature' and unthinkable of meeting the requirements of novelty, utility and non-obviousness to be classified as a human invention and therefore of being patentable have now gained the status of a human invention under certain circumstances.<sup>17</sup> In a landmark judgment the US Supreme Court has ruled that a genetically modified strain of bacteria capable of degrading components of crude oil was patentable as a new and useful manufacture or composition of matter.<sup>18</sup> Thereafter many such intellectual property protections has been and still are being granted to biological entities fulfilling the necessary requirements. Also copyright regime has made inroads into the digital domain because the violation of copyrights has become very easy in this age of digitalization and internet.<sup>19</sup>

17 Audrey R. Chapman, *Supra* note 2 at 10.

18 *Diamond v. Chakrabarty*, 477 US 303(1980).

19 Audrey R. Chapman, *Supra* note 2 at 10.

Moreover globalization has also interfered with the traditional knowledge arena of the indigenous communities which was earlier considered belonging solely to the said communities.<sup>20</sup> The use of globalization is also sometimes ascribable to the vested interests. Developed nations know that proper realization of the intellectual property rights of the entities located in their territory can only be possible if a proper politico-legal understanding is developed around the globe.

## VI. SOME SPECIFIC AREAS OF CONCERNS

Although the conflict between intellectual property rights and human rights has a wide arena, the two frameworks are mostly at irreconcilable terms when it comes to the issue of health, food security and information. Of these the issues of health and food security are more or less related to the purview of patent regime. The patent regime has been the most controversial of the intellectual property framework when it comes to the acrimonious relationship between IPR and human right. Granting of patent by the state to a person can be said to be resulting into the formation of a contractual relationship between the patentee and the patent-grantor i.e the state. In this relationship what patentee gets is exclusive rights to exercise monopoly rights about the use of the product invented by him and what state gets is the information about a new innovation which might be of great application for the society at large. Although today seen as a great challenge to the concept of human rights the patent regime is fundamentally based on the premise of balancing the conflicting interests in the society. On the one hand by granting monopoly right it addresses the concerns of the creator while by the stipulation of disclosure of the invention and fixation of a time period for the said monopoly it looks after the welfare of the society. Thereby the regime encourages the innovator for the research work and in lieu of such encouragement gets to know the valuable knowledge. This all, by default helps the cause of human rights of the millions who are ultimately benefitted by the invention. The innovator is also not at risk by sharing the secret in a way that he gets the most out of the invention during the patent period along with contributing for the social cause.

The patent framework could be both helpful as well as damaging to the cause of human rights by granting or denying the patent rights. There have been several cases where granting of patent rights by the authorities have resulted in unwanted consequences. A number of herbs and other plants etc having medicinal qualities have been used by the indigenous communities from times immemorial for remedial purposes. Many pharmaceutical companies, in spite of the presence of such knowledge from antiquity, have managed to get the patent rights due to lack of awareness on the part of such communities as well as of the state. These are the cases of the bio-piracies where traditional knowledge of the indigenous communities is appropriated by the bigwigs without sharing any benefit with the rightful. Apart from the denial of any economic or other interests, culmination of the situation arrives when the same communities along with the other world is debarred from using the patented products without the permission of the patent-holding companies. Traditional knowledge forms a part of economic social and cultural rights which is either owned by an individual or

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20 *Ibid.*

by a group of persons.<sup>21</sup> Therefore this practice of the big pharmaceutical companies can be easily compared with horizontal violation of human rights of the indigenous communities. For that reason it is imperative to deny the grant of patent rights in order to safeguard the human rights of the indigenous communities. In past certain patents like that of NEEM, TURMERIC, and BASMATI have been revoked by the competent authorities owing to the cogent justifications forwarded by the traditional knowledge advocates. Although several provisions under various national as well as international instruments can be cited advocating human rights in particular economic, social and cultural of the indigenous communities, a specific reference to United Nations Declaration on the Rights of Indigenous Peoples is necessary in order to understand the growing recognition for the human rights of even the most neglected people of the world. Article 11<sup>22</sup> of the said convention guarantees them multifarious rights with respect to their traditional knowledge apart from mandating the states to come forward in order to redress in case of appropriation of the same. Article 24<sup>23</sup> in unequivocal terms recognizes the right of such communities with regard to traditional medicines, health practices as well as medicinal plants, animals and minerals. Coming to Article 31<sup>24</sup> it explicitly recognizes the comprehensive rights of these communities with respect to traditional knowledge apart from authorizing them of attaining the IPR for the same. Also their rights have got recognition under The Convention on Biological Diversity adopted in 1992 at the Earth

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21 Subramanya SirishTamvada, TRIPS and Human Rights: The Case of India (2010) 2 *JGLR* 141.

22 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

23 Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

24 Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Summit, Rio De Janerio, Brazil.<sup>25</sup>

One more ill-effect of the patent jurisprudence is that it is capable of creating a 'global drug gap'<sup>26</sup> by a double-edged sword. Firstly granting monopolies for producing medicines leads to exorbitant pricing structure of the same and secondly the whole system favors the promotion of the innovations targeted for the developed states rather than the third world.<sup>27</sup> This favoritism is not for nothing but a simple economic choice made on the basis of better profitability. Here the riches gets the human rights to live as well the intellectual property rights to their property but ultimately again the not so privileged to be born in a suitable place gets nothing but ill-justified. Therefore need is proper restructuring of the legal array so as to attain a balance between intellectual property rights of the innovators and human rights of the needy apart from fixing a minimum threshold of healthcare to hold the government responsible for the non-attainment of the same. Also emphasis must be laid on promoting the drugs indispensable for the health requirements of the neglected ones.<sup>28</sup>

Since the TRIPS framework compels the developing countries to provide stricter intellectual property protections, the developing countries have to come across the conflict between the intellectual property rights and the Human Rights. In order to comply with the said agreement the developing nations have to make a lot of legislative changes into their intellectual rights framework which ultimately has an effect on the human rights guarantees. Taking the example of patents the TRIPS agreement obligates the member states to grant patents in all fields of technology, which definitely has a prejudicial impact on the lives of the people residing in the developing countries and also in the poorer countries. Taking the case of India, the Indian Patents Act, 1970 was much more humanistic in approach since it presented no scope for patentability in the case of two most vital areas of human existence i.e food and health.<sup>29</sup> This made possible accessibility and availability of cheaper medicines for the patients by the makers of the generic drugs. Much of this enabling environment for Indian companies changed when India amended its Patents Act in 2005- after completing the ten year transition period allowed when India signed the WTO agreement.<sup>30</sup> Also the mandatory inclusion of the 'product patent' clause to meet up to the agreement's standards has only made the matter worse. Now there is no way out except the exceptional cases of compulsory licensing etc when a product can be introduced into the market only by a production based on different processes. This notion of product patent has clearly proved to be helpful in creation of monopolies of the pharmaceutical companies and a big obstacle for the cause of human rights of the poorer patients. Moreover the

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25 Article 8(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

26 Laurence R. Helfer and Graeme W. Austin, *Human Rights And Intellectual Property Mapping The Global Interface* 140 (New York : Cambridge University Press, 2011).

27 *Ibid.*

28 *Id* at 144.

29 Amit Sengupta , "Patent to plunder" *Frontline*, May 4, 2012.

30 *Ibid.*

Amendment Act provides window for the practice of 'ever-greening'. The term 'inventive step'<sup>31</sup> provides enough scope for the practice which can be a way out to prolong the patent period. Also the section 3(d)<sup>32</sup> has been flexibly worded which can be used to evergreen a known substance by trifling improvements. All this clearly suggests the narrowing of the window of human rights and that too for the sake of the intellectual property rights. The implication is that the fulfillment of the intellectual property rights has to be the rule and the realization of a human right will remain be an exception to be made in extremely stipulating situation

In a recent case<sup>33</sup> the Supreme Court of India has declined the patent plea of a major pharmaceutical company on the ground of 'ever greening' practice adopted by it in order to extend the period of monopoly. In this case the company had tried to claim a new patent on an earlier known product of its by making pseudo-changes in the composition in order to meet the standards of innovation but without making any major change in the efficacy of the same. In a developing country like India where a humongous population has to strive hard for their survival, approval of a dishonest step like this would have led to further pushing back the common men from having access to a generic version of the medicine. The Supreme Court in its fine sense of wisdom and justice based on the legalistic as well as humanistic principles thwarted away the said effort in order to do justice to the deserving millions.

Apart from the legislative and judicial remedies steps can also be taken by the pharmaceutical companies on their own in order to maintain a balance between their IPR and human rights of the people. Since the pharmaceutical companies can recover the cost of the research and development and also earn profit from many, there is no need for an insistence of getting the proceeds from a few capable of affording. The point is that if the drugs are realistically priced they will be affordable by many and therefore the cost and profits will be easily realizable by the pharmaceutical companies. On the contrary the high-costing drugs affordable only by a few, although will be able to fill the pockets of the said companies will not be able to be available to the poor patients, who will left with no choice but to suffer. Therefore the model promoting the IPR of the companies as well as the human rights of the poor should be given priority over the one concerned only about the IPR of the pharmaceutical companies. While this is the case of patents, similar type of models with suitable

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31 Indian Patent Act,1970,Section 2(1)(...)(j) "inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art;

32 the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. Explanation.-For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy;".

33 *Novartis AG v. Union of India*, AIR 2013 SC 1311.

modifications can be applied to copyright framework in order to ensure the cultural rights of the millions. Here whatever the form audio, video or readable each of them also suffers from the menace of piracy. Therefore if a similar kind of a price-effective model is adopted in this arena it will apart from helping the cause of realization of cultural rights of millions and generating revenues for the authors will also help in curbing the threat of piracy. By adopting such measures a balance can be achieved between the IPR of the bigwigs on the one hand while human rights of the underprivileged on the other. As a result of this the corporations can easily meet up the demands of horizontal recognition of human rights and corporate social responsibilities on their part.

### **VII NEED FOR A SYNERGIZED APPROACH**

Although considered estranged against each other, the two frameworks are now seen as having a amorphous relationship for a long period of time. It is not that they have involved themselves into any conciliatory process but actually they were having the same roots. They were the branches of the same tree, the rights framework. The difference was that of the species. Credit can be given to the growing realization about the interdependence and indivisibility of the 'generations of rights'. The post- TRIPS years have further taken ahead this enlightenment. Although the two concepts are usually pitted against each other for interfering the realm of the another unduly, when conceived from the point of view of a harmonious relationship which can only be the best way forward it can lead us a to a framework where it will be having much more productive outcomes. Need it to look ahead in a coexisting scenario. It is clear that the IPRs are not completely unrelated to the notion of human rights and they are actually manifestation of the economic and moral rights of the rightful claimants. So being a part of the second generation of human rights they are only second to the civil and political rights. In this age of growing realization about the interdependence and indivisibility of human rights it will not be a overstatement to say that economic and moral rights of one cannot and should not be the reason of the moderation of civil and political rights of the other. If IPR can be put into the category of human rights and there is interdependence and indivisibility of human rights then IPR of one should help human rights of several.

Given the failure of the policy as well as legislation makers worldwide in keeping up with the pace of ever-increasing conflicts between the intellectual property rights and human rights, judicial intervention remains to be the best possible mechanism to address the situation. Indian judicial system has been proactively involved in expanding the scope of human rights. Time and again unconstitutional provisions and actions violating human rights have been struck down by the one of the most active judiciary of the world. But having said the above judiciary must also be cautious about the justified claims of the intellectual property owners in order not to send a negative signal to research and development as well as foreign investment because being a signatory to the International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights as well as of TRIPS, India has to fulfill all the international obligations arising on both the sides.

### VIII. CONCLUSION

Even though there have been divergent opinions on the platforms of WTO and WIPO as to how much importance should be given to the issue of human rights, it would not be wrong to contend that in this era of growing realization of human rights it is the need of the hour to imbibe the values coming with human rights. This will ultimately result into evolution of a much more balanced approach of implementation of international financial commitments, being consistent with human rights, apart from according more legitimacy to the objectives of such organizations. If adopted the upper course of actions will result into taking forward the case of both the economic welfare of the innovators as well as the human rights of the individuals. Additionally need is to look at the situation from a human rights point of view, since ultimately the problems which are arising all over is affecting a very large population of the planet who although are much more in number, but are much weaker in all other parameters. When there can be an agreement on trade related aspects of IPR (TRIPS), need today is of a Human rights related aspect of IPR. Advocating human rights should not be understood as contradicting IPRs. Law can also take a middle path. Actually the territory of law is full of exceptions and provisos. Therefore need is to properly carve out the necessary piece of the cake in order to satisfy the demands of disadvantaged. Consequently the arena of intellectual property rights can also provide some space for the human rights. The synergized approach between IPR and Human Rights can be said to be a fulfillment of horizontal expectation of human rights where an entity respects the rights of the other and this comes both ways. Ultimately it can be asserted that it is absolutely right that legality law should not be subverted for anyone but it is equally true to look towards equity jurisprudence in order to provide justice to the billions.

## RIGHT TO LIFE IN A CLEAN ENVIRONMENT: A HUMAN RIGHTS CONCERN

Harmeet Singh Sandhu\*

### I. INTRODUCTION

Human Rights have been conferred on human beings by virtue of their being born as humans. Human beings are entitled to a life of dignity and for achieving this objective; certain basic rights have been accorded to them. Human Rights can accordingly be defined as those minimum rights which every individual must have against State or other public authority by virtue of his being a human and these rights are available to him without any consideration.

The concept of human rights is very old and dates back to the ancient doctrine of natural rights founded on natural law and the protection of human rights has now become a keystone for achieving all round peace, development and the maintenance of a democracy.<sup>1</sup>

The later half of the twentieth century has been hailed as the Age of Human Rights. This century witnessed large scale profusion of human rights enunciations on a global scale and the then Secretary General of the United Nations rightly observed in his inaugural remarks at the 1993 Vienna Conference on Human Rights that human rights constitute a common language of humanity.<sup>2</sup> International and national acknowledgement of the relationship between human rights and environment protection, however, is of a recent origin.<sup>3</sup>

There is hardly any doubt that the world is moving in a wrong direction. We have reached a stage where the industrial way of life is no longer sustainable and the time has come where we must put a stop to it. Meeting the demands of the consumerist society is resulting in rapid exhaustion of the life support systems of the world. All this is making the planet unlivable.<sup>4</sup>

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1 Pramod Mishra, *Human Rights: Global Issues*, (Delhi:Kalpaz Publications, 2000) at 1.

2 Upendra Baxi, *The Future of Human Rights*, (New Delhi: Oxford University Press 2006 2nd Edition) at 1.

3 B.N. Kirpal, M.C. Bhanadari Memorial Lecture: Environmental Justice in India (2002) 7 SCC (Jour) at 1.

4 P.N. Bhagwati, "The crucial conditions", *The Hindu Survey of the Environment*, 1991, pp.165-167, at 167.

Economic growth is essential, but it is not and cannot be synonymous with development. Indira Gandhi, the former Prime Minister of India, while participating in the Stockholm Conference, 1972 stated: "... higher standards of living must be achieved without alienating people from their heritage and without despoiling nature of its beauty, freshness and purity so essential to our lives."<sup>5</sup>

The developed world is suffering from serious environmental degradation due to over-consumption, modern industrialization and unchecked economic growth. Over population, habitat loss, sustainable agriculture practices, introduction of invasive plants and animal species, air and water pollution, over consumption and poverty are some of the factors contributing to environmental problems in both developing and under- developed countries.<sup>6</sup>

Right to life in a clean environment has gone on to become an inalienable part of the human rights jurisprudence. With the passage of time, there is more realization amongst the masses and the same has enabled them to invoke the jurisdiction of the courts for protecting their various human rights, including the right to live in a clean and healthy environment. This has led to numerous cases being filed in the High Courts and the Supreme Court of India for seeking relief in this regard.

Former Chief Justice of India, Y.K.Sabharwal, while referring to the relationship between human rights and environmental protection highlights three distinct views. The first view is that environmental protection is described as a possible means of fulfilling human rights standards. The second view highlights the fact that the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection. Lastly it is felt that there is no need for a separate environment human right as the international environmental law has developed to such extents that even the domestic environments of states has been internationalized.<sup>7</sup>

## II. DEVELOPMENT AND RECOGNITION OF ENVIRONMENTAL RIGHTS

### International Perspective

Right to life is considered to be the most important right of all the human rights and this privilege would be incomplete if the same is not enjoyed in a clean and healthy environment. Article 3 of the Universal Declaration of Human Rights, 1948 declares that everyone has a right to life and Article 25 of this Declaration further states that everyone has a right to standard of living sufficient for the health and well being of both himself and his family... This right was once again reiterated at the International Covenant on Economic, Social and Cultural Rights, 1966. Article 11 of this Covenant declares that the States Parties to the Covenant recognize the same. Similarly, Article 12 (1) declares that States Parties recognize the right of everyone to the enjoyment physical and mental

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5 *Id.*

6 South Asia Human Rights Documentation Centre, *Human Rights and Humanitarian Law Developments in Indian and International Law*, Oxford University Press, 2008, at 390.

7 Y.K. Sabharwal, Human Rights and the Environment, *Available at: [supremecourtsofindia.nic.in/speeches/speeches.../humanrights.doc](http://supremecourtsofindia.nic.in/speeches/speeches.../humanrights.doc)*

health which is of the highest attainable standard.

Accordingly, right to life in a clean environment was once again taken up at the UN Conference on Human Environment held at Stockholm in the year 1972, popularly known as the Stockholm Conference. Principle 1 of the Stockholm Declaration declared that "Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being; and he bears a solemn responsibility to protect and improve the environment for present and future generations".

The Rio Conference on Environment and Development, 1992, popularly known as Rio Declaration, however, did not maintain the human rights perspective. Rio Declaration did not define the terminology of rights altogether and Principle 1 merely asserts that human beings are the major concern of sustainable development and are entitled to a healthy and productive life in harmony with nature. This failure on the part of Rio Declaration to give greater emphasis to human rights has led to continuing uncertainty and debate about proper place of human rights law in development of international environmental law. However, several global or regional human rights treaties as well as declarations or resolutions of international organizations have referred to right to decent, or healthy, or viable environment. There is also a growing trend to give environmental protection constitutional status in many national legal systems, either explicitly, or by judicial interpretation of other constitutional guarantees.<sup>8</sup>

### Indian Perspective

It seems that originally, the Indian Constitution did not contain any specific provision for the protection and promotion of the environment.<sup>9</sup> The founding fathers of the Indian Constitution did not really seem to be concerned with the idea of providing for environmental strategies in the fundamental law of the land as the international concern for environmental protection is of a recent origin. The same is evident from the omission of the use of the word "environment" in any of the provisions of the Constitution that was drafted by the Constituent Assembly.<sup>10</sup> But even then, the Indian Constitution is perhaps the first Constitution in the world, which contains specific provisions for the protection of environment.<sup>11</sup> According to M.R. Garg and N. S. Tiwana, "no country on the globe except India has given a constitutional status to law relating to environmental control, protection and preservation."<sup>12</sup>

It was only by virtue of the International Conference on Human Environment held at Stockholm in 1972 that an amendment was brought about

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8 Patricia Birnie and Alan Boyle, *International Law and The Environment* (New Delhi: Oxford University Press, 2004) pp. 252-3.

9 Gurdip Singh, *Environmental Law-International and National Perspectives* (New Delhi : Lawman, 1995) at 48.

10 B.Errabbi, *Environmental Protection: Constitutional Imperatives- Indian Experience*, R.P. Anand, *et al* (eds.) *Law, Science And Environment* (New Delhi: Lancer Books 1987) pp. 186-187.

11 Paramjit Singh Jaswal, *et al* (eds.), *Environmental Studies*, (Chandigarh : Vishwas Publications 1998) at 363.

12 M.R.Garg and N.S.Tiwana, *Enforcement of Environmental Law and Management of*

in the Constitution of India by way of Constitution (Forty-Second Amendment) Act, 1976 and specific provisions for protection and improvement of environment in the form of Fundamental Duties and the Directive Principles of the State Policy were expressly incorporated into the Constitution of India. These provisions explicitly enunciated the national commitment to protect and improve the environment.<sup>13</sup> The Forty- Second Amendment of the Constitution thereby makes it an obligatory duty on the part of the State and every citizen to protect and improve the environment.<sup>14</sup>

### III. EXPANSION OF THE SCOPE OF FANDAMENTAL RIGHTS

Fundamental rights are those basic rights, which are essential for the development of an individual as a human being. These rights enable an individual to lead a dignified life in the society. The fundamental rights are in the process of evolution. Their origin can be traced back to origin of human civilization. They always take shape in a context and keep on changing with the change of objective realities of a given human society. These fundamental rights are basically human rights because they are provided to an individual to become human beings.

As far as the human rights in India are concerned, they have traveled a long way ranging from first generation to third generation. The first generation human rights are legal and political in nature. The second generation human rights are social and economic in nature and the third generation human rights are known as developmental rights and have been invented by the judiciary through the process of judicial innovation. The first and second generation human rights are provided in Part III and IV of the Constitution of India respectively where as the third generation human rights are discovered by the judiciary while interpreting those rights which are given in constitution. The third generations' rights include right to clean environment, right to information, right to good governance, etc.<sup>15</sup>

The Permanent Peoples' Tribunal regards the "anti-humanitarian effects of industrial and environmental hazards not as an unavoidable part of the existing industrial system, but rather as a pervasive and organized violation of the most fundamental rights of humanity. Foremost among these is the right to life, health, expression, association and access to justice". All these rights have been secured to the people of India by virtue of the provisions of Part III of the Constitution dealing with fundamental rights. A constitutional provision is ever evolving and ever changing and as such does not follow a narrow, pedantic or syllogistic approach. Constitutional provisions, particularly the fundamental rights, must be broadly construed unless the context otherwise requires. Moreover, as the fundamental rights are to be applied generation after generation, they had to be stated in broad terms so as to cater to the requirements of different

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*Pollution Control*", M.R.Garg, et al (eds.), *Environmental Pollution and Protection*, (New Delhi : Deep and Deep Publications, 1995) at 258.

13 Gurdip Singh, *Supra* note. 9 at 48.

14 Mahesh Mathur, *Legal Control of Environmental Pollution*, Deep and Deep Publications, New Delhi, 1996 at 30.

15 Available at: <http://www.rightsedu.net/philosophy.htm>

generations.<sup>16</sup>

A right can be recognized as a fundamental right even though it may not be expressly mentioned in Part III. There are a number of unenumerated fundamental rights in Part III and an activist judiciary in India has taken the lead in bringing them within the ambit of Part III of the Constitution. Environment protection is one of such items. There are specific provisions for the protection of environment in Part IV- directive principles and Part IV-A- fundamental duties, but as far as right to live in a healthy environment is concerned, it is only the judiciary in India, which has interpreted it into various provisions of Part III, i.e. fundamental rights.<sup>17</sup>

Every duty implies the existence of a correlative right, but as far as the incorporation of fundamental duty relating to environment is concerned, we do not find any specific fundamental right in the Constitution of India. The Indian Judiciary has, however, concretized right in this regard by making a bold and innovative interpretation of Article 21. Accordingly, the right to live in a clean environment finds a place through the judicial constitutional legislation.<sup>18</sup>

The Supreme Court of India and the various High Courts have interpreted the right to wholesome environment as part of the 'Right to life' guaranteed in Article 21. Article 21 pronounces that no person shall be deprived of his life or personal liberty except for the procedure established by law. The protection and preservation of nature's gifts without which life cannot be enjoyed have been embraced within the right to life guaranteed in Article 21 of the Constitution.<sup>19</sup>

It is an established fact that there exists a vital link between environment and life. As such, living in a polluted environment, is without doubt, like dying every moment with eyes, ears, lungs, kidneys, skin, etc. exposed to variety of pollutants.<sup>20</sup> Today, the problem of environmental pollution poses a great threat to the very existence of human beings and other living creatures. The Gulf War further aggravated this problem. Taking all these factors into account, the Courts in India have shown a very healthy attitude in making right to live in a healthy environment as a fundamental right and hence enforceable.<sup>21</sup>

S. Shantakumar is of the opinion that though the Supreme Court was reluctant for a short period to explicitly declare that the 'right to life' under Article 21 included the 'right to clean and healthy environment', the High Courts in the country enthusiastically declared that the right to clean and healthy environment is an integral part of the right to life.<sup>22</sup>

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16 Paramjit Singh Jaswal, *Supra* note. 11 at 47.

17 *Id.* pp.47-48.

18 *Ibid.*

19 Gurdip Singh, *Supra* note 9 pp. 50-51.

20 Kusum, Perils of Pollution, *Hindustan Times*, September 30, 1987 at 13.

21 Paramjit Singh Jaswal and Nishta Jaswal, "Making Right To Live in Healthy Environment as Fundamental Right: An Assessment of Judicial attitude and People's Concern", B.P. Singh Sehgal (ed.), *Law, Judiciary And Justice In India* (New Delhi : Deep and Deep Publications 1993) pp. 396-408 at 397.

*Rural Litigation and Entitlement Kendra v. State*<sup>23</sup> is perhaps the first reported case wherein the Supreme Court indirectly recognized this right. In this case the question was whether extension should be granted to continue mining operations. The Court took the stand that mining activities caused ecological disturbance and violated the rights of people to live. The Court felt that the hardship caused to lessees was a price that had to be paid for protecting and safeguarding the right of people to live in a healthy environment.

In *Subash Kumar v. State of Bihar*,<sup>24</sup> the Supreme Court held that the enjoyment of pollution free water and air are essential for full enjoyment of life and if anything hampers this, it amounts to violation of Article 21. In such a situation a citizen has recourse to Article 32 of the Constitution.

In *T. Damodar Rao v. S. O. Municipal Corporation, Hyderabad*,<sup>25</sup> the Andhra Pradesh High Court had to settle the question whether part or area earmarked under a development plan for recreational purposes could be acquired and used by two state agencies for construction of residential houses. The Court held that the attempt to build houses in such an open space meant for recreational park was contrary to the law and amounted to violation of the right to wholesome environment as guaranteed in Article 21. Whenever violation of Article 21 takes place due to any upsetting of the environmental balances by the State or the citizens' actions, the court is duty bound to forbid the same.<sup>26</sup>

In *Free Legal Aid Cell v. Government of NCT of Delhi*,<sup>27</sup> public interest litigation was filed against the adverse effects of display of fireworks and use of high- sounding explosive fireworks on the health of adults and children in the High Court of Delhi. The Court referred to the challenges poised by noise pollution during festivals and marriages and opined:

The effect of noise on health has not yet received full attention of our judiciary, which it deserves. pollution being wrongful contamination of the environment which causes material injury to the right of an individual, noise can well be regarded as pollutant because it contaminates environment, causes nuisance and affects the health of a person and would therefore offend Article 21 if it exceeds reasonable limits.<sup>28</sup>

A writ petition was also filed in the High Court of Madhya Pradesh against noise pollution caused by loudspeaker in the case of *Sayeed Masood Ali v. The State of M.P.*<sup>29</sup> The Court in this case explained the meaning of the term right to life as used under Article 21. It stated that it does not mean mere basic animal existence, but life of human dignity, which is worth fighting for and

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22 S. Shantakumar in S. Shantakumar (ed.), *Introduction to Environmental Law* (Nagpur : Wadhwa & Company 2005) pp. 95-96.

23 AIR 1985 SC 652.

24 AIR 1991 SC 420.

25 AIR 1987 AP 171

26 *Id.* at 181.

27 AIR 2001 Delhi 455.

28 *Ibid.*

29 AIR 2001 M.P. 220.

worth dying for. Moreover, humans deserve a life of good health and absence of the same amounts to its denial. A welfare State is therefore under obligation to provide people with a healthy life.

In *Farhd K. Wadia v. Union of India*,<sup>30</sup> the Supreme Court of India while dealing with a civil writ petition held that interference by the court in respect of noise pollution is justified on the ground that a citizen has certain rights. These rights include 'necessity of silence', 'necessity of sleep', 'process during sleep' and 'rest', as they are biological necessities and essential for health. Silence is considered to be of prime importance. As noise is injurious to human health, silence is considered to be one of the human rights and is required to be preserved at any cost.

In *M.C.Mehta v. Union of India*,<sup>31</sup> the Supreme Court found an opportunity to examine the potentialities of the fundamental right to live so as to include the right to live in a clean environment. It is a case specifically dealing with an activity threatening the life of workers and the public in general. The Court pointed out that the case raised some seminal questions concerning the true scope and ambit of Articles 21 and 32 of the Constitution.

The Court carved out the right to live in a healthy environment through reading Article 21. The emergence of this right required the State to place restrictions on carrying on of hazardous industrial activities. The Supreme Court further emphasized the need to locate hazardous industries to safer places and insisted on minimization of risk to the community by maximization of safety requirements.<sup>32</sup>

#### IV. RIGHT TO ECQUALTY AND PROTECTION OF ENVIRONMENT

Article 14 of the Constitution is also invoked for the environmental protection. Article 14 provides for equality before law or the equal protection of the laws within the territory of India to everyone. It enshrines the right to equality before law and protects a person whenever the State takes any arbitrary or unreasonable action. Arbitrariness is prohibited under Article 14 because every arbitrary action violates the principle of equality enshrined in it.

In *Kinkri Devi v. State*,<sup>33</sup> Article 14 was invoked as there had been indiscriminate granting of mining leases and there was unchecked and unscientific exploitation of the mines by the lessees. The same would, in all likelihood, result in adverse consequences. It will have a far reaching and lasting impact on the natural wealth and the local population. In this case, it was alleged that the government arbitrarily granted the permission for mining activities without adequate consideration of environmental impact which amounted to the violation of Article 14. The court accepted this version and held that till the Government evolves a long term plan based on a scientific study to regulate the exploitation of mineral resources in the State without adversely affecting the environment, the ecology, the natural wealth and environment, it will be unable to achieve the

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30 2009(1) SCALE 293

31 AIR 1987 SC 965.

32 *Id.* at 981.

33 AIR1987 HP 4.

constitutional objective of safeguarding and protecting the environment. Similarly, in the wake of exercising the power of granting of mining leases in an arbitrary manner and without regard to the safety of the forests, the lakes, the rivers, wildlife, the life, liberty and property of the people living in these vulnerable areas from its harmful effects, the Court will be left with no other alternative but to intervene effectively by way of issuing writs, orders and directions including directions for closure of mines whose operations are proving to be harmful to the environment.

In *Enviro-Legal Action v. Union of India*,<sup>34</sup> the court has held that the principle of intergenerational equity would be violated if there was substantial adverse ecological effect caused by industry. The court has thus taken into account even the rights of the unborn generations stating that environmental statutes have been enacted to ensure good quality of life for unborn generations since they would be bearing the brunt of ecological degradation.

#### **V. RIGHT TO PRACTIC ANY PROFESSION OR TO CARRY ON ANY OCCUPATION OR BUSINESS AND PROTECTION OF ENVIRONMENT**

Article 19 (1) (g) guarantees to all citizens of India, the right to practice any profession or to carry on any occupation or trade or business. We find that most of the pollution is caused mainly by trade and business activities and different types of industries are contributing to environmental pollution. Whenever confronted, these industries have always contended that they are not committing any violation, but only exercising their right to freedom of carrying out trade and business as enshrined in Article 19 (1) (g) of the Constitution. Therefore, it has been made amply clear to them on numerous occasions that their right to freedom of carrying any business and trade is not absolute, but subject to certain reasonable restrictions. Accordingly, any act of theirs, which is offensive to flora and fauna or human beings, would not be permitted to be carried on in the name of fundamental rights.<sup>35</sup>

In *M.C.Mehta v. Kamal Nath*,<sup>36</sup> the Supreme Court held that a hotel discharging untreated effluent into the river Beas, thereby disturbing the aquatic life and causing water pollution could not be permitted to work and any disturbance of the basic environment elements, viz. air, water and soil, which were necessary for life, would be hazardous. The Court further pointed out that in exercising its jurisdiction under Article 32, the Court could award damages as well as levy exemplary damages on the erring industry/ hotel, which will prove to be a deterrent for others from causing pollution.

In *M.C.Mehta v. Union of India*,<sup>37</sup> popularly known as Ganga Water Pollution Case, the Supreme Court considered the problem of pollution of Ganga water by the effluent discharge from the tanneries. The Supreme Court directed the owners of the tanneries to establish the primary treatment plants so as to

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34 AIR 1996(5) 281.

35 S.C. Shastri, *Environmental Law* (Lucknow : Eastern Book Company, 2002) at 45.

36 (2000) 6 SCC 213.

37 AIR 1988 SC 1037.

prevent the pollution of Ganga water which is being used by large number of people of the country. The polluted water affected the health and life of the people. The Court observed that the financial capacity of the tanneries should not be taken into account while requiring them to establish the treatment plants.<sup>38</sup> In the subsequent case,<sup>39</sup> the Supreme Court, while entertaining the public interest litigation under Article 32 pointed out that the writ petition was filed by a person who was not a riparian owner but is interested in safeguarding the lives of people using water of river Ganga and hence the public interest litigation was maintainable.

So as to control and prevent the pollution of water of the river Ganga at Kanpur and thereby protecting the health and life of the people using the Ganga water, the Supreme Court issued certain directions by way of affirmative action for compliance by the Kanpur Municipal Corporation and other concerned authorities.<sup>40</sup> The Supreme Court further pointed out that since the problem of pollution of the water in the river Ganga has become very acute, the High Court should not ordinarily grant orders to stay of criminal proceedings to prosecute the industrialists or other persons who pollute the water in river Ganga.

In *Union Carbide Corporation v. Union of India*,<sup>41</sup> the Supreme Court directed the Union Carbide Corporation to pay a sum of U.S. dollar 470 millions to the Union of India in full settlement of all claims and liabilities related to and arising out of the Bhopal Gas disasters. The Court further explained the statement of reasons giving basis for arriving at the just, equitable and reasonable sum as it was a compelling duty, both judicial and humane, to secure immediate relief to the victims.

The Supreme Court also emphasized the need for evolving a policy at the national level to protect national interests from all such economic activities which are of very hazardous nature. Jurists, technologists and other experts in economics, environmentology, futurology, sociology and public health, etc. should help in evolving proper criteria for identify areas of common concern and the same may be accorded judicial recognition and legal sanction.<sup>42</sup> The Court also pointed out the criticism of M.C.Mehta principle that perhaps ignores the emerging postulates of tortuous liability whose main focus is to limit economic adventurism by social requirements. The civilized society has to protect its members from certain things and simply cannot allow them to be done, even if they are subsequently compensated for their resulting losses.<sup>43</sup> Thus the right to live in a healthy environment cannot be violated by anybody under the plea that if any harm is caused, then the injured party shall be suitably compensated. In other words, the right to live in healthy environment is supreme.

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38 *Ibid.*, p. 1045.

39 *M.C. Mehta v. Union of India*, AIR 1988 SC 1115.

40 *Id.* pp. 1126-28.

41 J.T.1989 (1) SC 296.

42 *Id.* at 79.

43 *Id.*

In *F.K.Hussain v. Union of India*,<sup>44</sup> the Kerala High Court pointed out that the right to sweet water, and the right to free air is attributes of the right to life for these are the basic elements which sustain life itself.<sup>45</sup>

In *Bangalore Medical Trust v. B.S. Muddapa*,<sup>46</sup> Bangalore Development Authority was permitted by the State government to make a residential complex wherein an open space was reserved for a park. Subsequently, on the orders of the government, it was allotted to the appellants medical trust for constructing a hospital. This was challenged as violative of the right of the residents and constitutional mandate of ensuring a quality life.

The Court accordingly held that protection of environment, open spaces for recreation and fresh air and other amenities to residents had to be taken care of by the development authority. Spaces reserved for parks and playgrounds cannot be sacrificed by selling them to private persons for conversions to other uses. Residents have a right to object as it abridges their fundamental right to enjoyment of life free from the ill-effects of urbanization, and endangers their health, safety and general welfare within the purview of Article 21. The Court held that the order of allotment of the site by the government as null and void and without jurisdiction.

In *V. Lakshmi pathy v. State*,<sup>47</sup> the location and operation of industries and industrial enterprises in a residential area was challenged as violative of Karnataka Town and Country Planning Act as well as the right to life under Article 21 of the Constitution. The Court pointed out that whenever citizens of the country are aggrieved for non-performance of statutory obligations by any authority coming within the fold of Article 21 of the Constitution of India or say under the anti-pollution laws of the land, they have the right to invoke the jurisdiction of the High Court under Article 226. It is the constitutional right of the petitioners and is to be responded by different constitutional remedies available under Article 226. Moreover, the Court stressed that environment protection does not interest only the educated and the rich. It has both social and political dimensions. The disposal and control of toxic waste and governmental regulation of polluting industries is public interest oriented.

## VI. CONCLUSION

On the basis of these cases, it is amply clear that the right to life and its ambit has been widened and the Supreme Court of India has declared right to life in healthy environment as a "Fundamental Right".

It emerges that the concern for the protection of human rights would be incomplete as long as we do not make adequate efforts to provide people with a clean and healthy environment. The concern that human beings can lead a dignified life only in a clean and healthy environment has been shown at different stages of human evolution and Universal Declaration of Human Rights, 1948 was

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44 AIR 1990 Kerala 321.

45 *Ibid.* at 323.

46 AIR 1991 SC 1902.

47 AIR 1992 Kant. 57.

one of the first initiatives in this direction at the international level. In India, Environment Protection did not receive much attention when the Constitution was drafted. However, following the Stockholm Conference of 1972, specific provisions for the protection of environment have been incorporated therein.

The State as well as the citizens has been put under obligation to protect and improve the environment. The three Acts drafted under the Environmental Laws failed to fulfill the demands of the public and also could not improve the degrading condition of the environment. The hazards of natural disasters, pollution, deforestation multiplied reducing natural facilities available to mankind. Noise pollution was still unaddressed and the provisions laid down under Agenda 21 and Johannesburg Declaration could not be adopted and implemented. The implementing agencies of the Government only paid a lip service and failed to address the core issues.

Fundamental Duties have also been incorporated in order to promote peoples' participation in restructuring and building a welfare society. People themselves have spearheaded a large number of eco-movements to protect further devastation from the Government in the name of sustainable development. The balance between environment and development has to be struck focusing on the dependency of the human beings on their environment and not vice-versa. The Governments are giving predominance to development at the behest of environment which is further reducing the concern for protection of environment.

Lately, the Supreme Court of India and the various High Courts have interpreted the right to wholesome environment as part of 'Right to Life' and once again made it clear that the freedom to carry on any business or trade is a qualified one. This should go a long way in ensuring that people are provided a clean and healthy environment to live in and thus strengthen the cause of sustainable development. Sustainability of the environment is possible only if mankind exploits the resources of nature in such a manner that they are not completely eliminated from the planet. The future generations can utilize the reserved resources and not only read about them or hear about them that there were such resources existing in the environment. Preservation of the natural resources, i.e. plants, trees, animals and other livable creatures is a necessity for sustainability to ensure the movement of the natural cycle or else mankind itself would be on the verge of elimination.

## BOOK REVIEWS

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**PARLIAMENT: POWERS, FUNCTIONS & PRIVILEGES - A COMPARATIVE CONSTITUTIONAL PERSPECTIVE (2013 ed.)-** By Dr. K.S. Chauhan. LexisNexis (A Division of Reed Elsevier India Pvt. Ltd.) 14<sup>th</sup> Floor, Building No. 10, Tower-B, DLF Cyber City, Phase-II, Gurgaon-122002, Haryana, India. Pp. Ivii + 797. Price Rs. 1295/-

The book under review is a systematic research work on the topic. The author has described the working of the Parliament, its powers & functions, after an in-depth study of parliamentary institutions of various countries like U.K., USA, China, Canada, Australia, South Africa, Japan, Switzerland, Russia, Brazil, Italy etc.

The universal acceptance of democratic governance based on principles of liberal constitutionalism is certainly the distinctive feature of modern governance.<sup>1</sup> The growth and evolution of parliament as an institution of governance across the globe is closely interlinked with the human conquest of liberty and the philosophy of liberal democracy.<sup>2</sup> The author elaborates that the word 'Parliament' has its origin from French and also from Latin word '*Parliamentum*'. Like other countries, the Parliament refers to the supreme legislative body of India, where the system of governance is akin to the British Westminster form of governance<sup>3</sup> The success and durability of any democratic politics depends upon the existence of a series of principles and values from which it draws its legitimacy. These principles and values have been outlined in the Preamble of the Constitution of India.

The author has divided the whole book into eleven chapters and an annexure. The first chapter encapsulates the historical evolution and a practice of parliamentary governance-as an institution which acts as the repository of people's will and centre of power. Rare are the occasions where narratives of growth of an institution are documented and summed up in an erudite manner with precision, the movement of power from one ruling class to the other, the tension and imbalances in power structure as existed between various branch of government - which undergone through a series of reforms and laid the foundation of modern governance. The enormity of literatures detailing each minute development on growth and evolution of Parliament not only provides researchers and scholars a vast ocean to explore rather sometime confusing. However, the book under review categorically details out the historical aspect with all precision without leaving any essential feature and development. It cannot be denied that the modern India had adopted the British form of parliamentary

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1 Dr. K.S. Chauhan, *Parliament: Powers, Functions & Privileges-A Comparative Constitutional Perspective*, LexisNexis (2013) at 3 .

2 *Id.* at 4.

3 *Id.* at 3.

governance<sup>4</sup> and hence the author has categorically described the development of English as well as Indian parliamentary system.

As a scholar of law, Dr. Chauhan in the very second chapter of book, deals on a subject matter which requires a serious attention for constitutionally meaningful governance i.e. 'Parliament- its Constituents and their inter-relationships'. Constitutionally speaking, the Parliament of India consists of the President and two Houses to be known respectively as the Council of States and the House of the People<sup>5</sup>. With a view to do justice to the title chosen on the one hand and fulfillment of one of the requirements of Article 79 of the Indian Constitution pertaining President, the author has added an exclusive chapter 2, dealing with aspects such as, powers of the President including the limitation on his power, relations and differences between Lok Sabha and Rajya Sabha. The chapter is also a comparative study of the composition of the parliament in several countries. To explain the relationship and differences among the Presidents of India, America and UK the author writes that being a republic, India cannot have a hereditary king. So an elected President is at the head of the Executive Power in India<sup>6</sup>. The President of India resembles the American President in as much as he is removable by the Legislature only under the special quasi-judicial procedure of impeachment.<sup>7</sup> But, on the other hand, he is more akin to English King, than the American President in as much as the Constitution entrusts to him no function to discharge on his own authority.<sup>8</sup> Nevertheless, the book also explores the 'constitutional silences' where the President's can exercise the powers, functions in exigencies, situation if arises within the constitutional framework. Additionally, the comparative information on the Parliament and its constituents make the book more resourceful.

The Chapter 3 of the book deals with the electoral process as envisaged under the Constitution of India with respect to members of Lok Sabha, members of Rajya Sabha, President of India and Vice- President of India along with the law governing 'Political Parties & their recognitions'. The nuances of free and fair election based on adult franchise - its principles, procedures, methods, limitations and extent of judicial review - which forms the bed-rock of democratic governance, has been analyzed beautifully by the Author. Article 71 of the Constitution of India calls for determination of all disputes relating to the election of a president or vice President to be decided by the Supreme Court of India. Besides analyzing the cases in which the Supreme Court had the occasion to adjudicate, the recent decision in *P.A. Sangama v. Pranab Mukherjee*<sup>9</sup>, the author makes an erudite analysis of all with a microscopic analysis of impact on political branch of such decisions. The discussion on the electoral system with a comparative overview of the USA, Germany, China, Canada & Australia provides an opportunity to reader to have a comprehensive view.

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4 *Id.* at 2.

5 The Constitution of India, Article 79 .

6 Dr. K.S. Chauhan, *Supra* note 1, at 36.

7 The Constitution of India, Article 56 .

8 Dr. K.S. Chauhan, *Supra* note 1, at 37.

9 2013 (2) SCC 239.

Chapter 4 of the book analyses the various powers and functions of the Parliament under the Constitution of India including the legislative power, residuary powers, constituent powers, power of impeachment of constitutional functionaries and their removal. The attractive aspect of analysis is that besides analyzing the series of decisions on the relevant topics; it also discusses the shortcomings, constitutional limitations on exercise of such power by Parliament. The Constitution Amendment process in the US Constitution and analysis of 'basic structure theory' in reference to Constituent power of Parliament - makes the book a masterly piece. The chapter also analyses the impeachment of Mr. Fernando Lugo (the President of Paraguay), as a special case with reference of Constitutional provision of Paraguay.

The other important aspects such as disqualification of members of Parliament are elaborately dealt with under Chapter 5 and 6, with later focusing on the 'Defection as Disqualification'. The grounds of disqualification enumerated in Article 102 and 103 of the Constitution of India have been summarized with analysis of all the leading case laws in chapter 5 of the book. The focus on 'office of profit' as a prescribed disqualification has been a subject matter of judicial scrutiny at various occasions, wherein the political bosses carve out statutory exceptions to save their disqualifications. The author also engages on the criminalization of politics in a limited sense i.e. 'disqualification based on conviction'. The analysis of judicial decisions *K. Prabhakaran v. P. Jayarajan*<sup>10</sup> amongst others states the law with a clarity. However, the reviewer also finds the criticism of recent decision by a Division Bench of the Supreme Court in *Lily Thomas v. Union of India*<sup>11</sup>, wherein the author terms the later decision as constitutionally incorrect and impermissible precisely due to the fact that decision of *K. Prabhakaran case*<sup>12</sup> cannot be upset by a bench of smaller composition. The author goes on to state that even if the findings of *K. Prabhakaran case*<sup>13</sup> is considered as '*obiter dicta*', the division bench has no authority to differ on a crucial issue of democratic polity like this; which has been in the midst of political- legal controversy in recent times.

The menace of 'defection politics' still haunts the terrain of India politics, despite the 52<sup>nd</sup> Constitutional Amendment which had been in vogue for almost three decades. The author command over the subject matter is reflected from the fact that the book not only analyses the critical issue of 'defection' through the prism of constitutional legal principles rather he reaches out to it through sociological and behavioural aspects also. The analysis of important decisions including *Kihoto Hollohan case*.<sup>14</sup>

Chapter 7 of the book traces the history of privileges attached to the parliamentary institutions, which is considered as sine-qua non for the effective functioning of the parliamentary institutions. The author in his indomitable style analyzes the principles and doctrines of separation of power, popular sovereignty

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10 2005 (1) SCC 754

11 2013 (7) SCC 653

12 2005 (1) SCC 754

13 *Ibid.*

14 *Kihoto Hollohan v. Zachillhu* 1992 (1) SCR 686.

and parliamentary privileges, legislative self dealing as a justification of legislative privileges. The legal position in pre- independence and post-independence era and a reference to the privileges of House of Commons with a comparative insights from the UK, Australia, USA, Canada and China is the hallmark of book. Author as argues and presents his thesis on parliamentary privileges and its judicial review under the scheme of Indian Constitution that privileges and its exercise is the defensive power of parliament rather than an offensive power which the parliament must proactively exercise. The author focuses on the 'expulsion as a disqualification' and its judicial review by the courts. The seamless web of competing arguments and its impact on other principles like 'Rule of Law', separation of power, checks and balances have been analyzed by the author with all his command and authority. The series of foreign judicial decisions from the USA, Canada, Australia which have discussed and evaluated makes the book unparalleled in the contemporary comparative constitutional law literature.

Media has undergone a sea change in the last two decade since the advent of globalization. Considered to be as fourth pillar of the 'State', the media has transformed itself as a centre of massive power and influences the public in an unprecedented manner. The increased interaction between the Media & parliament has been analysed in the background of existing realities. Traditionally, the press & media have enjoyed certain privileges while disseminating information to the Public. The technology enabled media has a tendency to intrude in the working of parliamentary institutions for varied reasons. In the event of a conflict between the said privileges enjoyed by both the pillars of democracy, it will be a difficult task to resolve such a conflict. This aspect has been elaborately discussed in the book by referring to Sting Operations carried out in India in certain cases in addition to referring to several relevant laws and case laws including that of foreign countries. The last chapter focused on *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha*<sup>15</sup> has been reflective of author's grip and command over the subject matter.

This book would be useful to the Parliamentary institutions, members of the legislative houses of the state Legislatures, Political Scientists, Researchers, Judges and the Lawyers as well as teachers and students. The book will certainly carve its niche for its scholarship and authoritative work and certainly will find a place in libraries across the globe.

***K. Elumalai\****

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15 2007 (3) SCC 184.

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***Broadcasting Reproduction Right in India: Copyright and Neighbouring Rights Issues***, by S. Sivakumar and Lisa P. Lukose, The Indian Law Institute, New Delhi, 2013, pp. xxii+273, price Rs. 300 (Hard Bound).

The Law on Intellectual Property Rights (IPR) as it stands today is nothing but a legal response to technological developments or the advancements in the digital technology. IPR refers to the legal rights that are bestowed by the State upon the inventor or the creator to protect his invention or creation for a certain period of time. IPR are monopoly rights and thus prohibit unauthorised use of the protected work or invention. These legal rights confer an exclusive right to the inventor or, the creator or, his assignee to fully utilize his invention or creation for a given period of time. In return, the State expects the invention or creation to be made public for use by others after the rights have expired or even during the period of protection, with proper authorization from the right holder. IPR covers all rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. The need of IPR has been strongly felt in terms as it is a promoter of healthy competition thereby leading to economic prosperity of a nation; it is seen as benefitting the public interest.

There are different forms of IPR, each being independent of the other and governed by a separate law. Copyright being one of those forms, extends protection to books, films, music, artistic works, computer programmes and multimedia works thereby, being concerned with the protection to expression of ideas or thoughts. It is considered to be a bundle of exclusive rights that are conferred upon the author of a particular work in order to exploit the work to his benefit. In comparison to the copyright law, the concept of neighbouring or related rights is new and in a developing stage. Neighbouring rights or Related rights, refers to the category of rights granted to performers, phonogram producers and broadcasters, i.e., to those persons or organizations which put efforts to make the works available to public or to communicate the same to them. In today's era the medium of technology has made access to knowledge and creativity unbelievably easy. It could be one of the strongest reasons behind legal recognition of these neighbouring rights.

The book under review deliberates on a very important and debatable issue of Neighbouring Rights and Broadcasting Rights. Rapid increase in technology and this era of digitalization have created difficulties in protection of the mentioned rights and this is why there have been continuous legal reforms in the arena of neighbouring rights and other copyrights both at international and national levels. The authors of the work under review, both with the law related to IPR as being one of their interest areas, have made an analysis of the neighbouring rights, broadcasting rights and more specifically broadcasting reproduction rights in their book. There has been an effort to examine various legal issues surrounding broadcasting in India in terms of both content and transmission. The genesis of this book lies in a UGC major project on the Global

Copyright and Neighbouring Right Regime that the authors of this book undertook and successfully completed in the year 2011.

The book under review begins with a brief introduction on the area of copyright, neighbouring rights and broadcaster's rights in India. The authors have highlighted a point here that, the Copyright Amendment Act, 2012, though has considerably widened the scope of neighbouring rights in India but has somehow refrained from restructuring the rights of broadcasting organizations as in the case of performer's rights. The laying down of rights and duties of broadcasters is an area that has been less touched by the Parliament. There has also been an emphasis on the point that it is the lack of robust legal protection and enforcement machinery which gives way to broadcast piracy and creates impediments for broadcasters to reap benefits of their work.

For the sake of convenience of the reader, the book has been systematically arranged into six chapters. Chapter one titled as 'Intellectual Property' starts with explaining the concept of intellectual property followed by the characteristics and subject matter of IPR. It gives a quick peek into the various types of intellectual property that find protection under the law. Some highlighted points are that, intellectual property system is dynamic and is characterized by its ability to evolve and adapt to the demands of time, it is intangible subject to constant revaluation and development. Development in the fields of information technology, biotechnology etc., have commanded regular review of IPR's.

Chapter two of the book as can be prima facie made out from the title, i.e., 'Copyright' deals with copyright as form of intellectual property. It minutely explains what the meaning of copyright is and what finds protection under the copyright law. This is followed by the detailed analysis of the economic and moral rights conferred under copyright. The authors have tried to bring forth the thin line of distinction existing between authorship and ownership of copyright. The transfer of copyright, through the medium of licensing and assignment has also been dealt with in a proper manner. The highlight of this chapter is, the issue of high importance concerning the academic community which is the doctrine of fair dealing, wherein, the authors have explained as to how the Copyright Amendment Act, 2012, has widened the scope of this doctrine.<sup>1</sup>

The Copyright Act in India has been amended six times till date and the most recent and highly debated one being the amendment which took place in the year of 2012. This is where the focus of Chapter three lies, which has been titled as 'Salient Features of Copyright Amendment Act, 2012.' The chapter highlights the point as to how the various amendments to the Copyright Act have been done in order to make the Indian Copyright law compatible with its international commitments like TRIPS. Also, the recent amendment of 2012 has tried to bring a harmony between Indian Copyright law and the major changes that have taken place in the global arena in terms of internet treaties (WCT-WIPO Copyright Treaty and, WPPT- WIPO Performances and Phonograms Treaty) by WIPO<sup>2</sup>.

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1 There has been an extension of fair dealing provisions to cover sound and video recordings as well under the Copyright Amendment Act, 2012.

2 Although India has still not ratified these treaties yet.

Chapter three discusses in detail the features of the 2012 Amendment Act, the more important ones being the concepts of "Commercial Rental", "Right to Store", the complex issue of as to who is the first owner in respect of a work incorporated in a cinematographic film etc. The other features of the amendment of 2012 that are Relinquishment, Licenses, special provisions for persons with disabilities, extension of doctrine of fair dealing provisions, have also been lucidly explained by the authors. Insertion of certain acts which would not amount to infringement of copyright and, the impact of amending provisions on the Copyright Society, Special rights of authors, Rights of performers have also been meted out good treatment by the authors under the third chapter. The reviewer feels that under this chapter rather than merely providing for the pre and post 2012 amendment position the authors should have critically examined every change brought about by the amendment, as what has been done is merely providing of details and not generating any debate (which could have been more interesting read).

Chapter four of the book titled 'Neighbouring Rights' gives an insight into one of the important aspects of copyright law. The chapter begins with tracing the origin of neighbouring rights; the growth and scope of these rights have also been explained well. The authors of the book under review have highlighted a point here which is, the view that the performers are less deserving of protection since their contribution is subsidiary to that of the authors was the reason behind the classification of these rights as neighbouring or related rights. It has also been explained that, the primary justification for protection of neighbouring rights is that the public performer displays certain creativity in making the work enjoyable to the public and thereby, easily satisfying the test of originality which is one of the important requirements for copyright protection. This chapter also discusses the international legal framework through various international conventions, Treaties and Agreements like Rome convention, Geneva Phonogram Convention, TRIPS Agreement, WIPO Performances and Phonograms Treaty and Beijing Treaty on Audiovisual Performances to explain the idea of neighbouring rights. Interestingly, the same chapter also makes an analysis of how the recent amendments have made the Indian law more compatible with the international regime of Copyright Law in terms of neighbouring rights.

Chapter five of the book under review deals with the Broadcasting Rights. Broadcasting Rights is one of the kinds of neighbouring rights that neighbour upon copyright protection. The emergence of number of competitive broadcasters has given rise to the duty of the government to regulate broadcasting by unauthorised and unlawful use of media. With the exponential growth in technology, it has become difficult to protect the rights of the broadcasting organizations. This technological advancement brought lot of challenges for the broadcasters as there were instances where the distributors were found tampering with the original programme carrying signals from the satellites. The broadcasters have been granted legal protection under the Rome Convention, TRIPS Satellite Convention, WPPT and, the Berne Convention. This chapter deals in detail with the mentioned conventions and explains what sort of rights the broadcasters have. The other sub topics of this chapter are the Indian Copyright Act, Judicial Interpretations and the Broadcasting Services Regulation Bill. Under the heading of Indian Copyright Act, the authors have touched upon the various provisions

of the Indian Copyright Act concerning broadcaster's rights; topics like strengthening of Border Measures, technological protection measures, statutory license for broadcasting, broadcasting reproduction rights, fair dealing etc. have been very clearly explained. Under the heading of Judicial Interpretations the authors have discussed various important case laws on the subjects of Freedom of speech and expression vis-à-vis right to broadcast,<sup>3</sup> Broadcasting Freedom, etc.

The Chapter six also the last chapter of the book titled 'Judiciary vis-à-vis Broadcasting Reproduction Rights' consists of recent very important rulings in the area of broadcasting reproduction rights. Case laws have been segregated under various sub-heads like Broadcasting Reproduction Rights, Infringement of Copyright by Broadcast etc. The important judgments which the authors have discussed under this chapter in an exhaustive and simplified manner are Zee Entertainment Ltd. v. Gajendra Singh 2008 (36) PTC 53 (Bom), Super Cassette industries Ltd. v. Entertainment Network (India) Ltd, AIR 2004 Del 326, ESPN Stars Sports v. Global Broadcasts News Ltd 2008 (36) PTC 492 (Del) etc. This is one point of appreciation that throughout the text of the book the authors have cited and discussed important judgments (Indian and foreign both) in an easy to understand manner. But, at the same time one cannot hesitate to point out that if the number of pages or the text devoted to the actual topic, i.e., Broadcasting Reproduction Rights would have been more, it would have been better in terms of keeping up to the title of the book.

The book also provides for ready reference in the form of an appendix containing the Copyright Act, 1957, as amended in 2012, Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007, The Communication Convergence Bill, 2001, The Cable Television Networks (Regulation) Act, 1995, The Rome Convention, 1961, the Brussels Satellites Convention, 1974, WIPO Copyright Treaty (WCT), 1996, The WIPO Performances And Phonograms Treaty (WPPT), 1996, and the Beijing Treaty on Audiovisual Performances, 2012.

This book is a piece of updated research in the field of Neighbouring Rights and the Broadcasting Reproduction Rights and is a good contribution looking at the dearth of publications in this field in the Indian legal arena. The book provides for a good read and shall be useful for law professionals, media houses, government bodies, researchers and students.

**Sumiti Ahuja\***

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3 It has been held that broadcasting is part of right to freedom of speech and expression under Article 19 (1) (a) of the Constitution of India. Also, in the case of *Secretary, Ministry of I & B v. Cricket Association of Bengal* (1995) 2 SCC 161, the Supreme Court has held that the primary purpose of all broadcasting media is public interest.

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