SANCTITY OF HUMAN LIFE IN THE CONTEXT OF HUMAN GENETIC RESEARCH

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Certificate

This is to certify that the thesis entitled "**Sanctity of Human Life in the Context of Human Genetic Research**" submitted by **Vani Kesari A.** for the award of the degree of Doctor of Philosophy is to the best of my knowledge, a bonafide record of research work carried out by her as part-time research scholar, School of Legal Studies, Cochin University of Science and Technology under my guidance and supervision. This thesis or any part thereof has not been submitted elsewhere for any degree.

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I do hereby declare that the thesis entitled *"***Sanctity of Human Life in the Context of Human Genetic Research"** submitted for the award of the Degree of Doctor of Philosophy is the record of the original research work carried out by me under the guidance and supervision of Dr. N. S. Soman, Associate Professor, School of Legal Studies, Cochin University of Science and Technology. I further declare that this work has not previously formed the basis for the award of any other degree, diploma, associate-ship, fellowship or any other title or recognition.

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This is to certify that the important research findings included in the thesis *"***Sanctity of Human Life in the Context of Human Genetic Research"** has been presented in the research seminar held at the School of Legal Studies, Cochin University of Science and Technology on 27/04/2015.

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Preface

*The study on the concept of sanctity of human life is a journey in finding out what is it said to be "**human**" in human life. It is an evaluation of the universal concept and the role it plays in controlling and moulding human conduct and relationships. This concept is a foundational principle of human rights law and the grundnorm of every legal system. However, of late, the challenges by way of certain advances in human genetic research had prompted the need to evaluate the significance and extent of the concept in human endeavours.*

Scientific advances by way of human genetic research promises significant diagnostic and therapeutic advances but at the same time pose threat to fundamental notions and assumptions on humanity, hence there is a global concern to derive common legal standards, Thus the major challenge is to analyse universal principles which can be a common criteria for evolving legal standards to control certain advances in human genetic research. Hence the relevance of the study.

The study aims at analysing the content, scope, extent and limitation of the concept of sanctity of human life. In this attempt it evaluates the extent to which the concept had been accommodated by legal systems and international human rights regimes. The problem which had been undertaken in the study is the extent of intrusion made to the concept by virtue of certain advances in human genetic research.

Human genetic research covers a broad spectrum of research activities. As a part of the study, the investigation was primarily limited to certain areas of research such as genetic mapping, human cloning, application of rDNA technology, embryonic stem cell research and pre implantation genetic screening and diagnosis.

The method of research adopted in this study is doctrinal in nature involving analysis and evaluation of both primary and secondary legal materials. Philosophical and jurisprudential discourses on the subject are evaluated for which even non legal materials were relied on. A review of the Regulatory frameworks at the national, regional and international level is undertaken in an effort to put light on the nature and content of the concept. The national and international practices were evaluated on the basis of Indian and foreign case laws.

The Thesis consists of nine chapters including the Introduction and Conclusion. The Introductory chapter gives a basic insight on the research topic and its relevance

The second chapter is based on the philosophical foundations on the concept of life. It attempts to make a philosophical inquiry into the scope, content and nature of the

concept of life. To this extent, it looks into the sacred, scientific and secular approaches to the concept of life.

The jurisprudential discourses on human rights reveal that though the justification for existence of human rights is varied and diverse, the fundamental postulate of all theoretical justification is that human life has inherent worth which needs to be respected and protected. The third chapter dwells on this aspect.

Sanctity of human life is the basic standard which is followed by all modern legal systems in the world. The fourth chapter deals with this aspect and proceeds to investigate the presence and impact of the concept in Constitutional, Criminal and Civil law.

The fifth chapter deals with the reflection of the concept in International Human Rights Instruments and the judicial interpretations involved in this regard.

Advancements in human genetic research had been the basis of development of biomedicine. Alterations made to the genetic material by intervention in the genetic process are a common practice in the field of genetic engineering. Although earlier these types of alterations were carried out only in plants and animals, of late it had been applied to human constitutions also. The reason for this is that it has immense utility in predictive and therapeutic medicine.

Human genetic research relating to biomedicine involves both benefit and harm. The manipulation of genes through the human genetic research affects not only the individual concerned but his family, siblings and off springs. Questions in relation to protection of genetic data and commercialisation of this type of research has raised concerns.

The study specifically focuses on certain advancements such as genetic mapping, human cloning, application of r DNA technology, embryonic stem cell research applied in relation to germ line therapies, embryonic stem cell research and pre implantation genetic screening and diagnosis. It analyses the extent to which these technologies have raised questions concerning human identity and respect towards human life. All these dimensions are being dealt with under the sixth chapter.

There are definite areas of conflict between the concept and the application of this type of research which had raised concerns. The essential areas of conflict centres around the status of embryos, freedom of scientific inquiry, commercialization of human genes especially due to patenting, genetic privacy and genetic discrimination which had been dealt with in the seventh chapter.

The International regulatory framework based on this type of research is a late comer. The earlier codes in the area of human genetic research were primarily concerned with human experimentation. The UN Declarations in this field of research

primarily stressed on the relevance of the concept and therefore the need to regulate the same. It in fact sought to declare human genome as the heritage of humanity. There is absence of legislation in India. This has been elaborately discussed in the eighth chapter. The last chapter deals with the conclusion and major findings of the study.

No work, however great or small, is ever the product of the effort of a single individual. While working on this thesis, the Author had the support, encouragement and advice of several individuals without whom this thesis would have been obviously impossible. The Author takes this opportunity to acknowledge and thank them all on their noble gesture.

The Author takes this opportunity to thank her Guru and guide Dr N.S. Soman, Associate Professor, SLS, CUSAT who made her understand through this work that to be human means to love, recognise and respect your fellow beings. The Author considers this as the ultimate wisdom one can gain in her life and the greatest knowledge which a teacher can offer to the student. The Author expresses her immeasurable gratitude and reverence to this great human soul.

The Author dedicates this work to her loving mother who left her while this work was progressing. Her boundless love and affection was the fuel behind the completion of this work. This work is also the realisation of the dream and aspirations of a father. The Author expresses her affectionate gratitude to her father Capt K.P. Kesari, at this juncture.

The Author had received unwavering support and encouragement from great legal stalwarts such as Late Justice Krishna Iyer, Supreme Court Of India, Shri Upendra Baxi legal scholar & Professor Warwick University, United Kingdom, Senior Advocate M. K. Damodaran, High Court of Kerala and Prof. V.D. Sebastian, the renowned academician. The Author expresses her deep sense of gratitude to them at this point of time. Gratitude is also due to Late P. Govinda Pillai, the progressive thinker and scholar who provided her with sufficient reading materials on the subject.

The Author also remembers with gratitude Dr A.M. Varkey, Retd Professor, SLS for his whole hearted support and guidance. The Author takes this opportunity to place her deep sense of gratitude to Dr N.S. Gopalakrishanan , Professor, SLS,CUSAT who gave his valuable insights on the subject. The Author also expresses her deep sense of gratitude to all the retired professors of the department for their encouragement and support with special reference to Dr D Rajeev.

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gratitude to all her former colleagues, staff and library staff of School of Indian Legal Thought, Mahatma Gandhi University.

During the course of the study the Author had visited prominent libraries and had received the assistance of several people. A special note of thanks to Ms. Susan Kurtas, Librarian, Dag Hammarskjold Library, UN Headquarters, New York, Smt. Sunitha Bhalla, Parliament Library, New Delhi. The Author also expresses her gratitude to the library Staff of National Archives of India, Central Secretariat Library, New Delhi, Indian Law Institute, New Delhi and Centre for Science and Environment, New Delhi.

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This work is a humble effort in exploring the unlimited contours of human life and the possible challenges humanity needs to face and overcome. In this task the Author acknowledges and owes to all the great scholars and thinkers from whom the Author learnt the great secrets behind human life.

Vani Kesari A.

CONTENTS

ABBREVIATIONS

Afr.J.Intl & Comp.L	-	African Journal of International& Comparative Law
A.I.R	-	All India Reporter
A.J.I.L	-	American Journal of International Law
All.E.R	-	All England Reporter
Am. J. Comp. L	-	American Journal of Comparative Law
Am.U.Int'l.L.Rev	-	American University International Law Review
Am.J.Hum. Genet	-	American Journal of Human Genetics
ART	-	Assisted Reproductive Technology
B.L.R	-	Bond Law Review
BRCA	-	BReast CAncer
B.T.L.J	-	Berkeley Technology Law Journal
CIOMS	-	Council for International Organisation of Medical Sciences
Colum.L.Rev	-	Columbia Law Review
CSIR	-	Council of Industrial and Scientific Research
DBT	-	Department of Biotechnology
DPP	-	Director of Public Prosecutions
DNA	-	Deoxyribonucleic Acid
ECHR	-	European Convention on Human Rights
ECOSOC	-	Economic and Social Council
E.J.A.I.B	-	Eubios Journal of Asian &International Bioethics
Emory L.J.	-	Emory Law Journal
EPC	-	European Patent Convention
EPO	-	European Patent Office
EU	-	European Union
Eur.J.Int.L	-	European Journal of International Law
FET	-	Frozen Embryo Transfer
Fla.L.Rev	-	Florida Law Review
GIFT	-	Gamete Intra-Fallopian Transfer
HGP	-	Human Genome Project
HGDP	-	Human Genome Diversity Project
HRQ	-	Human Rights Quarterly
HUGO	-	Human Genome Organisation
Harv.L.Rev	-	Harvard Law Review

hESC	-	human Embryonic Stem Cell
IEC	-	Institutional Ethics Committee
iPS	-	Induced Pluripotent Stem Cells
IPC	-	Indian Penal Code
IVF	-	Invitro Fertilisation
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
IBC	-	International Bioethics Committee
ICMR	-	Indian Council of Medical Research
J.I.B.L	-	Journal of International Biotechnology Law
J.I.L.I	-	Journal of Indian Law Institute
J.I.P.R	-	Journal of Intellectual Property Rights
J.Hist.Ideas	-	Journal of History of Ideas
J.Phil	-	Journal of Philosophy
J.Law & Society	-	Journal of Law and Society
J.Med.Ethics	-	Journal of Medical Ethics
J.S.R.I	-	Journal for the Study of Religions and Ideologies
M.L.R	-	Modern Law Review
Marq.L.Rev	-	Marquette Law Review
Med.Law.Rev	-	Medical Law Review
NCT	-	National Capital Territory
NBC	-	National Bioethics Committee
NGO	-	Non Governmental Organisation
Nat.Rev.Genet	-	Nature Review Genetics
New.Eng.J.Medicine	-	New England Journal of Medicine
Nw.U.L.Rev	-	North West University Law Review
OAS	-	Organisation of American States
OAU	-	Organisation of African Unity
PGS	-	Pre Genetic Implantation Screening
PGD	-	Pre Genetic Implantation Diagnosis
PNDT	-	Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act
PVS	-	Permanent Vegetative State
RNA	-	Ribonucleic Acid

rDNA	-	Recombinant Deoxyribonucleic acid
S.C.C	-	Supreme Court Cases
SCNT	-	Somatic Cell Nuclear Transfer
Stan Tech. L. Rev	-	Stanford Technology Law Review
St.Louis.U.J.Health L & Pol'y	-	Saint Louis University Journal of Health, Law & Policy
Trans	-	Translator
TRIPS	-	Agreement on Trade Related Intellectual Property Rights
Touro.L.Rev	-	Touro Law Review
UGC	-	University Grants Commission
UN	-	United Nations
UN Charter	-	United Nations Charter
UDHR	-	Universal Declaration of Human Rights
UNESCO	-	United Nations Educational, Scientific and Cultural Organisation.
UNSW.Law.J	-	University of New South Wales Law Journal
U.Pa.L.Rev	-	University of Pennsylvania Law Review
V.U.W.L.R	-	Victoria University of Wellington Law Review
WHO	-	World Health Organisation
WIPO	-	World Intellectual Property Rights Organisation
WMA	-	World Medical Assembly
WTO	-	World Trade Organisation.
UN Charter	-	United Nations Charter
Yale.L.J	-	Yale Law Journal
ZIFT	-	Zygote intra-fallopian Transfer

Chapter 1

Introduction

Man cannot live with food alone. Although food, water, sleep and essential physical comforts are inevitable but they by themselves fail to bring him a perfect sense of fulfilment. His mind is in constant search to know more and more of himself and the universe which surrounds him. Apart from this, his heart yearns to experience the profound values that can enrich and elevate his life.

The question on the meaning of life thus is inevitably raised by every human mind. Man's undeniable inclination to find the truth of his existence and his place amidst the vast varieties of life has always been continuous and incessant. Thus human knowledge plays a decisive role in comprehending the "Self". The significance of knowledge and inquiry of human life was succinctly explained to the world by great philosophers from time to time. One of the prominent British scholars, Bertrand Russell was of the view that the life of the instinctive man is always shut up within the circle of his private interest but if one wants his life to be great and free, he needs to escape from this prison which is filled with individual interest.[1] The solution which Russell prescribes is knowledge because all acquisition of knowledge is an enlargement of self. Through knowledge alone, he says, one's mind becomes capable of union with the universe which constitutes the highest good[2].

Thus an inquiry on the meaning, nature and value of human life is a way of understanding the self and his relation with other fellow beings, his rights as well as his obligations. However, we find human life is being termed often as obscure and mysterious. A definite meaning cannot and has not been given to it. The question what does it mean to be human has been subjected to numerous inquiries and interpretations. There is no consensus as to the exact meaning of being

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1 Bertrand Russell, *The Problems of Philosophy*, Oxford University Press, USA (1997), p.157, 161.

2 *Ibid.*

human. The meaning attributed to human by a scientist may not be the same for a theologian or for an intuitive moral philosopher. Thus it varies.

Religion had played an extensive role in influencing man's search for knowing himself and had attempted to create a unique position for man in his relation with the universe. It had tried to explain this unique status by resorting to metaphysical explanations to human life. It resorted to place human life on a higher pedestal based on divine mandate. This had profusely influenced man in his quest for knowing the meaning and value of his life. It brought forth the commonly held notion that human life is sacred since it is divinely ordained and thereby set forth an implied protection to human life due to it being holy. This brought about assumptions as to absolute inviolability of human life. This view of life can be more profoundly found in western religious philosophies than the east. The very same views had been raised in many of the issues involving human life especially in debates involving abortion, euthanasia etc. The phrase "sanctity of human life" had a prominent place in protestant discourses of the 19th century[3].

The Enlightenment era witnessed a drastic change in this approach towards life and envisaged an independent inquiry on human life. Thus evaluations based on individual perceptions on life apart from religion also gained momentum. The phrase sanctity and its secular connotations gained prominence. However both the approach attempted to place human life on a higher pedestal. Thus the assumption that man had a unique status in this universe gained prominence irrespective of religious or secular basis. This may be due to practical experience which man experienced due to excessive religious dominance and interference in human affairs. However for peaceful coexistence and survival it was felt that the unique position of human life needed to be given stress so that respect to the worth of human life is maintained.

Respect to the worth of human life embodies within it values such as equality, autonomy, etc. It incorporates both rights as well as obligations towards

[3] Geoffrey Gilbert Drutchas, *Is Life Sacred? The Incoherence of Sanctity of Life as a Moral Principle within Catholic Churches*, Pilgrim Press, Cleveland (1998), p.43.

one another. Political and religious experiences reveal that when legal system tended to ignore this basic concept, it had led to tyranny and anarchy.

The developments which took place after the Second World War prompted nation states to give a practical shape to this concept. The term "human dignity" came to be adopted as a new form of legal humanism deriving its basis from the concept of sanctity of human life. The reason for this is that recognition of this basic concept enables operation of a set of rights and obligations on a universal basis setting apart the diverse religious and other philosophical views on human life.

Thus the study evaluates the relevance of the concept and its practical application as a foundational principle of human rights law, its nature and the extent to which it is recognised and adhered. It also proceeds to evaluate the extent to which this concept stands as a test to modern scientific developments specifically in relation to human genetic research.

1.1 Recognition of the Concept of Sanctity of Human life as a Universal Doctrine

History reveals that the world had witnessed quite often the rejection of spiritual and moral heritage of man and had resorted to acts which demean humanity as such. It had culminated in wars and atrocities committed by one against the other. Hence when United Nations Organisation (UN) was established a general need was felt to give a concrete shape to a concept which would be treated as a common standard and which can be enforced in a common platform irrespective of differences in religion, race, language etc and which applies to all human beings unlimited by geographical boundaries. Thus the concept of recognition of inherent worth of human life gained momentum. The word dignity was used in place of sanctity for denoting recognition of the unique status of man and inherent worth. This was for practical operation and sustenance of the concept for ensuring peaceful coexistence cutting across religious, political and ideological differences between man and man. Though the concept of dignity

may have religious roots or various worldviews on life but the work it does is generally respect the worth of human life.[4]

After the Second World War, this concept found a central place in human rights instruments. It emerged as a compromise to various religious ideologies and philosophical worldviews on human life. Thus violation of dignity denotes violation of self-worth. Diminution of self -worth need not essentially be a physical act but it can also be psychological such as social exclusions or discrimination. All this comes under the concept.

Human rights came to be conceived as the universal egalitarian expressions which establish that individuals have certain inherent rights which are immutable by virtue of worth of human life. Thus respect for the value of life of fellowmen and concern for one's life came to be conceived as the basis of human rights. It incorporates both individual and collective dimension of human life. Respecting the worth of human life has both physical and psychological impact.

Legally after the UN charter and International human rights instruments came into existence, the concept of respect for worth of human life gained importance and was conceived as a practical concept which can cut across all barriers and reach human beings irrespective of any differences[5]. It became not only the source of all rights which accrue to human beings but also places man morally responsible for his acts.[6]

The concept requires every legal system to respect individual liberty if the community to which laws are imposed should adhere to them. Thus the concept plays as a decisive standard in every legal system. It is a yardstick for every law making process and also a universal standard to be recognised by all nation states. Each nation state has its own reasons for respecting the worth of human life, it may be religious inclination or ideological inclinations but all states concede to the fact that human life has an inherent worth and the legal system

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4 Jeremy Waldorn, "How law protects dignity?", available at www.pem.cam.ac.uk/up-content/uploads (visited on 11-5-2015).

5 Patrick Capps, *Human Dignity and the Foundations of International Law*, Hart Pub., USA (1st edn,, 2009), p.107.

6 Tibor R. Machan, "Human Dignity and the Law", 26 *De Paul Law Review* 807 (1977).

needs to recognise the same. Hence the concept got prominence in the evolution of legal principles relating to Constitutional, Criminal and Civil law.

Thus the concept, one having a universal application, is treated to be the basis of every modern legal schemes.

1.2 Relevance of the Concept of Sanctity of Human Life in Human Genetic Research

Man's fundamental urge to find the truth, widened the vistas of his knowledge not only about himself but also of all things living and non-living around him. It also led him to study his relation not only with his fellow beings but also with the entire universe of which he is a part. In this relentless struggle to find truth and to ensure he had existence worthwhile, different fields of knowledge developed. Amongst various disciplines science had played a remarkable role since it is considered as a major force in transforming human existence.

Scientific advancements are inevitable for the sustenance and progress of mankind. Among the latest technologies which had contributed extensively to human health and wellbeing is human genetics. Research in this area helps in answering questions about human nature, the causes of various diseases affecting human body, disease prevention and management. It not only increases the life span of humans but also helps in developing diagnostic tools and better pharmaceutical products to deal with diseases.

Of late however, certain advances in the field of human genetics had raised concerns. Prominent among them are genetic mapping, human cloning, application of certain types of rDNA technology, embryonic stem cell research and pre-implantation genetic screening and diagnosis. The study focusses on these aspects specifically.

Primary apprehensions and doubts in this area had centred on the concept of sanctity of human life. The reason being that, it had tended to question the fundamental notions and values about human life hitherto recognised. Socially conscious, had raised questions about the extent to which human biological entity

could be manipulated for scientific pursuits. Concerns are shown in relation to possible physical, psychological and social repercussions that could be made by such unbridled scientific endeavours. All these apprehensions are raised since it compromised sanctity of human life. In certain areas of human genetic research, the human nature itself is susceptible to modifications whose results are neither scientifically confirmed nor the consequences can be contemplated precisely. The effects of it are not confined only to the individual but to the entire society or humanity in fact. Moreover commercialisation of this research demands a serious need to inquire into the acceptance of these types of research.

No doubt there exist technologies which create stuffs like nuclear weapons, new viruses, superbugs, artificial intelligence and artificial subconscious, genetically modified foods etc which can be treated as a straightforward threat to mankind but the threat created by certain advances in human genetic research is considered by some as even greater than that[7]. The reason being in the former, the result of it can be easily contemplated and understood and law can take effective steps in regulating it, but this is not the same with the latter.

While major breakthrough in this field of research is exciting, they create dilemmas for both the individuals, the society in which he lives and for the entire humanity of which he is a part. The concept of sanctity of human life aims at protecting the multiple and interdependent interests of a human being ranging from a man's physical and psychological integrity his status in society and his dignified position as part of humanity. An in depth analysis of certain types of research is essential in order to articulate effective law making on the subject, so as to uphold the inherent dignity and worth of human beings.

It is alleged that human genetic research affects basic human rights such as right to life, bodily integrity, autonomy, privacy etc. If the concept of sanctity of human life is recognised as a foundation of these rights, then naturally an evaluation of the intrusion into the concept deems essential.

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[7] Francis Fukuyama, *Our Post Human Future-Consequences of the Biotechnology Revolution,* Picador, New York (1st edn., 2002), p.8.

The concept of sanctity of human life is deemed to be having a wider ambit since it covers the interest of not only the existing generation but also the future generation who belongs to the humanity. Therefore the intrusion cannot be confined to specific rights but needs to be addressed in a broader angle. The concept requires analysis to appreciate the need to control human genetic research.[8] Certain kinds of researches like reproductive cloning, germ line therapy etc affects the existing as well as the future generations. In order to evaluate whether human genetic research had intruded into the concept, an evaluation of the basic religious, philosophical and scientific assumptions on life deems essential.

[8] Roberto Andorno, "Human Dignity and Human Rights as a Common Ground for Global Bioethics", 34(3) *J Med Philos* 223 (2009), available at www.unesco.org.uy/ci/fileadmin (visited on 11-5-2015).

Chapter 2

Philosophical Foundations on Concept of Life

Core concerns on any aspect of human existence should necessarily begin with the analysis of "self". Philosophical inquiries on human life have existed since the birth of humanity. Questions as to what is the meaning, purpose and value of life have always disturbed human conscience and triggered human thinking. The relevance of an inquiry into the philosophical reflections on life provides answers to contemporary problems of the age which questions the commonly held beliefs systems and cherished notions on life. Great thinkers like J. Krishnamurthy had often asserted that, without self-knowledge there is no basis for right thought and action[1]. Hence, the need for a rational inquiry deems essential.

In fact every system of knowledge has something to say about life of man and its value, though there is no perfect system which defines life or value thereof. The reason is that the philosophy of life of man is so complex which defies all attempts to make any universally valid yardstick. As aptly described by Jawaharlal Nehru,

> "*Life is too complicated and as far as we can understand it, in our present state of knowledge, too illogical, for it to be confined within four corners of a fixed doctrine*[2].

The notion that life has value is universally accepted. However, some questions as to what is that which gives value to man's life and why that man's life is attributed more importance than other beings lacks consensus.

The spirit of inquiry within man to seek an answer to these disturbing queries has been growing ever since the birth of humanity. One finds a sense of mystery and unknown depths and an irresistible urge within man himself to

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1 J. Krishnamurti, *The Impossible Question*, Victor Gollancz Ltd., London (1st edn.,1973), p.86.

2 Jawaharlal Nehru, *The Discovery of India,* Penguin, India (1stedn., 19th reprint, 1999), p.24.

understand the same. Thus this inevitably leads us to the impertinent way of investigation of life. In fact, this quest undertaken by we humans, makes us understand that conceptual confusions and debates do exist as to our existence and the value of our life.

Philosophy merged with spiritualism had been able to make a strong appeal to the purpose of human life and as to why human life has worth. This view on human life carried with it two basic elements namely the value of life is the epitome of all other values and that no other value could override it and secondly that all lives are of equal value and importance. Thus religious discourses attributed divine elements on the creation, sustenance and worth of human life. The notion of attributing value to human life with the aid of metaphysical and theological explanations was strongly opposed by philosophers themselves who explained the worth of human life, based on individual moral convictions and validated at times with scientific explanations. They accepted human life as having sanctity and respect for human worth based on certain reasoning not based on theological derivations alone. Hence this necessitates an examination of the concept in all its dimensions to understand its content, nature and extent.

2.1 Etymological Meaning and Content of the Concept

The term 'Sanctity' has its root in Latin term '*sanctitas' or 'santus'*.[3] The word takes its origin in the 14th century[4]and is defined as godliness.[5]Non-religious meaning is also attributed to the term *"sanctity*" to indicate it as inviolable, reverence,[6]set apart,[7] regarded as beyond criticism[8], as having special importance[9] etc. Thus the term sanctity has both religious and secular character.

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3 *The Oxford English Dictionary*, Clarendon Press, Oxford (1970), p.83.

4 Available at http://www.merriam-webster.com/dictionary/sanctity (visited on 23-1-2015).

5 The Oxford Thesaurus gives the definition to the term 'sanctity' as godliness, blessedness, saintliness, spirituality, piety, piousness, devoutness, righteousness, goodness, virtue, purity, inviolability, importance, paramountacy. See *Concise Oxford Thesaurus*, Oxford University Press, New York (2nd edn., 2002), p.757.

6 *Ibid.*

7 *Collins English Dictionary &Thesaurus,* Harper Collins, Glasgow (2nd edn., 2006), p.668.

8 *Ibid.*

9 *Macmillan British Dictionary*, available at www.macmillandictionary.com/dictionary/british/ sanctity (visited on 24-1-2006).

Most of the dictionaries relate the term as having a religious base [10]but at the same time relate the term to truly secular connotations. Thus it is found that in order to understand the true meaning and scope of the concept, the etymological definition given to the term lacks sufficient clarity. On one side it is found that the term carries under it religious undertones and at the other end, it dealienates itself from theological base. Thus an inquiry encompassing all the dimensions relating to the concept of life becomes essential.

2.2 Sacred Foundations of the Concept of Sanctity of life

The western religious philosophy made a profound contribution to the development of the concept of sanctity of human life. Wide disparity exits as to certain thinkers giving naturalistic explanations to origin of the human species without the aid of divine intervention and at the other end of the spectrum certain thinkers seeking the support of theological explanations to emphasise that there was the presence of some invisible hand in the creation of man and thus his exalted position among all other species. Certain philosophers identified distinct faculties to human beings [11]and hence found that respect to human life as inviolable. However it is stated[12] that earlier philosophers like Thales of Milletus was of the view that the nature of the universe was that all things are full of god. It is found that the very same thinker attempted to give a naturalist explanation to the evolution of cosmos with cogent reasons. Thinkers like Democritus, Epicurus and Lucreitus who conceived atomic materialism[13]were not interested in attributing anything divine

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[10] *Websters Universal Dictionary,* Routledge & Kegan Paul, New York (Unabridged International edn., 1970), p.111. See also *The Random House Dictionary,* Random House, New York (1966), p.1265.

[11] Immanuel Kant was of the view that individual possess dignity because of his reasoning faculty and this receptive faculty of sensibility enabled us to understand even time and space. See Immanuel Kant , *Critique of Pure Reason*, Paul Guyer & Allen W Wood (Eds. & trans.), Cambridge University Press, Cambridge (1998), p.7.

[12] Diane Collinson et al. (Eds.), *Fifty Great Eastern Philosophers*, Routledge, London (Indian reprint, 2004), p.3.

[13] The atomists held that there are two fundamentally different kind of realities composing the natural world. atoms and void. While the atoms are eternal the compounds compounded out of them are not .Clusters of atoms moving in the infinite world come to form the KOSMOI or worlds as a result of a circular motion that gathers atoms up into a whirl creating clusters within it. Our world and species within have arisen from the collision of atoms moving about in such a whirl and will disintegrate in time, available at http://plato.stanford.edu/entries/democritus/ (visited on 4-6-2006).

behind the creation of man but viewed man as a tiny swirl moving through the void. They attempted to give naturalist explanations behind the creation of man [14]and did not even attempt to give human life as having sanctity since their investigations were exclusively on the essential nature of the external world.

Among the early sophist thinkers Protagoras can be considered as forerunner on the thought that life of man has got an innate value. He was of the view that man was created by virtue of a cosmic accident and that man is endowed with two peculiarities i.e., his foresight and sense of justice. This foresight enabled man to survive even the stronger animals and other mighty forces of nature.[15] The ultimate faith of the sophist on man is found in the words of Protogoras who emphasised that,

> "*Man is the measure of all things: of things which are, that they are and of things which they are and of things which are not, they are not"*[16].

The early philosophical thinking on the concept of life was based on naturalistic explanations rather than theological justifications. The conception of man as a product of nature rather than his status and role was hardly discussed in the Pre Socratic period.

Stressing on the role of man in the natural order and at the same time giving a novel conception such as the human soul, Socrates, the Greek philosopher brought about a sea change on the understanding on the worth of human life. He believed man as a culminating phase of natural order in which he has important function to perform. Emphasising on the capacity of human beings he went on to declare that man alone can bring nature into the light of understanding and can direct his life and activities into harmony with this order[17]. His conception of human soul as the guiding part of human person and life could be considered as distinct from early

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[14] Lucreitus, *On the Nature of Things,* Book IV, William Effrey Leonard (trans.), available at http://classics.mit.edu/Carus/nature_things.4.iv.html (visited on 4-6-2006)

[15] Available at http://www.britannica.com/EBchecked/topic/479580/Protagoras (visited on 4-8-2006).

[16] Plato, Theaetetus, section 152(a), available at http://www.perseus.tufts.edu/hopper/ text? doc=Plat.%20Theaet.%20152a&lang=original (visited on 27-5-2014).

[17] Aristotle, Metaphysica, in W.D. Ross (Ed.), *The Works of Aristotle,* vol .VIII ,Clarendon Press, New York(2nd edn.), A1,A2.

thinkers [18] yet it can be seen that the overemphasis of it and the conception that the soul retains itself after complete disintegration of human body [19]is highly imaginative. Man under the Socratic thought is conceived as composed of physical body with indivisible and nonphysical soul.[20]The primary duty of man according to him was to tend his soul so that peaceful coexistence with fellow beings is ensured. Apart from the uniqueness of human life due to existence of soul, Socrates sought to appreciate humankind and its worth on the fact that man's sound knowledge of things, his urge for the same and accurate knowledge of himself and fellow beings adds worth to human life.[21] The notable feature of the thoughts of Socrates, unlike his predecessors was that he attempted to give an explanation to the worth of human life not taking the support of divine element which later on cost him dear. Thus it can be inferred that these thinkers recognised the worth of human life was as the inherent ability to understand the worth and value of other beings and to respect the same. Taking a cue from Socratic philosophy on human soul, Plato his disciple developed his idea of reincarnation of human soul. He stressed that each soul has to choose its own mode of life but once a choice has been made it must suffer the consequences.[22]Souls which exercise evil faculties will be born again into lower form of human life and ultimately as an animal but souls which exercise higher faculties and live wisely, will be born to higher levels of life or ultimately may be liberated from the wheels of bodily life and may thereafter live without body. [23]This

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[18] Protogoras had stated that soul is nothing but sensation. Homer asserted that soul is a sort of ghost which attends the living body like a shadow.

[19] Plato, The Republic, Book II, in Saxe Commins & Robert N Linscott (Eds.), *Man and Man : The Social Philosophers* ,Random House, USA (1st edn.,1947), p.184.

[20] S. Radhakrishnan & P.T. Raju (Eds.), *The Concept of Man: A Study on Comparative Philosophy,* Harper Collins, India (5th edn., 2004), p.84.

[21] "….and if I say again that daily to discourse about virtue and of those other things about which you hear me examining myself and others, is the greatest good of man and that unexamined life is not worth living .you are still likely to believe me". Plato, Apology in Saxe Commins & Robert N. Linscott (Eds.), *Man and Man: The Social Philosophers,* Random House, USA (1st edn.,1947), p.212.

[22] *Id.,*at p.68.

[23] Plato distinguishes three levels of knowledge and desire which is present in human soul and he points out that fact that this has an impact on the moral behavior of man. Plato, The Republic, Book IV, in *The Dialogues of Plato* , B. Jowett (Ed. & trans.), Random House, New York(1920) , pp.698-710. See also Will Durant, *The Story of Philosophy* , Washington Square Press , New York (Pocket Book Edn.,1961), p.18.

view again lacks any scientific basis and is more or less a blind opinion. However the positive dimension which one infers is that it carries a moral injunction upon man to condition his conduct. This is more or less similar to choice making process discussed in ZendAvesta. In ZendAvesta in Yasna XXX[24] a similar discussion takes place where human soul is entrusted with the task of choosing between the rights and wrong based on free will and thus the fate of human soul based on one's actions, thoughts and deeds. One finds that Plato had immense faith in human attributes and believed in the presence of god who is invisible as that of human soul. In fact the earlier works of Plato reflected the idea that the natural order like light sent out from sun and the moon, the eyelids for protecting the eyes etc are everything really ordered to benefit man and for him alone[25].Thus he assumed that human life has a unique status in cosmic ordering but had ultimate faith in cosmic ordering.[26]He assumed that the divine attributes such as rationality and care for fellowmen should be developed by man.[27]He subtly affirmed the superior status of man in comparison with other beings on his discussions on human soul.[28]Platonic expressions on human worth and status found a distinctive explanation in the views of Aristotle. Placing great admiration for the existence of rational faculty in man, he stresses that with the ability to reason with the aid of senses man has the ability to have an insight of all other physical beings including the god himself[29]. However he admits that universe is composed of an order of changing entities at different levels of being such as plants, animals and men and are dependent on material principle

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[24] "Thus are the primeval spirits who as a pair (combining their opposite strivings) and (yet each) independent in his action, have been famed (of old). (They are) a better thing, they two, and worse as to thought, as to word and as to deed. And between these two let the wisely acting choose aright (Choose Ye) not (as) the evil doers"- The Doctrine of Dualism, Yasna XXX, The *Zend Avesta* , *Sacred Book of the East*, vol. XXXI, L.H. Mills (trans.), [1886], Available http://www.sacred-texts.com/zor/sbe31/sbe31008.htm (visited on 6-12-2013)

[25] Plato, Laws , Book X, in The *Dialogues of Plato,* vol II, B. Jowett (Ed. & trans.), Random House, New York (1920), p .645.

[26] See also Book I, III and VII, *Id.*\

[27] Plato, Philebus, in *The Dialogues of Plato,* vol II., B Jowett (Ed. & trans.), Random House, New York (1920), p.397.

[28] Anton Leist, "Persons as "Self- Originating Source of Value", in Kurt Bayertz et al. (Eds.), *Sanctity of Life and Human Digni*ty , Kluwer Academic Publishers, Netherlands (1st edn.,1996), p.181.

[29] Aristotle, Metaphysica, in Robert Maynard Hutchins (Ed.) , *Great Books of the Western World,* vol.VIII, W.D. Ross (trans.) , Encyclopedia Britannica, USA (1971), p. 499.

which is part of every being in nature[30]. While tracing human history he said the lower species of life came first and from these evolved higher forms. [31]His conception of evolution of human life could be said to have laid down the seeds of Darwinian Conception of origin of species. However though one could find that Aristotle had great respect for human reason, his writings reveal that he was aware of the weakness and limits of human knowledge. The difficult and grey areas where certain causes of nature are beyond human knowledge and comprehension is often found accepted by Aristotle, himself. This can be viewed as the drawback of his thoughts since he himself stresses on ultimate respect for rational faculty existing in man. Thus it is found that it was the Greek philosophy which had made a vital contribution to the development and recognition of humankind as having unique status and worth and therefore deserves to be respected. These thoughts infact, had immensely influenced religious thoughts especially the early western religion namely, Judaism.

The paradigm shift in philosophical thinking about the status of man in relation to other beings and the need to respect human life from other beings was brought to forefront by the philosophy of Cicero due to the influence of Stoicism. He refers to the idea of *dignitas humana*[32] which pin points the special status of man due to the superior mind within man which obliges him to stay superior to beasts. He found that humans have dignity or special status since they possess the faculty of reason which is common with god himself. However he did not consider god and man as equals nor man and man as equals. This makes his usage of "*dignity"* not equal to that which is conceived in human rights discourses. Thus it is found that his conception of dignity does not embody egalitarian ideals. Some writers point out that it was this principle which St Thomas Acquinas on his

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30 *Id.,* at p.598

31 According to him the first was all a physical thing is located in space and subject to motion. Then such a body was endowed with the vegetative principle to grow and nourish and when plant life was infused with the sense and locomotion it took animal form. Again the accidental development of animal form created the today's rational man. See Aristotle, "De Anima" (On the Soul) in Robert Maynard Hutchins (Ed.), *Great Books of the Western World,* vol. VIII, J.A. Smith (trans.), Encyclopaedia Britannica, USA(1971), pp.31-656.

32 Cicero M Tullius, *De Officiis*, Book I, Sec106, Walter Miller (trans.), available at http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0048%3Abook%3D1%3Asection%3D106 (visited on 1-2-2014).

elucidation of Christian ethics referred in his *Summa Theologica* about human beings loosing dignity when they deviate from the rational order by sinning.[33] The ancient Greek and Roman philosophical discussions ranged from naturalistic explanation to human life to existence of rational faculties in man as the reason for his special status and also the presence of social consciousness in man as the reason for his worth. Their discussions had no emphasis on the divine hand behind the creation of man but at the very same time deemed not to have abandoned their faith in god. However their views we find had a profound influence on the development of western religious thoughts.

2.3 Religious thoughts on Sanctity and Intrinsic worth of Human life

Sanctity of human life is recognized by all major religions. The term sanctity of human life has not been defined nor the origin of the concept been recorded. Sanctity denotes a sacred quality which establishes a line that the humans cannot transgress. It emphasises the principle of uniqueness of human life. By attributing sanctity to human life, religious teachings harnesses man to lead a virtuous and moral life, which ensures peaceful coexistence. Religious thoughts have contributed immensely in placing human life at a higher pedestal since they conceived that human life has an important obligation towards maintaining and sustaining natural order. While the western religious thoughts cast responsibility in man for sustaining the natural order since divinely mandated by the divinity itself especially as conceived by Judaism and later developed by Christian thoughts, on the eastern side the oldest religion namely Hindu philosophy conceived essential unity between man and the natural order and therefore inseparable. This was also stressed by other prominent religions like Jainism, Buddhism, Zorastrianism, Sikhism etc. The eastern religion made no distinction between sanctity to human life with sanctity of life as such. But the western philosophy seeks to distinguish between the two attempts to place human life on a higher pedestal with the responsibility to tend other beings. This is more prominent in religions like Judaism, Christianty and

[33] Mette Lebech, "What is Human Dignity?",*Maynooth Philosophical Papers* 59 (2004), available at http://eprints.maynoothuniversity. ie/392/1/ Human_Dignity.pdf (visited on 1-2-2014).

Islam. However prominent religions conceived man as having the responsibility to recognise and respect the inviolable quality latent in life through divine intervention. This is confined not only to himself but to all belonging to his species and towards other beings. This can be known if an inquiry into the basic tenets of major religions is made. A brief discussion on major religious tenets in this area reveals that sanctity of human life is an essential conception designed for peaceful coexistence.

2.3.1. Judaism and Christianity

The Concept of sanctity of human life finds a unique explanation under Judaism. The essence of Judaism is the togetherness of man and god[34]. It stressed that god created man in his image[35]. The divine dignity of man is accepted by the Jewish thoughts[36].There are principally two versions on the creation of man in the Bible, the first version is that man was created out of dust[37] and the other version is that, he was created in the image and likeness of god[38]. Thus it is found that

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[34] Genesis1-3, *The Holy Bible, The Old Testament* ,Thomas Nelson & Sons, USA (1st edn.,1952), p.1.

[35] Genesis-1:26, 27 Image of god often appears in Latin as *Imago Dei*. It seeks to assert that human beings are created in god's image and therefore have inherent value independent of their utility or function. The term refers to god's own self-expression through human kind and secondly god's love to human kind. See also John 3:16, 17.To assert that humans are created in the image of god is to recognize the special qualities of human nature which allows god to manifest in humans must love god, then humans must love other humans whom god has created. See also John 13:35.This is reflected in several international documents which speak about the inherent dignity of human life and the principle of universal brotherhood. *The Holy Bible, The Old Testament, Id.* at p.1,2.

[36] Genesis-1:1, God created on day1 light, then on second day he separated the sky from sea, on the third day dry land and vegetation, on the 4th day sun, moon and stars, and on the 5th day he created birds and sea creatures ,on 6th day he created the animals and the man. Then God said "Let us make man in our image, in our likeness and let them rule over the fish of the sea, and the birds of the air, over the livestock, over all the earth and over all the creatures that move along the ground.(Genesis1:27) This implies that all that was created by god was for man and he created man for having control on everything he had created. *The Holy Bible, The Old Testament, Ibid.*

[37] In the Genesis man is described as having created in the image and likeness of god. In the second chapter which tells us of the commandment not to eat the fruit of the tree of knowledge, man is having described as having been formed out of the dust of the earth.

[38] Genesis1:26, 27 speaks about the essential nature of human beings. There are differences of opinion as to the nature of man. The question is whether god is in human form or whether it says that humans are in image of god in their moral, spiritual and intellectual nature and whether it seeks to establish god' sown self-actualization through humankind has turned out to be controversial.

they felt earth is of little significance within the infinite universe. If it had attained any significance it is because man exists. According to Bible, man is -"*little lower than Divine and little higher than beast"*[39].The Jewish thoughts of the divine image and likeness is not only intended to signify what man has in common with other men but also it depicts of what he has in common with the almighty. This thought is different from Greek thoughts where man is understood as a part of the universe. This is more or less similar to '*Aham Brahmasmi*'[40]. Similarly, the Jewish thoughts represent the idea of treating oneself as the image of god. It is found that in the *Leviticus* 11:44 [41] which states that human beings can become holy. The Jewish thought revealed as man having the immense power and potentiality hence cruel and wicked in deeds [42] , the fear of god will help him flush out the cruelty and envies in him.[43] The principle that human life is holy and inviolable had been existing from time immemorial in almost all major religious thoughts in the world. This had been profound in the medical ethical debate from ancient times to the present day. Moreover on the question of whether human life is superior to other forms of life?, *Genesis* 1:26,28[44]is very clear in establishing an anthropocentric view of life, in the sense that all life forms exist for man to master it and for his benefit. Moreover the doctrine of stewardship

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[39] Psalm8:5,"And yet you have made him only a little lower than the angels and placed a crown of glory and honor upon his head."*The Holy Bible*, *Old Testament, Id.,* at p.631.

[40] The objective and subjective are nothing other than the manifestation of the same reality.

[41] Leviticus11:44," For I am the Lord Your God; consecrate yourselves therefore, and be holy, for I am holy*". The Holy Bible, Old Testament, Id*., at p.84.

[42] Job 9:24," The earth is given into the hands of the wicked .God blinds the eyes of the judges and lets them be unfair. If not he, then who?" *Id.,* at p.603.

[43] Ecclesiastes 12:13,14 "Here is my final conclusion: fear God and obey his commandments for this is the entire duty of man. For God will *judge* us for everything we do, including every hidden thing, good or bad". *Id.,* at p.747.

[44] Genesis 1:26 "Then God said, "Let us make a man-someone like ourselves, to be the master of all life upon the earth and in the skies and in the seas". , The *Holy Bible, Old Testament*, *supra* n.35.

[44] Genesis1:28,"So God made man like his Maker.
Like God did God make man;
Man and maid did he make them." *supra* n.35.

[45]found in biblical narration on creation process establishes that man has unique status and an important role in sustaining and maintaining the natural order ordained by god for him. Thus Sanctity of human life is found to be given more prominence in Jewish and Christian theology which can be said to be partial and to a certain extent biased.

The Christian theology with regard to evolution began with the affirmation that all that is, all of nature- cosmic and terrestrial is grounded in a creator god whose character is marked by freedom, justice, faithfulness, reliability and love. There are two theories with regard to creation as interpreted in certain expositions[46] on creation and the traditional doctrine of creation expressed that there is no source or ground of nature other than the creator god[47] .The doctrine of continuing creations asserts that, god continues as a source to the natural world in every moment.[48]However Biblical stories depict that human beings are part of this creation emerging on the sixth day, following a sequence any form.[49] Another conception about the sanctity of human life states that human beings are creations of the earth into which god has breathed divine spirit.[50] Thus according to bible the life of man is given by god and it returns back to god.[51]Again, the doctrine of image of god firmly re-establishes the presence of god in man.

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[45] Biblical doctrine of stewardship identifies god as the owner and man as the manager. Stewardship states that our purpose in this world is as assigned by God himself. See Genesis 1:1 (*Old Testament)*, Matthew 28:19-20,1 Corinthians 3:9, Gelatians 4:1-2(*New Testament)*

[46] Clifford N. Matthews, et al., *When Worlds Converge - What Science and Religion Tell Us*, Open Court Publishing Company, Chicago (2002), p.262.

[47] This relates to the principle of creation ex nihilo which means that creation out of nothing .All that exists has been called from nothing by the voice of god and brought into existence. The natural world depends upon the divine creator who transcends it. Nature is not the creator and so cannot claim ultimacy and sanctity without god.

[48] This relates to the principle of creation continua or continuous creation. This principle relates to the god's continued exercise of creative power through the course of natural and human history.

[49] See Genesis1:1-29

[50] Genesis2:7, 'the lord formed man of the dust on the ground and breathed into his nostrils a breath of life and man became a living soul'. s*upra* n.36.

[51] Ecclesiastes 12:6,7,"Yes, remember your Creator now while you are young, before the silver cord snaps, and the golden bowl is broken , and the pitcher is broken and the pitcher is broken at the fountain, and the wheel is broken at the cistern and the dust returns to the earth as it was, and the spirit returns to the God who gave it."*The Living Bible ,Old Testament* ,Tyndale House Pub., Great Britain (1st edn.,1972), p.746.

Jesus, in Christian thought is considered as a model or a form that human nature should take in and the central piece of human faith is that to conform their lives to the life of Christ and thereby to actualize their behaviour to that of the life of Christ who was self-giving to god.[52]This can be linked to the rituals which Christians follow i.e., Baptism and Holy Communion. Christ preached the sacredness of every human personality as a living temple of god [53]and his teachings stressed on the principles like brotherhood of all men[54] which had led to the development of the principle of equality[55] and inherent worth of human life. The practise of Jehovah Witnesses also clearly establishes the divinity in man.[56]

Different interpretations were given to the teachings of Christ by different thinkers and preachers of Christianity. Prominent among them are Francis of Assisi, St Augustine, St Thomas Aquinas etc. Francis of Assisi stressed on holiness of all creations in each and every thing. He called his own body as "*Brother Ass*" because it served his soul as the donkey serves his master.[57] His vision was distinct from that of St Augustine who saw the world order as hierarchy of beings, descending from the transcendental source through and thus descending even to the inanimate things existing in this universe.[58]According to St Augustine, in the hierarchy of being the human soul is more excellent than all things known by the sense and among the things more noble which god created.[59]

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52 Ted Peters, *Playing God? Genetic Determinism and Human Freedom*, Routledge, USA (1997), p.86.

53 Louise Saxe Eby, *The Quest for Moral Law,* Columbia University Press, USA (1st edn.,1944), p.73.

54 See Matthews5:23,24 , Mark11::25 and Luke 11:4,*12*

55 The idea was expressed by Paul that here can be neither Jew nor Greek, there can be neither bond nor free, there can be no male or female, all are in one man i.e., Christ Jesus. See Galatian 3 : 28 , *Id.,* at p.1329.

56 Available http://www.4truth.net/fourtruthpbnew.aspx?pageid=8589952841 (visited on 25-6-2007).

57 Ronald Teske, Augustine's Theory of Soul, in Eleonore Stump and Norman Kretzmann (Eds.), *The Cambridge Companion to Augustine*, Cambridge University Press, UK (1st edn., 2001), p.117.

58 R.A. Markus, *The End of Ancient Christianity*, Cambridge University Press , UK (1998), p.47.

59 William P O'Connor, *The Concept of the Human Soul: According to Saint Augustine,* available at http://www.forgottenbooks.com/books/The_Concept_of_the_Human_Soul_According_to_Saint_Augustine_1000168730 (visited on 2-10-2013)

The works of St Augustine reveal his ardent faith in Christian theology rather than as an attempt to give scientific explanation to concept of human life.

A subtle explanation on the sanctity of human life was given by St Thomas Aquinas based on his learning in pre- Christian Hellenic philosophy that the reasoning power in man enabled man to find the truth. The existence of god is affirmed not as an act of faith but as a fact of reason. According to him[60], world was not created by a chance but the order we observe in things is a sign of god's existence.[61]Thus accepting the natural law, he pointed out that all the manifestations which we find in nature is the will of eternal Law of the divinity .This is more or less similar to the teachings of his predecessor St Augustine.

The Concept of life thus freed itself from the naturalist explanations made by the Greeks and Romans and theological explanations were given to the concept of life. Justifications based on blind faith replaced natural explanations to life. Baruch Spinoza, the great philosopher of the 16th century also felt that god was the cause of all things, because all things follow causally and necessarily from a divine nature.[62] Faith in the existence of the divine hands in the life of man and thereby man's power of reasoning to understand him was the philosophical understanding during this time. However, this line of thinking was rejected by the philosopher Blaise Pascal who limited the power of reasoning in man and claimed that blind faith in god leads man to happiness since human reason is powerless to address the question

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[60] Aquinas happens to inquire into certain questions such as -1 whether the world is governed by someone 2 What is the end of this government? 3 Whether the world is governed by One 4 effects of this government 5 whether all things are immediately governed by god? 6 Whether all things are subject to effects of this government? 7 Whether the divine government is frustrated in anything……". Here, we find an inquiry by Aquinas based on reason. Thomas Aquinas, Summa Theologica, Treatise on the Divine Government, in Saxe Commins and Robert N Linscott, (Ed.) , *Man and Spirit: The Speculative Philosophers (The World's Great Thinkers)* , Random House, New York,(1947), pp.28-30.

[61] Answering on the question whether the world is governed by anyone? He said god created the world and this can be inferred from by observation of things and the order they follow. Therefore the unfailing order we observe in things is sign of they being governed by god. *Ibid*

[62] First part contains a discussion on the attributes of god and there is an assertion that god is the cause of all existence, prop 3-9; prop10-14, prop 21-28and the second part contains a discussion on origin of all beings in nature including man . Benedict Spinoza, Ethics, in Robert Maynard Hutchins (Ed.), *Great Books of the Western World*, vol. XXXI , W.F.Trotter (trans.), Encyclopaedia Britannica, USA (1971), pp.355-394.

of god's existence[63]. This preposition seems not to provide us a solution in our enquiry as to sanctity of human life. Thus what one could decipher is that there was a philosophical cleavage between philosophical thinking with regard to existence of sanctity. There were thinkers who felt that god was the cause of all things in the world which could be perceived by man's power of reasoning [64] and there existed philosophies advocating on blind faith which makes man to realise divinity in him[65].

The Principle of *Image of God* which attributes sacredness to human life received a novel change under the conception of Immanuel Kant. The notion that man is rational evolved into the rationality being the reason for man to become moral. Philosophical thinking on the concept of life thus evolved the necessity of man becoming a moral subject. He found the uniqueness of human life not in sacredness but in man's power of reasoning. This endowment in humans according to him enables man to exercise his freedom and to follow the moral imperative and this faculty enables man to achieve elevated status over and against the nature[66]. The writings of Kant inspired Arthur Schopenhauer and Friedrich Nietzsche who believed in the ultimate capacity of man which laid down the foundation for the development of humanism.

2.3.2 Islamic Philosophy

Sacredness to human life was a divine mandate as conceived under Islamic thoughts and beliefs. In Islam the entire universe is the product of God's creativity[67].Islam considers all life forms as sacred [68]but attempts to place human

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[63] "Let us then, take our compass; we are something and we are not everything. The nature of our existence hides from us the knowledge of first beginnings which are born of the Nothing ; and the littleness of our being conceals from us the sight of the infinite" Blaise Pascal, Pensees, in Richard Maynard Hutchins (Ed.),*Great Books of the Western World*, vol. XXXIII ,W.F. Trotter (trans.), Encyclopaedia Britannica, USA (1971), p.183.

[64] George Berkeley in his speculative thoughts believed that the conscious knowledge in man is an evidence of divine intelligence

[65] "It is the heart which experiences God and not the reason. This, then, is faith: God felt by the heart, not by the reason".*Id.,* at p.222.

[66] Immanuel Kant, Fundamental Principles of the Metaphysics of Morals, in Robert Maynard Hutchins (Ed.), *Great Books of the Western World* ,vol. XLII , Thomas Kingmill Abbot (trans.), Encyclopaedia Britannica, USA (1971), p.257.

[67] 'If indeed you ask them

life in a slightly higher pedestal[69]. It is found that humans are being treated as creation of a higher status since man had the ability or the capacity to acquire more and more knowledge and the unique capability of choosing between right and wrong. It is found that while angels were being created to be obedient to god, humans have been given the ability to choose between right and wrong. Islam also conveys the message that human life not only possesses infinite value but also that human life is sacred[70]. Allah is believed to be the creator and owner of all life. The word "*Al-Rabb"* translated as "*The Provident"* provides the god as the creator and

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Who has created the heavens
And the earth and subjected
The sun and the moon
(To His Law), they will
Certainly reply, "Allah".
How are they then deluded
Away (from the truth)? "Surah Al-'Ankabut 29:61 (The Spider), *The Holy Qur'an,* Abdullah Yusuf Ali (trans.*),* Goodword Books(1st edn., Indian reprint 2007), p.276

"And if needed you ask them
Who it is that sends down
Rain from the sky,
And gives life therewith
To The earth after its death,
They will certainly reply,
"Allah, Say," Praise be To Allah! But most
Of them understand not". Surah, Al-'Ankabut 29:63 (The Spider), *The Holy Qur'an, Id.*, at p.276

[68] "Do not the Unbelievers see
That the heavens and the earth
Were joined together(as one
Unit of creation), before
We clove them as under?
We made from water
Every living thing, Will they
not then believe." Surah Al- 'Anbiya' 21:30(The Prophets), *The Holy Qur'an, Id.* at p.220.

[69] "It is We Who created you
And gave you shape;
Bow down to Adam, and they
Bowed down; not so Iblis
He refused to be of those, *Id.,* at p.101.

[70] "Nor take life- which Allah
For a just cause…." Surah Al- Isra 17:33 (The Night Journey) ,*The Holy Qur'an, Id.,* at p.189.

preserving force behind all creations[71]. Quranic verses on creation are human centred[72]. It can be inferred that man alone was the ultimate object and purpose of the entire exercise of creation. This differs slightly from the Darwinian conception of Origin of Species wherein the biological process of natural selection has no purpose or design.[73]. It is believed that the evolution of life forms were in a slow process with a predetermined plan by the creator, the Almighty[74]. Thus not only the presence of the divine hand behind all the creation is looked upon as an attribute of god but also his process of creation being done without any flaw , with his

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[71] Mirza Tahir Ahamad, *Revelation, Rationality, Knowledge and Truth*, Islam International publication Ltd., United Kingdom (1998), p.339.

[72] It is Allah Who has
Made for You the earth
As a resting place,
And the sky as a canopy
And has given you shape-
And made your shapes
Beautiful -and has provided
For you Sustenance,
Of things pure and good-
Such is Allah your Lord.
So Glory to Allah,
The Lord of the World!" Surah Al-Mu'Min 40:64 (The Believer) ,*The Holy Qur'an, Id.,* at p.330.

[73] *Infra*

[74] "He Who created Death
And Life, that He
May test which of you
Is best in deed :
And He is the Exalted
In Might, Oft - Forgiving-
He Who created
The seven heavens
One above another:
No want of proportion
Will you see
In the Creation
Of (Allah) Most Gracious
So turn your vision again:
Do you see any flaw." Surah Al- Mulk 67:2-4 (The Dominion) *The Holy Qur'an, Id.,* at p. 402.

intervention at every stage of creation and sustenance of the life in all different beings that god has created signifies the presence of sanctity of life. It is believed that it is Allah who has created all living beings including Man giving different forms and it is his choice which is exercised for a being to become a human being[75]. This makes the Islamic thesis of evolution different from the scientific school of thought. The followers of Islam are asked to accept the presence of god in man and lead a virtuous life according to the mandate of god.[76] All things both living and

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[75] "Your Lord creates that He will and chooses freely, but they have no power to choose. Glorified and exalted be He above all that they associate with Him."Surah 28:68 Al-Qasas (The Narrations) *The Quran* Mahmud Zayid (trans), Dar Al-Chora Publications, Lebanon (1st edn.,1980) p.288.

[76] "It is We Who have
Created you: why will you
Not, then, admit the Truth?
Do you see?-
The (human Seed) that
You emit-
Is it you who create it
Or are We the Creators?
We have decreed Death
To be your common lot,
And we are not
To be frustrated
From changing your Forms
And creating you (again)
In (forms) that you know not.
And you certainly know already
The first form of creation:
Why then do you not
Take heed?
Do you see the seed that
You sow in the ground?
Is it you that cause it
To grow, or are We
The Cause?
Were it Our Will,
We crumble it
To dry powder, and you would
Be left in wonderment,
(Saying), "We are indeed

non-living, the entire universe along with the natural phenomenon is said to be ordained by God for man. It is believed that from the stage of conception to the death god himself acts as the agency which plans and executes His Will on man. It is believed that Allah made the air, water, fire etc. for the smooth survival of mankind. As for the creation of every living being, water is treated as the source[77]. Even animals came into existence from it is the belief[78]. But the creation of human

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Left with debts (for nothing):
"Indeed are we shut out
(of fruits of our labour)."
Do you see the water
Which you drink?
Do you bring it Down
(In rain) from the cloud
Or do We?
Were it Our Will,
We could make it
Salty (and unpalatable):
Then why do you say
Give thanks?
Do you see the Fire
Which you kindle?
Is it you who grow
The tree which feeds
The fire or do We
Grow it?
We have made it
A memorial (of Our handiwork),
And an article of comfort
And convenience for
The denizens of deserts.
Then glorify
The name of your Lord,
The Supreme!". Surah Al-Waqiah 56:58-74 (The Inevitable)*The Holy Qu'ran, Id.,* at p.381.

[77] Surah29:63

[78] "And Allah has created
Every animal from water
Of them there are some
That creep on their bellies;
Some that walk on two on two legs;
And some walk on four.

being is believed to be done in a unique way. In Quran, dry dust and clay are treated as the materials used for the creation of man. *Sura Al sajdah* also contains observations on the divine creation process of man[79]. When we compare the Judea-Christian concepts on evolution with that of Islam, one could find certain similarities between the two monotheistic religions in the manner of creation of human beings. Biblical narratives on creation pin point the fact that man was created by God from dust and breathed life on to his nostrils[80] and the process of evolution was long[81].This is more or less similar to Quranic version of evolution where man has been said to be created out of clay by god and has been given life by himself[82]. Hence the spirit of god himself exists in man. This is similar to the presence of god in man which is similar to the Hindu conception of divinity in man.

Allah creates what He wills
For ,surely, Allah has power
Over all things." Surah 24:45 Al –Nur (The Light) *The Holy Qur'an* , *Id.,* at p.242.

79 "He Who made
Everything which He has created
Most Good: He began
The creation of man
With(nothing more than) clay,
And made his progeny
From a quintessence
Of the nature of
A fluid despised:" Surah:32 :7-8 As-Sajdah (The Prostration) *The Holy Qur'an* , *Id.,* at p.284.

80 Genesis 2:7 "then the Lord God formed man of dust from the ground, and breathed into his nostrils the breath of life; and man became a living being." *Holy Bible ,Old Testament* , *supra* n.35.

81 *supra* n.49.

82 "And made his progeny
From a quintessence
Of the nature of
A fluid despised:
But He fashioned him
In due proportion, and breathed
Into him of His spirit
And He gave you
(The faculties of) hearing
And sight and feeling
(And understanding):
Little thanks do you give! Surah :32:8-9 (As –Sajdah) *'The Holy Qur'an* , *Id.,* at p.284-285.

Moreover, in Islamic thesis, man has been endowed with certain benefits which other living creatures do not enjoy for sustenance and survival.[83]Strong strictures have been laid down by the scriptures for intervention by man to bring about any change in the patterns of god's creation[84]. Hence it is clear that any intervention with life is not permitted except where there is a just cause for such an intervention since Quran upholds the principle of sacredness of human life[85]. Muslim Scholars feel that this stricture is not only to be applied to criminal offences like murder, homicide etc but also to modern advancements in science especially genetical engineering[86]. Allah is considered as the creator of the entire human race and

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83 "We have honored the sons
Of Adam; provided them
With transport on land and sea;
Given them for sustenance things
Good and pure ; and conferred
On them special favours,
Above a great part
Of Our Creation." Surah 17:70 Al- Isra (The Night Journey) *The Holy Qur'an, Id.,*. at p.192.

84 "I will mislead them,
And I will create
In them false desires; I will
Order them to slit the ears
Of cattle, and to deface
The (fair) nature created
By Allah." Whoever,
Forsaking Allah, takes Satan
For a friend, has
Of a surety suffered
A loss that is manifest.
Satan makes them promises,
And creates in them false desires;
But Satan's promises
Are nothing but deception.Surah:4:119,120 An-Nisa (The Women) *The Holy Qur'an, Id.,* at p.64.

85 "Nor take life- which Allah
Has made sacred- except
For just cause….." Surah – Isra 17:33Al (The Night Journey) *The Holy Qur'an*, Abdullah Yusuf Ali (trans.), Goodword Books, India (1st edn. , Indian reprint 2007), p.187.

86 *supra* n.69

anyone who interferes with the god given life will perish, due to his Sin[87]. All these form the foundation for Islamic medical ethics[88]. It is found that Quran upholds all actions by man which can serve and preserve the life of individuals but rejects those actions which are harmful to the wellbeing of mankind. Unlike the Christian concept of stewardship of life, Quran advocates stewardship of natural beings created for man to utilise. Thus it lays down a unique thesis on sanctity of human life.

2.3.3. Hindu Philosophy

The Conception of human life under the eastern religions were different from the western in the sense that they regarded that divine is not separate but part of man himself. Hinduism, is one of the oldest religions of the world as that of Judaism.[89]Hinduism reverses the Jewish and Christian conception of creation in the sense that it stresses that nothingness is not transformed into everything as we find in the creation theories of the bible but everything has emerged from 'Oneness' that was there at the beginning.

The discovery of man that "*within himself exist the eternal"* was made by the Hindu philosophers of the east. Hindu philosophy reflected the idea of sacredness of every life that exists in the universe. It tried to reflect three main principles:

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87 "On that account : We ordained
For the children of Israel
That if any one slew
A person –unless it be
For murder or for spreading
Mischief in the land-
It would be as if
He slew the whole people:
And if any one saved a life,
It would be as if he saved
The life of the whole people……"Surah Al-Ma'idah 5:32 (The Table Spread) *The Holy Qur'an, Id.,* at p.69.

88 Available at http://islamset.net/ethics/code/index.html (visited on 22-10-2008).

89 It's origin is traced back to 2000BCE (Before Common Era) , available at www.sacred-texts.com.

1 Intrinsic worth of every life forms

2 Intrinsic worth of every human being

3 Essential unity in the variety of life forms

The Hindu discourse on sacredness of life is elaborate and complex. An extraordinary diversity of thinking from empiricist materialism to transcendental absolute idealism on the concept of life is found in this philosophy. Though there is an account of emergence of life in this universe in various Hindu literatures[90] and presence of divinity in man, Rig Vedic account can be considered as prominent. Three hymns can be identified in this regard. The hymn pertaining to Prajapati seen as *Hiranyagarbha*, which declares that God manifested Himself at the beginning as the creator of the entire universe, who by becoming one with unconscious matter, transcend it and creates out of it the earth, the sky and all creatures of this world. He not only creates it but also by entering into them becomes the lord of all his created things. Thus it is found that all the individual creations reflect the divine and the collective totality reflects the Supreme Being[91]. The next hymn in *purushasuktha* reaffirms the principle of existence of the divinity in all beings. *Purusha* refers to the *paramapurusha, purushottama* who is the source and basis of all creation and the act of creation itself grew out of a rite of sacrifice in which *purusha* is the sacrificial offering[92]. Thus *purusha* manifests himself in all his creations. All creation is from his body. He encompasses it. The *purusha* being depicted as having thousands of feet, hands, eyes etc conveys the meaning that Almighty manifests himself in all life's created by Him[93]. .*Purusha* is also depicted as eternal- as being in existence in all that was, all that is and in all

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[90] Some of the observations on creation can be found in Matsya Purana, Narayana Suktha, Ishavasya Upanishad, Vedanta Sutra, Mahabharatha, Manusmriti etc.

[91] *Rig Veda Sanhita* , suktha X, ashtaka VIII, adhyaya VII, , W.F. Webster (Ed.), vol. VII, H.H. Wilson (trans.), Cosmo Pub., India (1st Indian Reprint,1977), pp.335-339.

[92] Available at https://archive.org/stream/SriPurushaSuktham/10sriPurushaSukta_djvu.txt (visited on 24-10-2014)

[93] "Purusha, who has a thousand heads, a thousand eyes, a thousand feet, investing the earth in all directions exceeds (it by a space) measuring ten fingers" *Rig Veda Sanhita,* varga XVII, sukthaVI(XC) purushasuktha adhyaya IV, aandala X, anuvaka VII, ashtaka VIII. See also Yajur Veda XXXI 1-6, Atharva Veda XXX-6.

that is to be. It also signifies that creation feeds on itself, since life feeds on life, everything being *purusha*.[94]The most relevant discussion of sanctity of human life is found in *Nsadiyasuktha* of the *Rig Veda*[95] .The *Suktha* is unique in the sense that it acknowledges the limitations of mankind in understanding the concept of life and its evolution and does not impose its findings on its followers. In the beginning there was neither being nor non being ,no sky, no air ,no earth .There was only darkness which cannot be described ,this all pervading dark potential ,it was That One presence, throbbing in all pervading 30ranscen but appearing to be darkness to the eyes which like to behold it and thus the process of creation started. Thus it is said that from "*Asat*", Non-being arose "*Sat*[96]. Throughout the discussions in *Upanishads* also we find that for man to understand that he is Himself the Ultimate reality, man has to lead a virtuous life. In many texts of *Upanishads* the identification between the *Brahman* the cosmic principle and *Atman* the personal principle is described.[97]In *Brahadaranyaka Upanishad*, we find that a correlation between the various parts of the microscopic human body, viewed as a macrocosmic person is established[98]. Thus in the Microcosm, the

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[94] "Purusha is verily all this (visible world) all that is, and all that is to be; he is also the lord of immortality; for he mounts beyond(his own condition) for the food (of living beings) *" Rig Veda Sanhita,* ashtaka VIII, adhyaya IV, auktha VI (XC) *Id.*,at p.250.

[95] "The non – existent was not, the existent was not; then the world was not, nor the firmament, nor that which is above (the firmament) How could there be any investing envelope and where? Of what (could there be) felicity? How (could there be) the deep unfathomable water?" *The Rig Veda Sanhita,* anuvaka XI, adhyaya VII, sukthaI(XXIX), varga XVII. *Id*., at pp.350-351.

[96] Available at http://home.comcast.net/~prasadmail/nAsadeeyasUktam-s.pdf (visited on 1-6-2009).

[97] Some of the main Upanishads in which there is a detail discussion are Brihadaranyaka Upanishad (Chapter III, Chapter V which is very prominent, Chapter VII ,Chandogya Upanishad(Chapter III 14th khanda&18th khanda, Chapter VI, Chapter VII, Chapter VIII) Mandukhya Upanishad(the solemn declaration in the beginning,chapter2) ,Katha Upanishad(Part II) ,Mundaka Upanishad(I mundaka,I khanda) etc.

[98] *"Om pura`namadah,purnamidam,*

Purnatpurnamudachyate

Purnasyapurnamadaya

Purnamevavassiyate...."

Aum. That is complete; this is complete. The complete is derived from the complete. When the complete is deducted from the complete, it is as if the complete remains. Chapter V-Santi Mantra Invocation, TheBrihadaranyaka Upanishad, vol.III, in NityaChaitanyaYati (Ed.) *Khila Kanda Rediscovering Indian Classical Literary Classics,* vol. V, D.K. Print World Pvt. Ltd., India (1996), p.1.

macrocosm is reflected which means that the entire Universe is reflected, in every grain of sand and in every cell of the body the entire human personality can be found. This is found to be true when we take into account the principles of modern cellular biology which says that with the help of a single cell we can understand a human being. The task before a Hindu is to understand this Reality[99]. The objective reality *Brahman*can have meaning and purpose only when viewed in the context of a knowing person. This is expressed in the famous statements namely "*Tat Tvam Asi"* [100] and "*Aham Brahmasmi*"[101]. Hindu concept of sanctity

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[99] "*Om asatom~asadgamaya*

Tamasom~ajyothirgamayas

Martyormaamritamgamaya

Om shanty, shanty, shanty".

"O lead me from unreal to real,

Lead me from darkness to light.

Lead me from death to immortality."

First Chapter, Third Brahmana, 28 verse *Brhadaranyako Upanishad* (as taken from Yajur Veda*)* in *Upanishads for All,* Chitrita Devi (Ed. & trans.) S. Chand & Co. Pvt. Ltd. , New Delhi (1st edn. ,1973), p.37.

[100] The meaning of Tat tvamAsi is "That Thou Art" which is found in *ChandogyaUpanishad*6.8.7. This is found repeated again and again in the very same chapter.

"*Sa yaesonimaaitadatmyamidamsarvam,*

Tatsatyam, saatma: tat tvamasi,

Svetaketo, iti : Bhuyaevama, bhagavan

Vijnapayatuiti, tatha ,saumya, itihovaca."

"All these things (beings of world) are with soul by that subtle cause called "Truth" All these are that "Truth" He is soul O Svetaketu you are that". Chapter 6, Section VIII , Verse 7 *Chandogyopanishad. Id.,* at p.312.

[101] The meaning of "AhamBrahmasmi" is "I Am Brahman" is found in Brihadaranyaka Upanishad Madhukanda 1.4.10

"brahma vaidamagraasit, tad atmanamevavetahambrahmasmiti:

Tas mat tat sarvamabhavat tat yoyodevanam

Pratyabudhyata, saeva tad abhavat, tatharsinamtatha

Manu syanamtaddhaitatpasyanrsrvamadevahpratipede,

Ahammanurabhavamsuryasceti, tad idamapietarhiya

Evamveda, ahambrahmasmitisiidamsarvambhuvati……"

"In the beginning there existed only Brahma.(Then by the influence of 'tamas' resulting in ignorance. He thought Himself as individual beings).

He (gradually after practising penance and meditation) knew that, "I am Brahma"

Knowing thus he became one with all.

Even among the gods whoever knew this (all – pervading) truth,became one with it .

of life is in this respect, since it finds divinity in all things both living and non-living. It states that objective and subjective are nothing but the manifestation of the Reality. [102]The *Upanishads* while attempting to find the cause of life ultimately finds the God to be the cause and the immanent lord in all his creations[103]. Teachings of the *Upanishads* convey the message that all living beings created by the Supreme Creator is eternal. It is stated that *Mahabharata* specifically refers to the sanctity in man.[104]The non- dualistic approach of Hindu philosophy was accepted by the *Advaita* School which found that there was essential unity in all variety of life forms by advocating the principle of *Brahman*[105]. This can be found to be a challenge to Cartesian thinking of mind-body dualism. *Taittriya Upanishads* and *Katha Upanishad* also identify *jiva* (soul) and *Brahman* as fundamentally identical.[106]It is found that our body is just like a garment, the soul atman is the crux of our life[107]. Every soul *atman* needs a body

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The seers too became like that even amongst men those who knew, became the same. Realising self as Brahma, the seer Vamadeva said, -"I became the sun , I became Manu".

Even now, if any one obtains right knowledge as such, he became all these.

First chapter, Brahman IV, verse 10 *Brhadaranyakopanisad, Id.,* at p.341.

[102] In Brihadaranyaka Upanishad it is being stated that whoever worships a deity thinking that one and himself as another ,he does not know , See 1.4.10

[103] Svetasvatara Upanishad explains that God is the ultimate cause of all causes. It is He, the Supreme person who pervades the whole world with his consciousness and power. He is the controller of time, through which the creation itself unfolds. It is He who sets the creation in motion and then rests peacefully, after uniting the individual jiva with the principles of matter. He is immortal and monitors every living being as the supersoul in the core of everyone's heart. See Sixth Chapter verses 1-5Svetasvatara Upanishad. *Id*., at pp.116-120.

[104] *Guhyambrabrahmatadidanvobravimi*

Na manusatsresthataram hi kinchit" (I tell you this, the secret of the Brahman: there is nothing higher than man' Mahabharatha quoted in S Radhakrishnan & PT Raju (Eds.) , *The Concept of Man: A Study on Comparative Philosophy,* Harper Collins, India (5th edn.,2004) p.1

[105] "Do not waste your efforts to win the love of or to fight against friend and foe, children and relatives. See yourself in everyone and give up the feelings of duality" Text 26 of *BhajaGovindam by SripadShankaracharya*Available at www.stephen-knapp.com/bhaja_ govindam.htm (visited on 22-7-2007)

[106] See Taittriya Upanishad II.2.1,II.7.1, and in Katha Upanishad2.3.2. The Tree of Life which is rooted in Brahman is discussed in Chapter2, section3

[107] "*vasamsijirnaniyatnavihayanavanigrhnatinaro, parani*

Tathasarisanivihayajirnayaanyanisamyatinavanidehi"

As a man casting off his worn out garments assumes others that are new, likewise casting off bodies that are worn out, the embodied one takes to others that are new."

to purify itself from the actions (*karma*) it did as a result of which it has impurities in its present manifestation. Thus in the cycle of birth and death every action (*karma*) has an impact on our soul and not our body[108].Thus our manifestation as a being or as human being depends on our actions. Man is considered as the supreme mode of manifestation of all earthly beings since man has the ability to liberate (from the cycle of birth and death by attaining *moksha*) himself through conscious effort taken by him[109].*Moksha* can be attained by him, by leading a virtuous life (in the path of *dharma*). *Karma* has got an impact on our liberation of *Atman* from our physical manifestation of life. Hence what we can decipher from this is that all life forms have in them the divine spark, in order to realisethis the human manifestation is the best but that 33ranscenden is also conditional in the sense that man can attain liberation only based on his deeds. All the different schools of thought in Hindu philosophy stressed on self-realisationconcept[110]. The non-orthodox school of thought like the *Carvakas*, reject the idea of transmigration of the soul as mystical. They were naturalist, hence held that all things happen by nature and come from nature.[111] The *Carvakas hold* the view that man is a product of four elements namely earth, water, fire and air. When particles of these elements come together and constitute a particular structure, life and consciousness emerge; and when particles are separated life and consciousness disappear. Thus it is found that the ancient Indian literature is a

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SamkhyaYoga,Chapter II,Verse 22, in *Bhagavad Gita,* NityaChaitanyaYati (Ed.), Nataraja Guru (trans.), DK Print World Pvt. Ltd., India (1993), pp.51-52.

[108] "The living entity in the material world carries his different conception of life from one body to another as the air carries the aromas". Purushottama Yoga, Chapter XV verses 8-10, *Id.,*at pp.331-335.

[109] Chapter III, verse 16 *Bhagavad Gita,* illustrate that by nature's law this human form of life is specially meant for self realization in either of the three ways namely Karma Yoga, Jnana Yoga or Bhakti yoga.

[110] The Vedic schools of thought such as the Nyaya, Vaisesika, Samkhya, Yoga, Mimamsa and Advaita Philosophy accepted the concept of Moksha.

[110] "Fire is hot, water cold

Refreshingly cool is the breeze of morning ,

By whom came this variety?

They were born of their own nature."

Madhava Acharya, *Sarva- Darsana-Samgraha- Review of the different systems of Hindu Philosophy*, E.B Cowell & A. E. Gough (trans.) , available at http://www.gutenberg.org/files/34125/34125-h/34125-h.htm (visited on 6-6-2013).

blend of philosophy ranging from materialistic conception of man extending to transcendental plane[112]. Swami Vivekananda while explaining the advaita philosophy tried to distinguish between the thinking of the east and west thus

"I am a spirit and not matter. The religion of the West hopes to again live with their body. Ours teaches there cannot be such a state. We say freedomof the soul instead of salvation."[113]

This it is found to be true since in biblical narratives on death we cannot find the principle of transmigration of the soul or the ultimate freedom of the soul but we find that after death, the judgment[114] comes from god whether we are to merge with the eternity in paradise[115] or go to hell for our evil deeds[116] . However one can observe that all the major religions in the world accept the fact that all creations were made by Him, the lives of those created were sustained by Him and the life of all that is created by Him ends in Him. Hence it can be inferred that the concept of sanctity of life is universally accepted..But then the questions which comes up in mind is when God becomes the creator, preserver and protector, to what extent man can interfere with this process and to what extent man can adorn His role?, to what extent man can predict that his actions would always yield benefits to the mankind? No positive answer emerges for the man to suggest that he can be successful than Him, the Almighty.

2.3.4 Jainism

Sanctity of life as an absolute value came to be recognised by Jainism. It embodies within itself the concept in all its dimensions- "*We must no*t *take life*

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[112] *supra* n .105 at p.237

[113] Lecture on "Divinity in Man*"* ,Ada Record, February 28, 1894, *The Complete Works of Swami Vivekananda, v*ol. II ,Advaita Ashrama Pub., Calcutta (1st edn.), p.477

[114] "And just as it is destined that men die only once, and after that comes judgment" Hebrews 9:27 *The Living Bible*, Tyndale House Pub, Great Britain (1st edn., 1972), p.1382.

[115] "For God loved the world so much , that He gave His only Son, so that anyone who believes in Him shall not perish, but have eternal life" John 3:16. *Id., at* p.1181.

[116] "Don't be afraid of those who can kill only your bodies- but can't touch your souls! Fear only God who can destroy both soul and body in hell". Matthew 10:28. *The Living Bible*, *Id.*, at p.1061.

[117]"which is the negative side of the concept of sanctity, the positive sanctity which contains the principle that "*we must help keep existing life alive*"[118] and the prescription of human actions on the basis of sanctity in order to achieve the maximum sanctity of life by containing injunctions for its followers in the form of –not destroying any life forms under any circumstances[119] and to do whatever possible to sustain life.[120] Jains believe that all life is sacred [121]without any distinction between animal life[122], insect life,[123] microbial life and human life. This devotion to life finds expression in the precept relating to life of monk- the monk must strain his water before drinking,[124] he has to wear a gauze mask over his mouth to prevent the unintentional inhalation of innocent insects[125] , the monk is required to sweep the ground before him as he goes (avoiding the crushing of living beings by his footsteps) to tread softly for the very atoms underfoot

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[117] In SastraParigna(knowledge of weapon) it is said that knowledge is two- fold comprehension and renunciation. It says the purpose of knowledge is for the comprehension and renunciation of everything that hurts other things(Book 1, Lecture 1, Lesson 1) and in the same book (Lecture 3, Lesson 2) a direct injunction is given "He should not kill, nor cause others to kill nor consent to the killing of others". *Akaranga Sutra* available at http://www.sacred-texts.com/jai/sbe22/ index.htm(visited on 3-8-2008)

[118] "With due consideration preaching the law of the mendicants, one should do no injury to one's self nor to anybody else, nor to any of the four kinds of beings .But a great sage, neither injuring nor injured, becomes a shelter for all sorts of afflicted creatures, even as an island, which is never covered with water." Book 1, Lecture 6, Lesson 5, *.Akaranga Sutra*, *Ibid.*

[119] The six lessons of the first lecture of the Akaranga Sutra treat the actions which injure six classes of lives or souls. According to the lectures we can infer that there are numerous lives or souls embodied not only in animals , men, plants etc but also in the four elements- earth, water, fire and wind and that is not to be destroyed.

[120] The entire AkarangaSutra contains injunctions to the human beings to condition their actions and conduct so as to conserve the life of all beings.

[121] "All beings are fond of life like pleasure, hate pain, shun destruction, like life, long to live. To all life is dear". Book 1, Lecture 2, Lesson 3 *Akaranga Sutra, Ibid.*

[122] Book1, Lecture 1, Lesson 6 *Akaranga Sutra, Ibid.*

[123] Book 1, Lecture 1, Lessons1-6 of Akaranga Sutra lays down the mandate to protect all life forms. *Ibid*

[124] "Thus I say. There are beings in water, many lives; of a truth, to the monks water has been declared to be living matter. See! Considering the injuries (done to water bodies), those acts (which are injuries, but must be done before the use of water, eg straining) have been distinctly declared. Moreover he (who uses water which is not strained) takes away what has not been given (i.e., the bodies of water lives) ....." Book 1, Lecture1,Lesson3 , *Akaranga Sutra, Ibid.*

[125] He should first inspect his mouth cloth, then his broom and taking the broom in his hand he should inspect his cloth. See Lecture 26 "*Uttaradhyayana"* available at https://archive.org/ stream/sacredbookseast17mulluoft/sacredbookseast17mulluoft_djvu.txt (visited on 16-5-2008)

harbours thousands of minute life forms[126].

Jainism like Buddhism, does not believe in a creator god but lays stress on eternal universe governed by natural laws[127] .Jainism finds in essence we all are one but this one underlying unity manifests in many diverse life forms, hence Jainism advocates looking upon others as we look upon ourselves[128] .Unlike Buddhism , Jainism believes in souls and believes that even the tiniest of insects have an immortal soul (*jive*) that is continually incarnated within the bounds of *karma*.[129]Jains, believe that all lives share a common soul and that life can be found even in the wind, in the rocks, and earth. The principles of *anekantavada* (non-absolutism), *Parasparopagrahejivanam*(interrelatedness of all forms of life) and *ahimsa* convey the message of sanctity of life. Thus it is found that Jainism has embodied within itself the respect for nature and all its beings in it which supports the principle of deep ecology. The *Tathvartha Sutra*[130] states the principle of *Parasparopagrahejivanam* which implies that all life is connected together by mutual support and interdependence [131].It indirectly conveys the message that just as we want to live, so do all beings big or small. *Acarang sutra* conveys the message of essential unity in all life forms. Thus it is found that the respect for all life forms is the central tenet of every principle found in jain

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[126] "A monk who forms no resolutions and is possessed of carefulness should wander about, giving no offence to any creatures. To no living beings, whether they move or not, whether above or earth, by putting a strain upon them by his hands or feet." Book 1, Lecture 10, *Sutrakritanga, Ibid.*

[127] In the *Akaranga Sutra*, Book1, Lecture1, Lesson1, available at www.sacred-texts.com/jai/sbe22/sbe2217.htm (visited on 9-8-2008) creation of the universe is not attributed to any creator.

[128] " As it would be unto thee, so it is with him whom thou intendest to kill

As it would be unto thee, so it is with him whom thou intendest to tyrannise over

As it would be unto thee, so it is with him whom thou intendest to torment. In the same way (it is with him) whom thou intendest to punish and to drive away. The righteous man, who lives up to these sentiments, does neither kill nor cause others to kill (living beings)". Book 1, Lesson 5, Lecture5 *Akaranga sutra, Ibid.*

[129] "The immovable beings are changed to movable ones, the movable beings into immovable one's, beings which are born in all states become individually sinners by their actions" Book 1, first lesson, lecture8 *Akarangasutra ,Jainasutras,* vol. I , Hermann Jacobi(trans.) , Sri Satguru publications ,India (2003), p.81.

[130] See *Tattvatara Sutra* chapter 5 :21, available at www.jainsquare.com/sutrascripture/tattvarthasutra (visited on 10-8-2008)

[131] Chapter II of Tattvartha Sutra, the coexistence of variety of jivas is explained and the rest of the chapters convey the principle. See Dalsukh Malvania (Ed.) ,*Commentary on Tattvarth Sutra of Vacaka Umasvati* , K.K. Dixit (trans.) , LD Institute of Indology, India (1974), pp.64-65.

teachings [132].Jainism recognises divinity within each soul , hence respects not only the humans as having divine soul but all living beings. Jainism not only recognises human rights but also goes one step forward recognising the rights of all beings for ensuring a peaceful coexistence. To Jains, "*Ahimsa Parmo Dharma*" Non violence is their supreme religion [133].The negative connotation given to *Ahimsa* is non injury[134]while the positive side of non violence is the reverence for life which is very wide, deep and encompassing[135].

For Jains, even a clod of earth,[136] a drop of water[137], or a small piece of charcoal[138] is to be venerated and respected since in these exist and depend the countless (*Asankhya*) invisible *Nigod* (one body) globules who have souls and have the cycle of birth and death. In the *Uttaradhyayana sutra*, it has been described that all these tiny sub-microscopic life forms have life and hence the precept of Ahimsa applies to them also[139]. The existence of sub microscopic beings with a life span has been scientifically confirmed today[140]. Jainism emphasises on self or individual effort to move the soul towards the divine liberation. The soul which conquers the inner enemies and achieves the state of Supreme Being is called *Jina*or the

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[132] "The Arhants and Bhagavats of the past, present and future, all say thus, speak thus, declare thus, explain thus-all breathing, existing, living, sentient creatures should not be slain, nor abused nor tormented nor driven away" Book1, Lecture4, Lesson1, *Akarangasutra*, *supra* n.129.

[133] No original religious script in Jainism contains this verse although certain jain temples contain it.

[134] Even at the state of Itwara(religious death) the prescription is that while in deathbed also he has to be careful that he should not kill any being by lying down on the ground. See, Book1, Lesson6, Lecture7 *Akarangasutra. Ibid*

[135] "Knowing the connection of the world .Look at the exterior (world from analogy with thy own) self; (then) thou wilt neither kill nor destroy (living beings);viz out of reciprocal regard (well examined he does no sinful act. What is the characteristic of a sage 'Recognizing the equality (of all living beings), he appeases himself" Book1, Lecture3, Lesson3, *Akarangasutra supra* n.117

[136] Book 1, Lecture1, Lesson 2, *Akarangasutra, Ibid.*

[137] Book 1, Lecture1, Lesson 3, *Akarangasutra, Ibid.*

[138] Book 1, Lecture1, Lesson 4, *Akarangasutra, Ibid.*

[139] In the 36 lecture of Uttaradhyayana Sutra we find the classification of different life forms and the injunction of ahimsa towards these beings. See also Uttradhyayana Sutra, Lecture 36 , *Jainasutra,* vol. II, Hermann Jacobi(trans.) , Sri Satguru Publications, India (2003) pp.206-232.

[140] In fact, scientists have confirmed that human body itself is a host for several bacteria and there is an interdependence of these organisms and the man himself. See Margaret J., McFall-Ngai, Brian Henderson, Edward G. Ruby, *The influence of Cooperative Bacteria on Animal Host Biology*, Cambridge University Press, New York (2005), p.13.

conqueror[141]. Thus when the soul is freed from *karma* it attains divine consciousness. This means to achieve the state of divinity is following the path laid down in the precepts[142]. However the jain literature, finds an unique capacity within man to correct his *karma* and achieve the divine heights through self-effort .Thus any action of man is based on how far it will serve the cause of other beings and alleviate the suffering of his fellow men. However the Jain prescriptions and austerities to be followed clearly shows that life per se is to respected and protected and any sort of interference with life even for the larger interest is considered as sin. Jainism though does not need a god for achieving sanctity, yet believes in the sanctity of entire existence.

2.3.5. Buddhism

The concept of sanctity of life assumes a unique explanation under the *Buddhist* teachings. To Buddhist, *Kamma* (or *karma* in Sanskrit) meaning volitional activity whether mental, verbal or physical determines the form of life and' being ' , a never ending process (even death cannot terminate this process) determines the way to nirvana or final state of perfection [143].Buddhist do not consider or accept the fact that human life is a spark of god's glory nor the divine creation of man only but accepts the rarity and preciousness of human birth[144] since humans only have the potential to terminate the cycle of life and death[145](samsara) and attain *nirvana*.

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[141] In the *Akarangasutra, i*n the fourth part, sixteenth lecture on liberation, the state of complete liberation is stated. The Gina has been stated as the "Knowing One". *supra* n. 135.

[142] I Right Knowledge; II Faith ; III Conduct and IV Austerities; this is the road taught by the Ginas who possess the best knowledge *Uttaradhyayana* Sutra Lecture 28, (The Road to Final Deliverance) *supra* n.125.

[143] "All that we are is the result of what we have thought: it is founded on our thoughts, it is made up of our thoughts. If a man speaks or acts with an evil thought, pain follows him as the wheel follows the foot of the ox that draws the carriage"-verse1 *c*hapter1- Twin verses The Dhammapada , F Max Muller (Ed. & trans.), *Sacred Books of the East*', vol. X ,Clarendon press , Oxford (1881), p.3.

[144] "Difficult (to obtain) is the conception of men, difficult is the life of mortals difficult is the life of mortals, difficult is the hearing of the True Law, difficult is the birth of the Awakened (the attainment of Buddhahood). verse 182, Chapter XIV, *The Dhammapada , Id.,* at p.49.

[145] "Give up what is before, give up what is behind, give up what is in the middle, when thou goest to the other shore of existence, if thy mind is altogether free, thou wilt not again enter into birth and decay" verse 348 , Chapter XXIV, *The Dhammapada*, *Id.,* p.80

[146]Thus the content of the life process, according to Buddhism is an unending cycle of growth and decay, integration and disintegration and this is believed to be applicable to the whole range of sentient beings from the tiniest insect to man and this cycle of birth and death can be terminated based on the karma.[147] Every human being is believed to be endowed with the "Awakening mind" (due to his ignorance and crave for material desires he may not know this) or *Bodhicitta*[148] and this signifies the unique human capacity for self-transformation and attaining divinity. Moreover it points out the capacity of man to critically think for oneself and guide one's own without the divine intervention[149]. Thus man himself is the standard for moral and ethical responsibility which seems akin to humanism. Life according to *Buddhism* is not an absolute value to be preserved at all cost by man but in fact it stressed on transitories of life.

Buddhism finds sacredness in all living beings without any distinction i.e., a state of equal sanctity and equal worth but finds the human role important since man's potential to achieve the direct path to *nirvana* gives sanctity and prominence to his life. In the wheels of life the place which is allocated to the realm of man is in the third cycle. Man is depicted at the centre of the cycle, with god's and titans at the north, spirits in the south, animals in the west and revenants in the east[150]. This symbolises that man can only experience both happiness and suffering without being addicted to any experiences and has got the capacity to free himself from the round of existence[151].The concept of life is depicted in the *bhavachakra* .It is revealed that the whole beings in the universe in the web of

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[146] Nirvana means Nir means leaving off Vana means the path of rebirth. "Him I calla Brahmana who knows the destruction and return of beings everywhere, who is free from bondage, welfaring (Sugata), and awakened(Buddha)" verse419, Chapter XXVI , *The Dhammapada, Id.,* at p.89

[147] The four noble truth about the cause of the cycle of birth and death are discussed in Rohitasasutta, Dhammacakkappavattanasutta of the Suttapitika.

[148] Chapter XIV verses179-195 *The Dhamapada* contains an enumeration of the qualities of the "Buddha- TheAwakened"and the state of Boddhicitta.

[149] The way to the highest realization is the eight fold path. It consists of right views, right resolve, right speech, right conduct, right livelihood, right effort, right mindfulness and right concentration of mind.

[150] Bhavacakra or wheels of life is a symbolic representation of samsara.

[151] Pinit Ratanakul, "The Buddhist Concept of Life, Suffering and Death and Related BioethicalIssues", 14 *Eubios Journal of Asian and International Bioethics* 141 (2004).

samsara, and the cycle of birth and death do exist in all beings. The unique status of humans is that he can get rid of this cycle of birth and death by overcoming ignorance, attachment and aversion and thereby conditioning his actions or karma. Thus Karmic actions contribute to the birth or attainment of liberation and determines the nature of species which one may be born be it as an animal, bird or man. The Buddhist philosophy stressed that, the fact of being born as a human being is itself dependent on actions done.

Sanctity of life is recognised and emphasised in the first of the five precepts (*pan`cas`ila*) which is a precept which directs to refrain from destroying living creatures[152]. Buddhist belief in sanctity is not grounded in divine origin but in spiritual destiny[153]. The *dasasila* (ten precepts),[154]begins with the resolution stressing on sanctity of all life forms and contains resolution to abstain from depriving a being of its life(*pan~ali~pata*). Moreover it can be found in the Buddhist literature relating to man's responsibility to alleviate suffering[155].

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[152] "All men tremble at punishment, all men fearth death, remember that you are like unto them, and do not kill, nor cause slaughter." verse 129, Chapter X *The Dhammapada, Id.,* at p.36.

[153] Roy W,Perrett, *"Buddhism*, *Euthanasia and Sanctity of Life*", 22 *Journal of Medical Ethics* 309 (1996) .

[154] The Ten precepts include the eight and five precepts (basic precepts to be followed). Some sects of Buddhism do not follow the ten precepts entirely. The First precept in the 10 precepts begins with the resolution" I Undertake the precept to refrain from destroying living creatures"(SuttaPitaka).

[155] "Upon harming another for one's own sake,
One is burn in hells and the like;
But upon afflicting oneself for the sake og others,
One has success in everything. (verse 126,ChapVIII)

The desire for self aggrandisement
Leads to a miserable state of existence, low status and stupidity
By transferring the same desire to somebody else;
One obtains a fortunate state of existence, respect and
wisdom . (verse. 127 , Chap. VIII)

By ordering another around
For one's own sake , one
Experiences the position of
Servant and the like;
But by ordering oneself around for the sake of others, one experiences
The position of a master of life. (verse.128, Chap. VIII)

Thus unlike other religions which stress on divinity in man Buddhism tries to lead man to divinity. Moreover it does not stand in the way of any developing scientific technology if it is for alleviating the sufferings of all beings. But it is found that the religion itself places the responsibility in man for all his actions on the basis of how much it may lead one to emancipation at the metaphysical plane.

2.3.6 Zoroastrianism

The sacredness of life per se is found in the teachings of the Zorastrians. It advocates veneration to life based on the theory of divine creation. To Zorastrians, creation is the act of god, hence recognises divinity in all creations[156]. It believes in the immortality of human soul having neither a beginning nor an end[157].The *Faravahar*, winged symbol of Zoroastrianism represents this aspect. However, the creation and sustenance of life is attributed to the God Himself [158]i.e., *Ahur Mazda*. Humans are said to be constituted of both spiritual and material existence[159].Spiritual existence is deemed to be of prior existence. Thus man is said to be a combination of the thinking self and the corporeal self. All beings have a soul (*urvan*) and all beings are sanctified with *fravashi* (the guiding spirit)

Santideva, *A Guide to the Bodhisattva Way of Life (Bodhicaryavatara),* Vesna A. Wallace & B Alan Wallance (trans.), Snow Lion Pub, Ithaca (1st edn.), p.105.

156 Fargard I deals with the creation process undertaken by Ahur Mazda and it declared him as the creator of all that existed .*Zend Avesta* , F Max Muller (Ed.), The *Sacred Books of the East* vol. IV , James Darmesteter (trans.), Clarendon Press, Oxford (2nd edn,1895) ,pp.1-10.

157 "And to this (man, His chosen saint), Ahura Mazda will give both the two (greatest gifts,His). Universal Weal and Immortality, by means of His bountiful spirit and with His Best Mind, from (the desire to maintain His) Righteous moral Order in word and deed and by the (strength and wisdom) of His sovereign power (established) in Piety (among his folk)."- 11 This Gatha consisting of Yasna XLVII-L explains the bountifulness of Ahura Mazda. *Zend Avesta*, available at http://sacred-texts.com/zor/sbe23/index.htm (visited on 16-2-2015).

See also ZamyadYastXIX *Zend Avesta* , Max Muller & Max Fausball (Eds.),*Sacred books of the East* ,vol. XXIII, James Darmesteter (trans.), Clarendon Press, Oxford (1882), p. 290 speaks of the immortality of the soul.

158 "I am the Keeper. I am the Creator and Maintainer; I am the Discerner, I am the most beneficent Spirit" OrmazdYast. Also in Yasna XLI there is a prayer to Ahura personifying him as the king, the life and the rewarder, *Zend Avesta* , *Ibid*

159 "And therefore, O Great Creator, The Living Lord! (inspired) by Thy Benevolent Mind, I approach You (and beseech of Thee) to grant me (as a bountiful gift) for both the worlds, the corporeal and (for that) of mind, those attainments which are to be derived from the (Divine) Righteousness, and by means of which (that personified Righteousness within us) may introduce those who are its recipients into beatitude and glory'.Gatha3, Yasna XXVIII, *Zend Avesta, Ibid* . See also Max Muller & Max Fausball, (Eds.) , *Sacred Books of the East* vol. XXXI, LH Mills (trans.) Clarendon Press, Oxford (1886), p. 18.

having the transcendental divine essence[160]. Hence its teachings convey the message of reverence to all creations. The human soul is found to be a seat of perpetual war and struggle between the spirit of goodness or light (God) and the spirit of evil (*Ahirman*). This phenomenon is said to prevail in the entire universe. Ultimately in the struggle the god himself or goodness will triumph[161] but for this, each human being is entrusted with the responsibility to assist the God in this endeavour so as to bring about eternal peace among everything that exists[162]. The religion recognises the existence of the moral and ethical opposites of good and bad, right and wrong in man which needs a careful choice making by man based on his free will[163]. However, the human being is made responsible for the choice he makes and thus accountable in the life and after life. Thus the fate of the soul of the man depends on his thoughts, words and deeds[164]. This is akin to the *karma- moksha* principle in Hindu philosophy. *Fravashi* which is the divine spark is recognised to be in every part and particle of those created. The path to heaven is based on how far man obeys and conforms to the universal order (*asha*)[165]. Thus it postulates the beginning of life as being divine and likewise recognises the end of life in god himself[166].

The Christian theological doctrine of *Image of God* has not been accepted

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[160] Yasht13- TheFarvardinYast contains the attributes of fravashi. The Fravashi is the inner power in every being that maintains it and makes it grow and subsist. In this Yast ,in the first part1-84, there is a glorification of the powers and attributes of fravashi in general. *Zend Avesta*, *supra* at n. 56 at pp. 179- 200.

[161] "Thus are the primeval spirits who as a pair (combining their opposite strivings), and (yet each) independent in his action , have been famed (of old). (They are) a better thing, they two, and a worse as to thought, as to word and as to deed. And between these two let the wisely acting choose aright (Choose Ye) not (as) the evil doers."-The Doctrine of Dualism,Yasna XXX, *Zend Avesta , Ibid.* n. 159 at p.29.

[162] "Zarathustra chanted aloud the Ahuma- Vairya ' The Will of the Lord is the law of holiness; the riches of Vohu – mano shall be given to him who works in this world for Mazda, and wields according to the will of Ahura the power he gave to him to relieve the poor".Fargard XIX Vendidad, *ZendAvesta, Ibid.* n.160 at p.204.

[163] While analyzing Yasna 30.5, Yasna31.2 ,Yasna 10 it very clear that they believed that righteousness and evil pervade in all creations and in the entire universe.

[164] "Amazda – worshipper I am, of Zorathustra's order; (so) do I confess , as a praiser and confessor, and I therefore praise aloud the well- thought thought, the word well spoken and the deed well done"- Yasna XII, *Zend Avesta, Ibid.*

[165] Yasna XXVIII , Yasna XLVII speaks about the righteous order or asha

[166] Yasna 31 conveys the message that life begins in him and ends in him.

by these thoughts though they accepted the involvement of god in creation and accepted that the creation process was undertaken in six phases. This is evident from *Khordeh Avesta* wherein it is stressed that God is formless[167]. However, it stressed on the responsibility of man to condition his actions and thoughts for alleviation of sufferings. It recognised the unique quality in man wherein man alone had the capacity to control his actions thereby leading to the path of eternity. Again the selection of a human being (*Zoraster*) as the most appropriate being to convey His message to all His creations throws light on the uniqueness of human life.

Any human action thus, should be justified according to, how far it respects the sanctity of life and how far it alleviates the suffering of others. Hence any interference with life be at the scientific level, is judged on the basis of the above two criteria. In this sense, it is found that the teachings of Zoroastrianism are more adaptable to new scientific developments.

2.3.7 Sikhism

Everything that has got life is sacred according to Sikhism[168]. Thus the central tenet of Sikhism is the concept of sanctity of life. However it regards human life as the highest form of life. It postulates that if human life has intrinsic worth, it is because it is a gift of god[169]. Moreover it believed that since we are in this body (human) that we can attain liberation[170].

Thus human life is believed to have utmost value due to two factors-

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[167] "What is the form of our God?

Our god has neither face nor form, colour nor shape nor fixed place. There is no other like Him; he is Himself singly such a glory that we cannot praise or describe Him; nor our mind comprehend Him." Khordeh Avesta – a conversation between Zarthosti master and pupils excerpted in Dadhabhai Naoraji, *The Parsee Religion,* available at https://archive.org/details/cu 31924031767779 (visited on 5-11-2014).

[168] "All living beings are Yours - You are the Giver of all souls". Section 03- So Purakh- part 001 *Shri Guru Granth Sahib,* available at http://sacred-texts.com/skh/granth/gr03.htm (visited on 12-9-2008).

[169] "To act without understanding is to lose the treasure of human life". Section 05- Siree Rang- part 020, *Shri Guru Granth Sahib, Id.*

[170] "Aasaa, Fifth Mehl:

This human body has been given to you.

This is your chance to meet the Lord of the Universe." Section 04- Sohila- part 001 *Shri Guru Granth Sahib, Id.*

(a) Human life carries within it, the spark of divine,[171] since God is the creator, preserver and protector[172].

(b) It is through human life alone that the soul gets liberated.

The approach of Sikhism is eco-centric in the sense that it respects nature[173]and believes in peaceful coexistence of all species,[174] since such conformity of man with nature is the divine design of god for man[175]. Thrusting on the theory of reincarnation, it lays down that the soul before attaining human form would also have transmigrated into animals, plants, trees, rocks, mountains, demons, ghost etc. The reason for transmigration of soul is based on karma.[176] It is the determinant for all the imperfections and sufferings in life[177] and the prominent factor which determines the liberation of the soul[178]. However it recognises human form as an important phase in the evolution of a human being

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[171] "Amongst all is the Light- You are that Light

By this illumination, that Light is radiant within all."Section 4- Sohila-part 002 *Shri Guru Granth Sahib, Id,n. 167.*

[172] "All beings and creatures were created by You

Without You, there is no other , O Creator

You are my Support and my Protection." Section 06- Raag Maajh- part 014 *Shri Guru Granth Sahib, Id.*

[173] "The One Lord is contained in the water, the land and the sky". Section 07- Raag Gauree- part 044 *Shri Guru Granth Sahib, Id.*

[174] "The names and the colors of the assorted species of beings were all inscribed by the Ever-flowing Pen of God." Section 01- Jup_part003 see also Siree Rang Section 05- part016,*Shri Guru Granth Sahib, Id.*

[175] "He created the world, with its various colors, species of beings and variety of Maya.

Having created the creation, He watches over it Himself, by His greatness". Section 01-Jup-part0, 6*Shri Guru Granth Sahib, Id.*

[176] "O Nanak, the karma of past actions cannot be erased.

Beasts, birds, demons and ghosts-in there many ways the false wander in reincarnation". Section 25- Raag Maaroo- part 017 *Shri Guru Granth Sahib, Id.*

[177] "The blessings of this human life has been obtained, but still, people do not focus their thoughts on the Name of the Lord

Their feet slip and they cannot stay here any longer. And in the next world, they find no place of rest at all.

This opportunity shall not come again. In the end, they depart, regretting and repenting." Section 05-Siree Raag- part 015 *Shri Guru Granth Sahib, Id.*

[178] "One who departs with virtue and self-discipline is not struck down and is not consigned to the cycle of birth and death". Section 05- Siree Raag-part 063 *Shri Guru Granth Sahib ,Id.*

(at the metaphysical plane) towards complete god – centred harmony[179]. Death is seen as an opening to another life[180]. Advocating equality of everything that exist[181], it stresses on compassion[182]. All actions are judged on the basis of how far it alleviates sufferings. The very purpose behind the life of a man as per the scriptures is establishment of the harmonious relationship with the Supreme soul[183].

Sikhism gives prominence to duties, hence believes that the human body is given to man by god [184] and therefore a Sikh has an obligation to preserve it and equally has the obligation not to harm others. It believes that though human body is perishable, the soul is eternal. The soul is a part of god [185]and hence it aspires to reunite with god. Just as Zoroastrianism, it says that God is formless[186], timeless

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[179] "This human body is so difficult to obtain; it is only obtained by great fortune

Those who do not meditate on the Naam , the Name of the Lord are murderers of the Soul."Section 07- Raag Gauree – part 038, *Shri Guru Granth Sahib, Id.*

[180] "They die and die, over and over again, only to be reborn, over and over again." Section06- Raag Maajh-part 022*, Shri Guru Granth Sahib , Id.*

[181] "Out of the same clay, the elephant, the ant and the many sorts of species are formed. In stationary life forms, moving beings, worms, moths and within each and every heart, the Lord is contained."Section 24- Raag Maale Gaouura- part005*, Shri Guru Granth Sahib, Id.*

[182] "Do Seva- Selfless Service, follow the Guru's Teachings and vibrate the Lord's Name, Har, Har ,Har" Section 7-Raag Gauree-part026*, Shri Guru Granth Sahib, Id.*

[183] "Gauree Gwaarayree, Fifth Mehl

In so many incarnations, you were a worm and an insect

In so many incarnations, you were an elephant, a fish and a deer

In so many incarnations, you were a bird and snake

In so many incarnations ,you were yoked as an ox and a horse

Meet the Lord of the Universe- now is the time to meet Him

After so very long, this human body was fashioned for you."Section7- Raag Gauree- part026, *Shri Guru Granth Sahib, Id.*

[184] "Maajh , Fourth Mehl:

The Lord is my mind, body and breath of life". Section 06- RaagMaajh-part001 *Shri Guru Granth Sahib ,Id.*

[185] "The Guru has given me this One understanding:

There is only one, the Giver of all souls. May I never forget Him".Section1- Jup-part002 *Shri Guru Granth Sahib, supra* n.167.

[186] "Whatever pleases You is the only good done,

You, Eternal and Formless One". Section 1- Jup- part004 *,Shri GuruGranth Sahib ,Id.*

and universal.[187]The liberation from the cycle of birth and death from different life forms is the basis of the Sikh understanding of the goal of life. The religious injunction to alleviate suffering recognises the principle of sanctity of life. Hence according to Sikhism any intervention by scientist with human life or life per se would be judged on how far it respects the sanctity of life principle.

All the religions of the world perceive life as such as having intrinsic worth rather than instrumental value. Religious thoughts hold life as sacred on two grounds-

a) That life is a gift from god and hence any intervention with it is an intervention with the Divine Will.

b) That life per se is a reflection of the divinity Himself manifesting Himself in all beings.

The former represents the western view on life and the latter represents the eastern. Christianity, Islam etc view life as sacredly ordained and having been created to carry out the Divine will. The Eastern religions like Hinduism, Buddhism, Jainismetc convey the idea that all sentient beings have value and that the divine is imminent in the creation and not separate from it. This is in contrast to the western religious thoughts, wherein sharp distinction is made between humans and the rest of the beings and the transcendental god is viewed as separate and different from the being created. Some of the prominent religions in the east believe in the transmigration of the soul, reincarnation theory and the principle of final liberation of the soul. Treating liberation of the soul and attaining divine status as the cardinal purpose of life, it proceeds to hold that human life is unique and special in the sense that it has got the capacity to liberate and emerge with God in the transcendental plane. The Christian and Islamic thoughts recognises the uniqueness of human life right from the beginning i.e., from the creation process itself wherein there are specific description of uniqueness of human life as

[187] "One Universal Creator God. The Name is Truth. Creative Being Personified. No fear, No Hatred.
Image of the Undying, Beyond Birth, Self Existent. By Guru's Grace-
Chant and Meditate." Section01- Jup- part, 001 *Shri GuruGranth Sahib, Id.*

divinely planned and implemented by the divine creator, thereby stressing specifically on sanctity of human life. The distinction between human and non – human life is made in western religious teachings and prominence is given to human. Such a sharp distinction is not made in the east. However there is a total unity in all the religious thoughts in the world on the sanctity of human life , since all teachings agree to the fact that from the beginning to the end of human life or life per se there is an active participation (or an invisible hand) of an Omnipotent source. Thus it can be inferred that all the religions in the world accept the concept as universal.

All the religions in the world treat sanctity of life as an absolute concept. They perceive life to be divinely ordained and hence propose the idea of inviolability of life. Though the eastern outlook on this is with regard to treating life per se as inviolable, the western outlook is not to that extent stringent with regard to inviolability of life of other beings except man. Human life is treated as sacred and hence inviolable. This outlook of the west is clearly visible with regard to issues like abortion, euthanasia, capital punishment etc However the negative connotation to the concept of sanctity of life that *We must not take life* and the positive connotation that *We must help keep existing life alive* though has its roots in all the religious dogmas, large amount of difficulty is faced when practical issues come up[188]. For example, medical termination of pregnancy becomes inevitable when foetus suffers from abnormalities in which case the negative sanctity requirement cannot be complied with. Thus we find that there are grey areas where the religious doctrine cannot be applied with, in its absolute sense. Hence a detail enquiry on the concept is further necessitated. However it is found that all the religions advocate that the presence of divinity in man can be perceived by man

When he recognises that the divinity is present in his fellow men also. The term sanctity of human life not only recognises the inviolable quality and intrinsic worth of man but also it embodies the principle that all human lives is divinely

[188] Available at http://rocket.csusb.edu/~tmoody/191S12%20belshaw%20ch.%202.html (visited on 23-9-2009).

ordained without any distinction, hence the respect for the life of fellow beings is the divine mandate.

2.4 Scientific Affirmations and Challenges to the Concept of Life

Questions relating to causation of life and its sustenance had been a constant piece of inquiry with regard to the study on the concept of life. Theological explanations to why human life has got worth and the justification for it was not based often on observable facts and failed to prove the human mind. This way of understanding was largely due to the intellectual development in the age of enlightenment during the 17th century especially in Europe which is known as the age of reason. This period emphasized on the relevance of reason and challenged ideas based on traditional dogmas and faith unsupported by proof. Thus this period not only revolutionized human thoughts but questioned theological conceptions on sanctity being attributed to human life. These thoughts stressed that rational thoughts begin with clearly stated principles and can be tested based on clear evidence. Scientific method of analysis was able to provide some context of our understanding of life and hence the acceptance of the theories like big bang[189], a bio genesis [190] and evolution[191]. Thus it lead to discoveries overturning traditional conception of sanctity being attributed to human life and thereby introduced new perspectives on nature and man's position within it. In fact thinkers like Francis Bacon were of the view that superstitions and idols tend to beset the mind and prevent it from acquiring accurate understanding of life. Thus philosophical thinking which attributed divine intervention as cause behind the worth of human got displaced with scientific method of inference and deductions. The speculative nature of inquiry into the life of man was the result of protestant reformation which questioned religious prerogatives in the creation and

[189] Big bang theory is the cosmological theory on the early development of the universe. According to the theory, the universe was originally in an extremely hot and dense state that expanded rapidly. This expansion caused universe to cool and resulted in the present diluted state that continues to expand today.

[190] Abiogenesis is the study of how biological life arose from inorganic matter through natural processes and the method by which life arose on this earth. Most amino acids called building blocks of life can form via natural chemical reactions unrelated to life.

[191] Theories relating to biological or organic evolution of organism.

sustenance of life as such. Majority of the thinkers belonging to this school of philosophy did not attribute any support to the view that human life is godly or holy since they questioned the very existence of god himself. Humanism of the Renaissance period may be seen as a reason for this kind of approach. Also this approach may be due to the Copernicus conception replacing the thinking of Aristotle and Ptolemy. The Copernicus conception of universe[192] gave a death blow to the Ptolemaic system which was similar to many theological teachings in which universe is seen to be created by god for the purpose of man. Thus the concept attributing sanctity to human life came to be questioned. Experimental findings made by Newton explaining the universal phenomenon in nature by simple discoverable laws not only added to the growing man's faith in capacity to attain knowledge but had a subversive effect on Christian notion of divine creation and salvation in Europe. The novel conception of life based on scientific analysis was undertaken by Rene Descartes. Absolute certainty was sought to be given to the existence of man rather than relying on metaphysical explanations. He established through his famous reasoning "*Cogito, ergo sumor I think*, *therefore I am'*[193] as the ultimate truth behind the existence of man. This preposition becomes true when '*I conceive it in my mind'*[194]. Thus he conceived man as an immaterial thing with faculties of intellect and will[195]. He held mind a non-physical substance with consciousness and self-awareness which is distinct from brain. The mind- body dualism of the Cartesian philosophy was distinct and the simple skeptism of one's existence proves that he exist reveals man as an

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[192] Nicholas Copernicus, On the Revolution of the Celestial Spheres, in Saxe Commins & Robert Linscott (Eds.), *Man and the Universe: The Philosophers of Science (The World's Great Thinkers)*, Random House, New York (1st edn.,1947), p.48.

[193] Rene Descartes ,*Discourse on Method,* Part IV, in Saxe Commins & Robert Linscott (Eds.), *Man and the Universe: The Philosophers of Science (The World's Great Thinkers)*, Random House, New York (1st edn.,1947), p.186. See also Rene Descartes, Principles of Philosophy, article7, part1 and Rene Descartes, Discourse on Method in Robert Maynard Hutchins (Ed.), *Great Books of the Western World ,* vol. XXXI, Elizabeth S. Haldane & G.R.T. Ross (trans.), Encyclopedia Britannica, USA (1971), p.51.

[194] Rene Descartes , Meditations II in Robert Maynard Hutchins (Ed.) , *Great Books of the Western World ,* Elizabeth S. Haldane & G.R.T. Ross (trans.), Encyclopaedia Britannica, USA (1971), pp.77-81.

[195] "But what then am I? A thing which thinks. What is a thing which thinks? It is a thing which doubts, understands(conceives), affirms, denies, wills, refuses, which also and feel" Rene Descartes*, Meditations III, Id.* at p.79.

emancipated being with reason. Thus anthropocentric vision on life as the man's ability to know himself through his own rational faculty established a strong faith on the capacity of man himself. The religious notions on sanctity also attributed great faith in human reason. The theological reasoning though placed faith in human reason as the source for knowing the divine or the reality and attaining salvation the scholars of the scientific school especially Descartes placed reliance on faith in knowing that he exist. In Part V of his book, *Discourse on Method*[196]Descartes discusses the rationality of man as the principle factor for the great divide between man and animal. The mind body conception of Descartes at times resembles the Aristotelian conception of soul - body relationship. However his conception that god exist and it is god that made man to think and have a clear distinct perception questions his attempt to give a scientific explanation to the concept of life[197].The existence of god in Cartesian thoughts was through ontological deductions [198]rather than on metaphysical explanation as we find under religious teachings. However the affirmation *I Think: I am* which Descartes made and his reasoning that god exist sounds contradictory. Cartesian thinking marked the way for application of scientific method in the inquiry on questions relating to life. Logical reasoning, inferences and deductions came to the main forefront on explanations towards any inquiry. This had an impact on philosophical thinking and critical review of old modes of thought questioning traditional belief based thoughts on evolution of humans and divine intervention in the life of man. Skeptical philosophers like Hume discussed about the "science of man"[199]or science of human nature which expanded our understanding on

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[196] Rene Descartes, Discourse on Method, Part V in Robert Maynard Hutchins (Ed.), *Great Books of the Western World,* Elizabeth S. Haldane & G.R.T. Ross (trans.), Encyclopaedia Britannica, USA (1971), p.60.

[197] Rene Descartes, *Meditations on First Philosophy: with Selections from the Objections and Replies,* John Cottingham (Ed.), Cambridge University Press, UK (1996 reprint), p.24.

[198] The argument he raises is that from Cognito I know I exist and since I am not perfect in every way, I cannot have caused myself. So something else must have caused my existence and no matter what (my parents), we could ask what caused it to exist." *supra* n.193, at p.52.

[199] " It is evident, that all the sciences have a relation ,greater or less, to human nature; and that however wide any of them may seem to run from it, they still return back by one passage or another" David Hume, *Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects,* Book I, Part 1 , L.A. Selby-Bigge (Ed.), Clarendon Press, Oxford (1896) p. 19.

human nature and laid the foundation for understanding on human senses, perceptions, passions, morality etc. This led to further philosophical discourses on morality developed by Adam Smith, Jean Jacques Rousseau and Kant and secularized theories of psychology by Locke. Scientific method of analysis further led toreligious tolerance and stress on freedom and democracy. Scientific empiricism led to questioning religious orthodoxy and autocratic trends in political societies. Thus nature came to be regarded as a complex of interacting laws governing the universe and individual human being as a part of it designed to act rationally. Thinkers like Voltaire influenced by Newtonian Laws at the same time expressing faith in god, established tolerance and concern for fellow beings. His predecessor Montesquieu was no different from this line of thinking[200]. Adam Smith in his works elucidating on human nature was of the view that the fellow feeling in humans places the status of humans in a unique plane. However he does not deny the fact that humans are selfish but stresses that man's pleasure lies in his concern for others[201]. These remarks sowed seeds for recognition of respect for the life of fellow beings. Thus it came to be understood that human equality must follow empirical knowledge. Equal human worth was recognised through scientific empirical rationalism. The views of Voltaire had an impact on the recognition of liberty and free will and were an inspiration for French revolution. Man as a rational being with equal worth to that of other human beings came to be established through philosophers who adopted this approach. However it is found that these philosophers did not negate god or religion as such but sought to give scientific explanation to life and existence of god. This might be the reason for

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[200] In his discussion on laws, he establishes that man as a physical being is an intelligent being but usually has the tendency to transgress the laws established by god. He has his own private passions and due to ignorance, he forgets his own Creator and so by laws of religion the god reminds him that he has certain duties towards all his fellow men and other beings with the help of religion. However he points out that philosophy has provided against this tendency in human by laws of morality. Montesquieu asserts that legislators have to confine man by political and civil laws his obligations towards his fellowmen.

See Baron de Montesquieu, *The Spirit of Laws,* Book I, available at http://lonang.com/library/reference/montesquieu-spirit-of-laws/ (visited on 29-9-2008).

[201] R.H. Coase, *Adam Smith's View of Man,* available at http://www.chicagobooth.edu/~/media/59F2E558F3604398BBF9518FCF3EBC9E.PDF (visited on 2-10-2008).

Voltaire suggesting that even if god did not exist it is necessary to invent it[202]. Since according to them god is a psychological necessity to the mind of man. Counter arguments also exist wherein Nehru, stressed that too much dependence on supernatural entities leads to loss of self-reliance in man[203]. However the innate connection between nature and man and the interdependent nature of humanity is visible in thoughts under the scientific school. Though philosophers like Montesquieu and Rousseau were not favouring an open scientific inquiry, their philosophies had immensely contributed to the science of politics.

Questioning scientific and technological progress but at the same timeignoring biblical account of creation and sanctity to human life , Rousseau the renowned philosopher believed in the natural goodness of humanity which led him to conceive the idea known as "*noble savage*"[204]. The interdependence of human life and the ultimate faith in human freedom was the main thrust of Rousseau's thought. Explaining that in a state of nature man acted morally and it was self-love and desire for self-preservation combined with human reason (amour desoi) that led to denigration of mankind[205]. Development of civil institutions and even scientific progress had led to moral degeneration of man and hence he advocated social contract to achieve a state wherein individuals can preserve themselves and remain free. Stressing on the need for social contract he expressed his anguish on the state of man prior to social contract thus,

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[202] Voltaire, "*Epistle to the Author of the Book -The Three Impostors*, Jack Iverson (trans.), available at www.whitman.edu/VSA/trois.imposteurs.html (visited on 3-10-2008).

[203] Jawaharlal Nehru, *Towards Freedom- An Autobiography of Jawaharlal Nehru*, John Day Company, New York (1941), pp.236-271.

[204] Rousseau had not actually used this term but in his writings he had revealed that in the state of nature men were naturally good. A discussion of this is found in his works. See Jean-Jacques Rousseau , *A Discourse upon the Origin and Foundation of the Inequality among Mankind* 18,96, R. and J. Dodsley, London (1761).

available at https://archive.org/stream/discourseuponor00rous/discourseuponor00rous_djvu.txt (visited on 3-10-2008)

[205] Jean Jacques Rousseau, The Social Contract and Discourses, BookI, in Ernest Rhys (Ed.), *Philosophy and Theology,* available at http://archive.org/stream/therepublicofpla00rousuoft/therepublicofpla00rousuoft_djvu.txt (visited on 10-6-2014).

> "Man *is born free; and everywhere he is in chains. One thinks himself the master of others, and still remains greater slave than thy."*[206]

His firm commitment to egalitarian principles and freedom influenced political thoughts in Europe and questioned religious despotism. He finds man as an individual and as a social being, thereby conceives social contract for harmonious existence. Though we find Rousseau's philosophy as such did not stress on the need for scientific inquiry on concept of life yet the philosophy could curb the general feeling that only blind faith in religion can solve human problems. The contribution of philosophies especially by Voltaire, Montesquieu and Rousseau not only questioned traditional belief systems imposed by theology but practically overthrew the political limitations it created on humans thereby advocating equality and freedom. A synthesis of the reason, nature and man [207]can be found in these thoughts which led to a wider perception on humanity. However the greatest challenge to the theological conception of sanctity of life came about with the scientific affirmation of Charles Darwin relating to his observations on natural selection. Attempts to explain the nature through explanations in nature itself was the essential attribute of his thinking and through this Darwin explained the reason behind the diversification of all organisms. The theory of evolution propounded holds the notion that all life is related and has descended from a common ancestor. Complex creatures evolve from more simplistic ancestors over a period of time. Thus it presumes life from non-life purely on descent with modification on a purely naturalistic basis or process. Genetic mutations occur in an organism's code, beneficial mutations are passed on and end result is an entirely different organism from original. The principle of natural selection displaced and questioned the religious account on evolution of human life. The concept of natural selection and theory of evolution questioned the ideas which established god as creator and sustaining force behind life and established that simple laws of nature is sufficient to explain the life of man. The divine purpose as the reason behind the creation of man was not only rejected but in its place the

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[206] *Supra* n.205.

[207] Available at www.britannica.com/EBchecked/topic/188441 (visited on 10-6-2014).

notion that man was the product of mere development from other life forms came to gain prominence. Theory of common parentage or ancestor ship displaced the religious notion that human species was a superior being. Man came to be viewed naturalistically by being placed along with other beings which include not only animals but even rocks, minerals, star clusters etc. The intellectual, moral and aesthetic powers of man were treated as a culmination of a long evolution.[208] This scientific breakthrough however was criticised by theologians as a part of viewing man as a conglomeration of cells. Attribution of value to life creates not only respect for life but also envisages notions of equality which paves way for harmonious existence. Though Darwin's findings have led to scientific progress, it is a fact it did not attribute any value to human life which is found rectified in the views of Einstein. Darwinian Conception challenged the religious notions of sanctity and hence earned great criticism from theological circles. However great change was brought to the conception of man since earlier man was viewed as a being distinct from other beings in the nature by virtue of his rational faculties, soul etc but the theory recognised man as a part of natural order, different from other beings in terms of structural complexities. Thus man became an object of scientific investigation and explanation. This enabled thinkers like Sigmund Freud to undertake the study of man and his personality which resulted in the theory of psychoanalysis.[209]

The era of scientific humanism conceived Man as a part of nature and that this is to be conceived by man himself in his mind and respect not only other beings but to be compassionate with nature as a whole. The essential understanding that apart from the structural constitution which may be scientifically evaluated or theologically examined man has an important role to play in this universe was recognised by thinkers. Albert Einstein observed thus:

> "A *Human being is a part of the whole called by us "universe" limited in time and space. He experiences himself, his thoughts and feelings*

[208] M.C. Otto, "Scientific Humanism", 3 *The Antioch Rev*. 530(1943).

[209] In his view on psychoanalysis he maintains that it is concerned with the study of one's self or one's personality.See Sigmund Freud, *General Introduction to Psychoanalysis*, G Stanley Hall (trans.) , Horace Liveright, Inc., New York (1920), p.5.

as something separated from the rest – a kind of optical delusion of his consciousness. The delusion is a prison, restricting us to our personal desires and to affection for a few persons close to us. Our task must be to free ourselves from our prison by widening our circle of compassion to embrace all humanity and the whole of the nature in its beauty. Nobody is able to achieve this completely, but striving for such achievement is itself a part of the liberation and a foundation of inner security."[210]

These views dispel the common notions that science is devoid of value considerations and scientific method does consider value systems.

One of the greatest attacks against the concept of sanctity of human life based on Christian assumptions came from the writings of Friedrich Nietzsche. However his challenge cannot be said truly against religious attribution behind the value of life but equally questioned scientific humanism based on reason. He was against attributing any value to human life or the world as such. Thus questioning both egalitarianism and rationality, he opposed all types of value attribution to life. Attacking the Christian doctrine of sanctity, he proclaimed that belief in god as a despair of meaninglessness. The often repeated assertion of *God is dead*or *Gottist tot* [211]challenged a priori attribution of meaning to human life. The striking feature of Nietzsche's philosophical thinking is that he brought the question of life from the "world " to the existential question as to the meaning of "self". Thus his conception *life affirmation or Bejahung*[212]questioned all doctrines which attributed sanctity or value to life. He conceived an inward conception of self and was firm on the belief that one affirms one's life if one would accept the offer of

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[210] Albert Einstein letter of 1950 as quoted in New York Times, 29 March, 1972. See transcript of the letter, available at www.lettersofnote.com/2011/11/delusion.html (visited on 5-11-2014)

[211] Friedrich Nietzsche , *The Gay Science, with a Prelude in Rhymes and an Appendix of Songs*, Book III, Walter Kaufmann (trans.), Vintage Books, New York (1974), p.181.

[212] He remarked thus," The first question is by no means whether we are content with ourselves, but whether we are content with anything at all. If we affirm one single moment we thus affirm not only ourselves but all existence. For nothing is self-sufficient, neither in our selves nor in things...." Friedrich Nietzsche, *The Will to Power* , Book IV, Walter Kaufman & R.J. Hollingdale (trans.), Vintage Books , New York (1967), pp. 532-533.

living exactly the same life over again including its pains and sufferings. [213]His observations on the concept of life can be found in his classic work '*Untimely Meditations*' which may be explained in simple terms thus

> "*Why the 'world' exists, why humanity exists, this need not, concern us for the present moment..... but why you, individual exist, this ask for yourself and if no one can tell you, then try to justify the existence a posterior by setting for yourself, some purpose, some goal, some "therefore" a high and noble "therefore" Perish in pursuit of your goal- I Know no higher life-purpose than to perish in the pursuit of something great and impossible*".[214]

Thus he was against setting any a prior value to life and his nihilistic approach made him establish the fact that meaning and morality of one's life comes from within oneself[215]. He was against laying any value foundation to human life. Posing extreme faith in man while adhering to systematic scientific approach on life, his philosophy was more concerned with enhancement of individual rather than creativity or realities of the world. Nietzche's philosophy based on self-abstraction of an individual does not recognise man in his collective sphere. So it is one sided and partial and is against the notions of equality. Man does not live in isolation but in company of other fellowmen and the individualism prompted by Nietzsche if followed leads to anarchy and tyranny. Totally alienating moral value to life not only deprives harmonious existence of man but is also a denial of liberty and autonomy. Thus it is found that Nietzsche's philosophy lacks prudence and is totally impractical and it is this method which led scientific approach to be labelled as an approach devoid of value. His thinking had negatively influenced the modern scientific approach which not only denies god's hand behind the creation of man but also does not subscribe importance to human life. This had led to devaluing the life of man.

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[213] Christopher Hamilton, "Nietzsche on Nobility and the Affirmation of Life*",* 3 *Ethical Theory and Practice* 171 (2000).

[214] Friedrich Nietzsche , Untimely Meditations , Daniel Breazeale (Ed.), R.J. Hollindale (trans.) Cambridge University Press, Cambridge (1997), p.112.

[215] Friedrich Nietzsche, The Will to Power, in Dr Oscar Levy (Ed. & trans.) , *The Complete Works of Friedrich Nietzsche,* T.N. Foulis, London (1933), p.38.

The divine hand behind the creation of man is frequently a matter of scientific investigation and questioning. Of late, Stephen Hawking, the renowned scientific thinker opined that God is not required for creation of the man or for the creation of the universe. The scientific explanation to this was the M theory. According to him it is not necessary to invoke god to light the blue touch paper and set the universe going. Taking the cue from Voltaire that god was conceived as a product of mental creation of man himself, Hawking explained the origin of life based on laws of gravity and scientific theorems. The notion that life is observable and deducible no doubt had gained acceptance. The greatest challenge posed by this way of thinking was that Man has become an experimental subject devoid of any value. But it is a fact that religious mandates had been able to create a sense of reverence to human life. Scientific thoughts on `the other side have been able to challenge divine attribution to life but it is found that it had either sought naturalist explanations to human life or reason. Their thoughts acknowledged the fact that Man has got a unique status among the beings in the universe but based on verifiable evidence. A naturalistic explanation to life by observation and deductions using human reason finds the cause behind this uniqueness. Earlier philosophical thoughts following scientific method have influenced man's greater understanding on not only himself but also his socio, economic and political status. Be it writings of Adam Smith which introduced newer understandings on man and his role in economic environment or the writings of Voltaire and Rousseau where man was considered as a being and his relation with the political state or Hume's philosophical concepts which influenced Constitutionalism. Earlier philosophical inquiries suggesting scientific approach opened up floodgates of new ideas or thoughts based on constant research to find an answer to the question "the Man" not only based on Gregor Mendell or Darwin's prophecy alone but alsobased on man's socio, economic, political levels. It brought an understanding of Man at all levels and so the growth of social sciences. Nietzsche's philosophy had made a negative impact on sanctity of life and of late the scientific inquiries are attempting to place man just as a collection of particles totally neglecting his relation with fellow beings which is a deviation from the earlier approach.

Individual abstraction of man had reduced the inquiry of man deviating to certain aspects of human life while ignoring the other. As we are aware of the fact that a single human being cannot be an excellent experimental subject to arrive at a finding on human life since humans differ. The need to study man as a whole thus would involve an application of scientific method in different aspects of science such as physiology, psychology, sociology, physics, chemistry etc Thus knowledge of man as a whole is the only possible way of understanding the life of man. Scientific method with the support of all streams of science could achieve this. This was clearly emphasised by Dr Alexis Carrel, the noble prize winner in his seminal work "*Man, the Unknown"* wherein he states the relevance of scientific method to look into all aspects of human life inorder to understand the science of man. He observed thus:

> *"The essential needs of the human being, the characteristics of the human being, the characteristics of his mind and organs, his relations with his environment, are easily subjected to scientific observation. The jurisdiction of science extends to all observable phenomena- the spiritual as well as the intellectual and the physiological. Man in his entirety can be apprehended by the scientific method. But the science of man differs from all other science. This science alone is capable of giving birth to a technique for the construction of society. In the future organisation of the individual and collective life of humanity, philosophical and social doctrines must give precedence to the positive knowledge of our selves"*[216]

This view on the science of man seems enlightening on the aspect that man is not only a collection of materialistic particles, a sub conscious being, a being with soul, possessor of rational faculty and intelligence but also a part of the community in which he belongs, part of the environment, part of the economy etc. Hence man needs to be viewed in all perspectives in order to understand human life. However it can be inferred that the writings of Dr Alexis Carrel did not stress

[216] Alexis Carrel, *The Man, the Unknown* (1935), available at https://archive.org/stream/ManThe Unknown/alexis-carrel-man-the-unknown-penguin-1948_djvu.txt (visited on 2-8-2014).

much on value of human life as his works reveal that he had great admiration for eugenics and these views had great influence on Nazi thoughts later.

Thus scientific approach on life of man based on observable facts found man as an individual and man as a part of the collective whole. It conceived that human life can be understood by observable facts based on sound reason. It displaced theological reasoning about human life. Man and laid scientific basis on It can be inferred that it enhanced our knowledge between truth and belief on the life of man. It is found that the analysis shifts from rationalism to empiricism. However the essential value of human life and the implications of placing human life as a subject of experimentation is hardly undertaken by the scientific school. Human life is seen as emancipation from a series of long scientific evolution but man is not a mere matter but has an extensive role to play and this we could find in secular philosophical inquiries on life

2.5 Secular understanding of concept of life

Though the systematic inquiry about human life first began with religions the legitimacy of this was questioned by secular traditions from time to time. The philosophical thinking during the enlightenment period attempted to give naturalistic explanations to human life and by reposing faith in human reason sought to examine life by systematic inference and deduction based on verifiable facts. However the greatest drawback of the application of scientific method was that it did not attribute any value to human life but conceived man as an experimental subject. Hence an explanation to the life of man devoid of theological explanations which may be verifiable or non-verifiable enlarges our understanding on life.

From time immemorial non-believers are often confronted with instinctive convictions of whether, why and how human life has intrinsic worth? The philosophers of this school of thought did not attribute any significance to existence of divine hands in making “the Man” but rather accepted the other peculiarities, capacity, ability etc inherent in man who commands a unique respect for man. It ranged from man being conceived as a thinking entity to man as a

moral subject. Hence rejecting the Divine will they believed in inherent worth of man. However it can be found that sanctity can be understood in two ways:

a) Veneration or respect for life

b) The concept of inviolability

The concept of respect for life is an attitude of life which is universal and secular in nature. However the attitude of veneration for life essentially carries with it the element of inviolability. The difference in thinking in a religious and non-religious manner is that, in the non religious conception conveys the basic disposition or attitude that life needs to be revered as against a religious dogmatic injunction against interfering with life. However it is worthwhile to note that this development in thinking rather in an irreligious manner was due to the development of humanism of the Renaissance period .Humanism, a philosophy centred around the human being, stressed on the importance of man. The concept of human worth and dignity could be said as a major contribution of humanist thoughts. Even the pre-Socratic philosopher like Protagoras supported the notion that "*man was the measure of all things"*, thus recognised the intrinsic worth of human life[217]. Holding that God was the metaphysical mental hallucination of man, Proudhon, the philosopher and anarchist rejected the supremacy of god on humanity and held that humanism as the most perfect theism[218]. This attitude towards life, however, was not alien to the thinkers of the east .Confucius, the Chinese thinker stressed on the basic goodness of man[219] and stated that love for humanity as the highest virtue[220]. The distinction between man and animal

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[217] "Socrates: Then You were quite right in affirming that knowledge is only perception ; and the meaning turns out to be the same, whether with Homer and Heraclietus , and all that company, you say that all is motion and flux or with great sage Protagoras, that man is the measure of all things; or with ……..." Section152, Plato, "*Thaetetus*", Benjamin Jowett (trans.), available at http://classics.mit.edu/Plato/theatu.html (visited on 12-10-2008).

[218] P J Proudhon, *System of Economical Contradictions or the Philosophy of Misery*, Benjamin R. Tucker (trans.), University Press: John Wilson & Sons, Cambridge (1888), p.461.

[219] The Master said,"Man is born for Uprightedness. If a man lose his uprightedness, and yet live, his escape from death is the effect of mere good for him." Book 6 passage 17(Yung Yey) Confucius, *Confucian Analects* (Lun Yü), James Legges (trans.), (1893), available at www.sacred-texts.com/cfu/conf1. htm (visited on 13-10-2008)

[220] "Tsze – Kung said," Suppose the case of a man extensively conferring benefits on the people, and able to assist all, what would you say of him? Might he be called perfectly virtuous ?". Confucius, *Confucian Analects* (Lun Yü)*, Ibid.*

according to Confucius is man was a moral one but the other was not and so the first concern is the human being always.[221] Thus it is found that secular conception of life gave more stress on human life. However it is inferred that totally alienating sacredness from the concept of life was not acceptable to philosophers like Erasmus, who tried to revolutionise existing Christian principles through rational conception based on humanistic principles[222].

Erasmus was against then theological approach insisting on superstitions and religious dogmas imposed on man. He believed that god had endowed humanity with free will and valued that trait in humans and punished or rewarded them on the basis of how they choose between good and bad. Thus the path to salvation by man based on divine grace.[223] Christian teachings were reinterpreted to make it more humanistic and acceptable to all. The reason for this may be that the philosophers could for see the dangers of totally alienating religion from the conception of life which they felt may lead to unethical behaviour by man and moreover they were aware of the supremacy of church at that time. However Martin Luther attacked this finding of Erasmus and denied the existence of free will in man since he is under the subjection of god[224]. However the rationalisation

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[220] "The Master said "Why speak only of virtue in connexion with him? Must he not have the qualities of a sage? Even Yao and Shun were still solicitous about this." Confucius, *Confucian Analects* (Lun Yü) *Id.*

[220] "Now the man of perfect virtue, wishing to be established himself, seeks also to establish others; wishing to be enlarges others." Confucius, *Confucian Analects* (Lun Yü)*, Id.*

[220] "To be able to judge of others by what is high in ourselves-this may be called the art of virtue". Book 6 chapter 28 passages 1,2,3. (Yung Yey) Confucius, *Confucian Analects* (Lun Yü)*, Id.*

[221] "The stable being burned down, when he was at court, on his return he said, "Has any man been hurt? " He did not ask about the horses." Book 10 passage 12 (Heang Tang) Confucius, *Confucian Analects* (Lun Yü),*Id.*

[222] "But in as much as faith is the only gate unto Christ, the first rule must be that thou judge very well both of him and also of scripture given by his spirit, and that thou believe not with mouth only, not faintly not negligently, not doubtfully, as the common rascal of Christian men do: but let it be set fast and immovable throughout all thy breast, not one jot to be contained in them that appertaineth not greatly unto thy health."(It conveys the meaning that we must judge well of scripture) Desiderius Erasmus, The *Manual of Christian Knight*, Methuen & Co., London (1905), p.78.

[223] Fook Meng Cheah , *A Review of Luther and Erasmus: Free Will and Salvation* Available at www.prca.org/prti/nov95b.html#en30 (visited on 7-11-2008).

[224] See section1-6, Sections167-168 Martin Luther, *De Servo Arbitrio, "On the Enslaved Will" or The Bondage ofWill,* Available at http://www.truecovenanter.com/truelutheran/luther_bow. html (visited on 7-11-2008).

of Christian beliefs brought about a concrete impact on philosophical thinking wherein values of respect, worth etc were read into the concept of life hitherto unknown. Thus rationalisation of Christian beliefs had an impact on development of secular vision to human life. The western belief system also underwent a change simultaneously.

The concept of sanctity of life received a unique reasoning under the Deist school of philosophy which advocated that God does not interfere with the functioning of natural world in anyway ,allowing each individual organism to live according to the laws of nature that the God designed during the creation process[225]. Thus it is found that accepting that life had sanctity, since god had created human life[226], deism tried to explain the process of life as a natural one. However the key feature of deist philosophy was that it gave prominence to reason and questioned revelation. Infact the writings of Thomas Hobbes reveal that "reason" as a primal source in his cosmological argument on existence of god[227].Opposing the Christian supernatural and dogmatic authority but at the same time being a strong deist Thomas Paine asserted the need for free rational inquiry on the concept of life[228]. Dismissing supernatural claims and miracles he for the first time stressed on notions of human equality, natural liberty and love for fellow beings through his interpretation of god, reason, nature and humanity.[229] These thoughts laid the foundation for the French and American revolutions. However one could find that he had ardent faith in god which he did not deny but asserted that his religious view need not be necessarily accepted by all. This proves his liberal attitude and recognition of principles of autonomy and liberty as existing in man.

Recognition of ideas of liberty, autonomy and equality thus sprouted in

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[225] The deist rejected religion as such but believed the hand of god in creation.

[226] Thomas Paine, *The Age of Reason : In Two Parts*, G.N. Devries, Corner of Vesey-Street& Broadway, New York (1827), p.27.

[227] Available at en.wikipedia.org/wiki/Deism (visited on 19-6-2014).

[228] "The most formidable weapon against errors of every kind is Reason I have never used any other and I Trust I never shall", *Id.,* at p.3.

[229] "I believe in One god and no more and I hope for happiness beyond this life. I believe in the equality of man and I believe that religious duties consist in doing justice, loving, mercy and endeavoring to make our fellow creatures happy." *Id*., at pp.5-6.

western philosophy but recognition of man as a moral subject came to be recognised mainly through the writings of Immanuel Kant. Respect for life and recognition of the intrinsic worth of human life as a value came to be recognised through his thoughts. Laying down the moral precept that each human being, a rational person exist as an end in himself and should not be treated as a means to an end, he tried to stress on the worth of human life and the principle of inviolable quality of human life which were till then recognised as a moral law laid down in religious doctrines only. He observed thus:

> *"Now I say: man and any rational being exist as an end in himself, not as a means to be used by this or that will, but in all his actions, whether they concern himself or other rational beings must be always be regarded as an end."* [230]

The distinct feature of Kant's philosophy is that he regards human life as having intrinsic worth not due to the fact that humans are biologically superior but due to the fact that man has the ability to act morally and is a "*moral subject*"[231]. Hence he prefers man to be addressed as "*person*"[232]and other beings lacking the rational ability of making moral judgments as mere things .Thus under his theory, the concept frees itself from the metaphysical conception and the conception of man attains the status of a rational moral being capable of making decisions as to what is just and what is not just. This according to Kant makes man a being with inherent dignity and autonomy[233]. Kant laid more stress on rationality than revelation and logically proved that God's existence might be

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[230] Immanuel Kant, Fundamental Principles of the Metaphysics of Morals, in Robert Maynard Hutchins (Ed.), *Great Books of the Western World,* vol. XLII, Thomas Kingmill Abbot (trans.), Encyclopedia Britannica, USA (1971), p.271.

[231] "Now morality is the condition under which alone rational being can be an end in himself." *Id*., at p.274.

[232] "It follows incontestably that, to whatever laws any rational being may be subject , he being an end in himself must be able to regard himself as also legislating universally in respect of these laws, since it is just this fitness of his maxims for universal legislation that distinguishes him as an end in himself ;also it implies his dignity (prerogative) above all mere physical beings that must always take this maxim from the point of view which regards himself and , likewise, every rational being as law-giving beings (on which account they are called persons*." Id., at* p.276.

[233] "……..but that which constitutes the condition under which alone anything can be an end in itself, this has not merely a relative worth but an intrinsic worth, that is dignity". *Ibid.*

impossible but found nothing wrong in acting as if there be God since it is morally reasonable[234]. His conception of categorical imperative laid down the moral law for man to condition his actions and thereby justifying universality of human rights and law as such.[235]His conception of duty (moral) not to treat man as a means to an end, can be treated as a direct warning to scientist who subject man to experimentations. Thus Kantian ethics says that some actions are never to be done, no matter what good they produce. His conception of personhood for the rationale man establishes his strong commitment towards humanity. However too much stress on rationality and self-consciousness alone, was not always appreciated as a reason for the uniqueness of human life under western philosophy. In fact philosophers like Arthur Schopenhauer called upon to discard tendencies to focus on rationality and self-consciousness to comprehend human life but instead have a self-introspection to understand life. Thus he perceived that if one looks deeply into himself, he will discover not only himself but also the essence of the universe. Thus stressing on the need to understand one's own inner being to understand the world and relation of man with the universe,[236] his feelings resulted in propagation of ideas of individualism. Schopenhauer's view deems as purely unconcerned of the role of man in relation to his fellowmen. However, Kantian views on life as a moral being can be considered as an acceptance of man as an individual rational being and his obligation towards his fellow beings which indirectly presupposes the recognition of man as a social being. Thus Kantian prepositions deems acceptable since man lives not in isolation but in the company of his fellowmen and therefore has to be necessarily moral.

The transition of thoughts from Man as a moral subject to the essential relation between man and his fellowbeings gained prominence through the

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[234] Immanuel Kant , *Religion Within the Limits of Reason Alone,* Book IV , Theodre M. Greene & Hoyt H. Hudson (trans.), Harper & Row Pub., New York (Torch Book edn.) , pp.139-141. there is a narration as to how religion takes its form ,he also argues why Judaism cannot be treated as a religion ,advocates on the pure religion of reason.

[235] "Act on that maxim whereby thou canst at the same time will that it should become universal law." *Id. at* p.268.

[236] Available at http://plato.stanford.edu/entries/schopenhauer#4 (visited on 4-7-2014).

philosophical reasoning of Hegel, Fuerbach and Marx etc. This philosophy viewed man as a social being and the entire existence of every human being as being sustained, nurtured, furthered and developed in all its dimensions through recognition and respect of other fellowmen was stressed through their thoughts. These thoughts evoked a view that the individual is nurtured through social relations. Though it can be found these principles existed prior also in the views of Plato and Aristotle the significance of these thoughts were that it did not take the assistance of god or the soul to explain this aspect. Thus the concept of sanctity of human life was identified with regard to the relation of individual through social relations without the support of theological prepositions. It attempts to understand the life of man in relational sense.

Totally emancipating from the Kantian position with regard to reason in man, Hegel in his exposition of dialectics, reposed faith in reason (on a religious basis) which enables man to recognise the Self within him and the Selves around him thereby recognise the Universal consciousness[237]. According to Hegel, man pursues knowledge (at least in part) to inquire into questions like Who we are? And what we are? Hence self-knowledge is possible only if one can comprehend the world in its fullness, experiencing it through all possible shapes of consciousness.[238] Hegel's dialectic prophecy of thesis, antithesis and synthesis[239] attempts to explain human nature and helps the human understanding of the reality .To Hegel, this prophecy works both internal within 'Self 'and externally in the nature and everything in it. Unlike Kant who said that only a rationale being is

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[237] George Wilheim Friedrich Hegel, *Phenomenology of Spirit*, A.V. Miller (trans.), Motilal Banarasidass Pub., India (1998), pp.138,410-414.

[238] "The Significance of that 'absolute' *know thyself*'- whether we look at in itself or under the historical circumstances of its utterance is not to promote mere self – knowledge in respect of the particular capacities character ,propensities and foibles of the single self. The knowledge it commands means that of man's genuine reality- of what is essentially and ultimately true and real of mind as true and essential being". George Wilheim Friedrich Hegel, Philosophy of Mind, Book II, in *Encyclopaedia of the Philosophical Sciences, With Five Introductory Essays*, William Wallace (Ed. & trans.). Oxford Clarendon Press, Oxford (1894), p.3.

[239] Hegel himself has not used this triad to explain human nature but it is found in the writings of Karl Marx.

[239] "Or to speak Greek- we have thesis, antithesis and synthesis. For those who do not know the Hegelian language, we shall give the consecrating formula: affirmation, negation and negation of the negation". Karl Marx, *The Poverty of Philosophy- Answer to the "Philosophy of Poverty" by M Proudhon*, Progress Pub., Moscow (1973), p.92.

a person, to Hegel, a person means a self-conscious being[240]. Such a person begins to recognise each other as selves, thus rights and duties become correlative. The life of man is distinct in the sense that he has got a desiring consciousness and this desire itself undergoes transformation which gives arise to a clearer self-awareness. Thus the individual understands that there is no end to chain of desires Thus I has posted myself as a desire (subject) confronting with objects of desire ready to be consumed (object) This subject/object complex is "*Life"* according to Hegel[241].In the search for self-discovery in the object of consciousness manifests itself in a crude desire to acquire power over external reality and coerce it to recognise man as independent from it. Hegel thus conceives the term called *recognition* as a person's claim to be treated not just as a natural object but as a self, independent and superior to natural things. Thus Hegel identified the uniqueness of human life and the underlying reason in human nature to claim unique status from other beings. Through his master-servant dialectic[242], he tried to explain the basis of human rights i.e., the dependency of man and man.[243] He believed that man will be able to know his 'self' (as a moral personality)only if he treats others as selves, thereby making the category of self or moral personality to be known [244].Thus recognition according to him, is the implicit basis of the mind or spirit[245]. To Hegel, to subsume oneself as a moral person is decisive since it represents a leap of self consciousness to universal self consciousness[246](Absolute Knowledge) and thus mutual recognition puts an end to state of nature .He follows Kant, to the extent recognising man as a moral personality ,rooted in self-consciousness which enables him to command respect from others. However his

[240] "But the person, as an intelligent being feels that underlying essence to be his own very being". *Id,* at p.1.

[241] *Ibid.*

[242] *Ibid.*

[243] Lewis P. Hinchman, "The Origin of Human Rights- A Hegelian Perspective", 37 *Western Political Quarterly* 7(1984).

[244] "Moral life is the perfection of spirit objective- the truth of the subjective and objective spirit itself". , *Ibid.*

[245] *supra* n. 238.

[246] "Universal self consciousness is the affirmative awareness of self in another self: each self as a free individuality has his own 'absolute 'independence, yet in virtue of the negation of its immediately or appetite without distinguishing itself from that other. Each is thus universal self- conscious and objective. "para 436, *Id.* at p.56.

theory may be said to have some resemblance with the Vedantic and the Jainist philosophy of the east[247]. However it is found that the conception of person, as a conscious being with a rationale to recognize himself and consequent mutual recognition brings forth an idea that norms govern the individual actions and as these norms are applicable to all, my actions get regulated. This throws life on the fact that social consciousness can bring in a moral life. Thus we could say that Hegel's conception of life attempts to define not only what we are? But on how we act? Which necessarily denotes an ethical behaviour, which is accepted universally.

The strategic shift of thinking attributing man himself as divine and rejecting that an outside entity namely the God, had made human life sacred was brought forth through the writings of Ludwig Fuerbach. This proposal for a new divinity-the Man [248]was totally different from the religious conception of sanctity of human life .Rejecting the theological philosophy of sacredness of life as god given or the divine will, this philosophy attributed god as the product of human psychology[249].As the founder of anthroptheism, he felt that Man is at once 'I 'and 'thou'; he can put himself in the place of another. Thus he had faith in the inherent capacity of man and accepting the Hegalian view he believed in the capacity of *human geist* or spirit to recognise the universal consciousness[250]. According to him every aspect of what we call as "divine or god" relates to some feature or need of human nature.[251]Thus god is man's mental invention where human desires to achieve certain attributes (which are believed to be non attainable generally) are cast on the god, and thereby certain ethical codes are developed in man's

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247 *Ibid.*

248 "Man was already in God, was already God himself, before God became man, i.e., showed himself as man." Ludwig Feuerbach, *The Essence of Christianity,* Mariam Evans (trans.), Calvin Blanchard Pub., New York (1855),p.77.

249 "All religious cosmogonies are products of imaginations.", *Id.,* at p.62.

250 "My fellow –man is the bond between me and the world. I am, and I feel myself, dependent on the world because I first feel myself dependent on other men. If I did not need man, I should not need the world. I reconcile myself with the world only through my fellow- man. Without other men, the world would be for me not only dead and empty, but meaningless. Only through his fellow does man become clear to himself and self-conscious; but only when I am clear to myself does the world become clear to me." *Id.* at p .81.

251 "All the attributes of the divine nature are, therefore, attributes of human nature*". Id.* at p.34.

endeavour to achieve the status of a perfect being. This makes god, an illusory projection of human qualities[252]. Accordingly, god is nothing other than man: he can be treated as an outward projection of the inward nature of man. Thus he finds that the essence of religion is nothing but the essence of man and the history of religion is nothing but the history of man[253].

Respecting the special status of human consciousness when compared to other beings[254] and the capacity of human mind to create, invent and to think about the infinite[255], he stressed that this power is universal pervading in all human beings. Thus the essence of god is Man[256], whether man accepts it or attributes it to other entity outside him. He believed that human mind is much more than what we perceive. This view is similar to the proposition of Sigmund Freud, who also believed that the existence of god as a wish fulfilment of man. He felt that religion was a mental illusion of man to satisfy his desires[257]. To Locke, the psychological traits especially memory, the ability to make abstractions and comparisons, the continuity of consciousness etc are the factors responsible for man to be treated as a person as distinct and unique from other beings[258]. The conception of these philosophers leads us to think that sacredness of life is a concept whose design is made by man to promote certain ethical standards and to assert the principle of inviolability of human life which emerges from the basic urge of man to assert his superior claim over other beings.

Secular conception of human life received a unique reasoning when

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252 "God is the highest subjectivity of man abstracted from himself." *Id.* at p.54.

253 *Ibid.*

254 "The animal is sensible only of the beam *which* immediately effects life; while man perceives the ray to him physically indifferent of the remotest star." *Id.* at p.24.

255 "As we can conceive nothing else as a Divine being than the Rational which we think, the Good which we love, the Beautiful we perceive; So we know no higher spiritually operative power and expression of power, the power of the word. God is the sum of all reality. All that man feels or knows as a reality he must place in God or regard as God." *Id.* at p.78.

256 "God is the mirror of man."*Id.* at p.62.

257 Sigmund Freud, New Introductory Lectures on Psycho-Analysis, in Robert Maynard Hutchins (Ed.), *Great Books of the Western World,* vol.54, W.J.H.Sprott (trans.), Encyclopaedia Britannica, USA (1971), p.878.

258 John Locke, *An Essay concerning Human Understanding- In Four Books,* BookII, vol.I, available at http://www.gutenberg.org/files/10615/10615.txt (17th edn.), pp.280-322.

individual abstraction was given a backseat and man as a part of the collective whole was given prominence. The influential philosophy in this direction was the Marxist perspectives on human life. Following Fuerebach's prophecy that the essence of religion is the essence of man[259], Karl Marx, the founder of communism, rejected the method adopted by Feuerbach in understanding the life of man by way of abstraction inherent in each single individual[260]. The concept of life cannot be understood clearly according to Marx, if man is treated as a being in isolation but in fact life of man should be considered as an ensemble of social relations[261]. He believed that human existence is not solely based on consciousness of men alone but it is the social existence that determines their consciousness[262]. Thus the value of human life cannot be related to a single individual's life but to his being – a component of the collective whole. Thus he perceives the concept of human life not on pure idealism but based on sensuous life.[263] An individual's life according to him depends on social relations, this social relations is determined by the material conditions of production in the society[264].Marx rejected the notion of god as manmade and eliminates the garb of religion in giving sanctity to human life[265].

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[259] *supra n.*256.

[260] "Feuerbach resolves the essence of religion into the essence of man. But the essence of man is no abstraction inherent in each single individual. In its reality it is the ensemble of the social relations."- Karl Marx, *Theses on Feuerbach,* in Karl Marx & Frederick Engels(Eds.) , *Collected Works* , vol . V ,Progress Pub., Moscow (1976),p.7,

[261] "But man is no abstract being encamped outside the world. Man is the world of man, the state, society." Karl Marx, Contribution to the Critique of Hegel's Philosophy of Right*,* Karl Marx & Frederick Engels (Ed.) , *Collected Works,* vol III ,Progress Pub., Moscow (1976), p.174.

[262] Karl Marx & Frederick Engels, *The German Ideology* Part I, C.J. Arthur (Ed.), International Pub, New York (2004), pp.51-53.

[263] "The chief defect of all previous materialism- that of Feuerbach included- is that things (Gegenstand),reality, sensuousness are conceived only in the form of the object, or of contemplation, but not as human sensuous activity , practice, not subjectively. "Karl Marx, Theses on Feuerbach*,* in Karl Marx & Frederick Engels (Eds.) , *Collected Works* , vol. V, Progress Pub., Moscow (1976), p.6.

[264] "As individuals express their life, so they are. What they are, therefore, coincides with their production, both with what they produce and with how they produce. The nature of individuals thus depends on the material conditions determining their production." Karl Marx & Frederick Engels, *The German Ideology'* Part1, C.J. Arthur (Ed.), International Pub, New York (2004), p.42.

[265] "Man makes religion, religion does not make man. Religion is the self –consciousness and self-esteem of man who has either not yet found himself or has already lost himself or has already lost himself again." Karl Marx, Contribution to the Critique of Hegel's Philosophy of Right*,* in

Human life, according to Marx, cannot be understood as a permanent and universal phenomenon but could be comprehended based on social circumstances which is in a constant change (historical in nature)[266]. He believed in the inherent ability of man as a species capable of making or shaping their nature[267]. Hence the term "*Gattungswesen*" is used by him, referring man as a species being.[268].Thus according to him, the attribution of sacredness to human life is an artificial creation of human mind[269], which denies man from knowing the reality that in sensuous life , the individual depends on social relations which again is determined by the material conditions of production. He along with his collaborator Frederic Engels felt that the myth of god was a deliberate exploitation by organised religions to keep man in bondage so as to exploit the humanity for the economic gains of the religious elites[270]. He emphatically establishes that it is the mode of production which determines the socio, economic, political life of individuals[271]. Following Hegel's views, he emphasised the need for developing the social consciousness. Thus the principal aim of Marx is to liberate the human's from the pressure of economic needs so as to enable him to be fully human and thereby to emancipate the individual to overcome alienation so as to restore the capacity of man to relate and recognise other men and to be in

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Karl Marx & Frederick Engels (Ed.) ,*Collected Works 1843-44* , Jack Cohen et al. (trans.) Progress Pub., Moscow, (1976) ,p.175.

266 Karl Marx& Frederick Engels, The German Ideology , Karl Marx & Friedrich Engels (Eds.) , *Collected Works,* vol V, Progress Pub. , Moscow (1976), pp.31-37.

267 Marx conceived humans as 'homo faber' (man the maker). He refers to humans as producers in his *German Ideology*, part 3 1, at p.32.He discusses that the ability of man is not restricted to his own subsistence but can make and produce things for others too. *Id.* at p.32.

268 Economic and Political Manuscripts of 1944 - Estranged Labour, in Karl Marx & Frederick Engels (Ed.), *Collected Works 1843-44* , Jack Cohen et al. (trans.), Progress Pub., Moscow, (1976), p.277.

269 "Hitherto men have constantly made up for themselves false conceptions about themselves, about what they are and what they ought to be. They have arranged their relationships according to their ideas of god, normal man etc. The Phantoms of their beams have gone out of their hands. They, the Creators, have bowed down before their creations. Let us liberate them from the chimeras, the ideas, dogmas, imaginary beings under the yoke of which they are pinning away." *supra* n. 266.

270 "Christian Socialism is but the Holy water with which the priest consecrates the heartburnings of the aristocrat." Karl Marx &Frederick Engels, The Communist Manifesto in Saxe Commins & Robert N Linscott (Eds.), *Man and the State: The Political Philosophers* , Random House , New York (1953), p.521.

271 s*upra* n. 266.

conformity with nature. This holistic approach to human life emphasised the fact that the value of an individual's life is not related to his personal life alone but to his being as a component of the collective whole.

Marx considered human life superior to other forms of life since he considers man to be a conscious being. According to him man has got the unique capacity to make one's life once object which means to treat one's life as something as that under one's control. While stressing on the capability of man and his superior status Marx makes a comparison between man and other beings. He maintains that though it is true that other beings like animals, birds, bees etc can produce like man for eg like collecting food, building dwellings, nests, etc to satisfy their physical needs, they produce only when their physical need compels them but for man he can produce not only for his physical needs but for all other beings found in nature. Again animals, according to him is only engaged in its life activity which is not a conscious activity as that of man.[272] Through the process of dialectics in nature, he tried to explain the universal interconnection and thereby the development of social consciousness[273]. Marx and Engels appreciated the theory of evolution propounded by Darwin to the extent that it exposed the fact that nature functions dialectically and that it overthrew the divine theory of evolution[274]. Thus Marxism displaced the argument that all beings and nature per se is divinely ordained. It marked the era for appreciation of human life based on real life rather than metaphysical concepts. The tool employed for this was dialectics, which was found acceptable by thinkers like Antonia Gramsci. Commenting on the philosophy of Praxis, as an absolute historicism or absolute humanism[275], Gramsci conceived Marxism as an earthly thought[276] based on absolute worldliness which is completely based on concrete actions of man who

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[272] Economic and Philosophic Manuscripts of 1844*,* Karl Marx & Frederick Engels, *Collected Works* , Vol III, Progress Pub., Moscow (1976), p.276.

[273] Frederick Engels , *Dialetics of Nature,* Progress Pub. , Moscow (1934), pp.300-311.

[274] Mikulak W. Maxim, "Darwinism, Soviet Genetics and Marxian- Leninism', *J. of Hist. of Ideas*, 365 (1970).

[275] Quintin Hoare &Geoffrey Nowell Smithe (Eds.), *Selections from the Prison Notebooks of Antonia Gramsci,* Orient Longman Ltd., India (1st edn.), p. 417.

[276] Gramsci finds Marx as the creator of the 'Weltanschauungen' (World Outlook), *Ibid.*

works for the transformation of reality for his historical needs. He however, appreciates the philosophy as an attempt made to explain the life of man in its real crude form rather than relying on metaphysical explanations. However one could decipher through the Marxist writings, that they attributed human beings as a being capable of having a social consciousness and the ability of conditioning their actions thereby having a unique status from other beings which is not an endowment of a mystical entity namely god but by virtue of man's body emanating from nature and merging at last with nature and thereby attributing this superior status bestowed on humans by nature .According to him religion is just like the opium which hindered man to understand and comprehend his intrinsic worth . Thus he believed in the intrinsic worth of human life though he did not attribute it to god. This view was later confirmed even the evolutionary scientist, Richard Dawkins who rejected the intelligent design of god in the making of man[277]. Thus we can decipher that the non- religious argument also considered that human life has intrinsic worth though they were not interested in attributing the term" sanctity" or "holy" etc. However they tried to respect the life of man as a part of society rather than on an assessment made subjectively and thereby giving a general view on the life of man.

It can be understood that sanctity of life concept is a value which pinpoints the intrinsic worth of life and for it to exist it does not need a spiritual explanation or support but can exist as a value by itself (value independent of itself) though etymologically it is connected with religion and this concept perpetuates a virtuous and responsible conduct on the part of human beings towards himself and towards others. Thus it can be inferred that this concept is the beginning point of ethics and norms essential for man to exist.

Man's relation with the entire biotic community and his obligation to recognise and respect all other beings in the nature and to live in conformity with nature were prompted by a set of philosophers. Thus by stressing on respect for

[277] Richard Dawkins, *The Selfish Gene*, Oxford University Press, USA (3rd edn,2006), p.11. He claims that genes are responsible for the evolution. Richard Dawkins, *God's Delusion,* Bantam Press, New York (2006), p.11-180. In this, he rejects the notion of divine design of god for humans.

life, they did not find man as distinct from the ecosystem and biotic community but as a part of it. Through this philosophy they instilled a sense of moral responsibility to respect all biotic and eco system in general. Sanctity human life thus came to be regarded as respect to all forms of life and an obligation on the part of humanity to conserve and protect the environment.

Stressing that the greatest drawback of western philosophy was that it fails to analyse the' self' before giving a world view[278] and rejecting the notion that human life is superior to other forms of life due to the existence of any special faculty or capabilities endowed on humans as a species ,a universal ethic came to be developed by Albert Schweitzer who recognised that the will-to –live exist in all beings ,which merges as the Universal- will- to-live and thereby the emergence of the ethical principium "*Reverence to life"*[279]. This principle , embodies the notion that man needs to recognise consciously that in all life the *'will to live*' exist and this leads him to value all life forms and thus create a fundamental principle that life per se is to be respected and venerated[280]. Thus not relying on God or divine external agency Schweitzer called for reverence to all life forms which contained the seeds of contemporary environmental philosophy of ecocentrism. He believed that Jainism contained his notion of life, wherein he believes that life has inherent worth without any distinction and this notion helps one to understand the meaning and value of life per se and respect the same. His logical exposition brings a unique explanation to life wherein respect for life per se brings in a respect for human life since humans having the conscious capacity to bring his life in conformity with nature which animals don't have and this conscious capacity inherent in human nature sets human beings apart from rest of the nature (not superior to other life forms). Reverence to life brings in ethical

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[278] Albert Schweitzer A, *Civilization and Ethics-The Philosophy of Civilization* ,vol. II , Adam & Charles Black Ltd, London(1923), p.13.

[279] "True philosophy must start from the most immediate and comprehensive fact of consciousness: I am life that wants to live, in the midst of life that wants to live." Albert Schweitzer, *Out of My Life and Thought: An Autobiography*, Antje Bultmann Lemke (trans.), Johns Hopkins University Press (2009), p.164.

[280] Ara Paul Barsam, *Reverence For Life- Albert Schweitzer's Great Contribution to Ethical Thought*, Oxford University Press, USA (1st edn., 2008), p.15.

behaviour and conduct which perpetuates universal love[281]. Thus according to him reverence to all life as sacred gives birth to ethical behaviour. However his works cannot be treated as a total alienation from religion since he believes that his notions lie latent in Christian philosophy also[282]. This exposition of life proves the fact that the concept is independent in itself and does not need the support of religion to exist but acknowledges that the acceptance of god as the creative will and ethical will enables man to lead a life which accepts and follows the concept of reverence to life. The concept of reverence to life was given an extended meaning by environmentalist and thinkers alike. Thinkers like Aldo Leopold was not prepared to limit reverence to life alone but tried to expose the fact that man has not only to limit his love and respect to other life forms such as plants and animals but extent to the entire biotic community including the soil subservient to land[283]. Hence conservation of nature is to be an inherent responsibility in man. This inherent responsibility in man respecting nature as such, would condition his conduct and force the reformulation of the norms of the society essential to preserve the eco system .These writings revealed that man is interdependent with the nature and should respect living and non-living entities .The writings of Aldo Leopold though does not provide any contribution towards the exposition of the concept of sanctity of life yet it can be found that his conception of conservation is built on the concept of the need to value the nature and all life forms in it even the non-living entities since even non- living entities such as soil, rocks etc contributes to the sustenance of life forms per se. However the contemporary deep ecology movement ,supporting the views of Aldo Leopold, hold that the right of all forms of life to live is a universal right[284] and it rejected the idea that beings can be ranked and judged as superior based on reason, soul ,consciousness, higher consciousness etc, thereby attempting to establish that human species as superior.

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[281] *Id*., at p.15.

[282] *Id*., at p.16.

[283] Baird Callicott, "The Conceptual Foundations of the Land Ethic", in J. Baird Callicott (Ed.), *Companion to a Sand County Almanac: Interpretive and Critical Essays* ,The University of Wisconsin Press, Madison (1987), p.205.

[284] Arne Naess, "The Shallow and Deep, Long – Range Ecology Movement: A Summary "16 *Inquiry* 95 (1973).

They treated all life as having an intrinsic worth rather than instrumental value. They rather claimed that the intrinsic worth of all life forms are not known by man due to the anthropocentric approaches followed by man and not due to religion as such[285].Thus unless we understand the other living organisms and man as a species in it, the intrinsic worth of life even the worth of man cannot be understood. Contemporary thinkers like Peter Singer who vociferously stood for animal rights, taking the cue from eco centrism, advocated that some animals like dogs, pigs, apes, monkeys etc, even prawns are persons because they enjoy rational attributes or sentience while some human beings like infants[286], frail persons who are ill (mentally and physically) are not[287] .Hence quality of life is relevant than sanctity of life. His view is that all human life is not of equal worth; treat beings with the ethical situation in hand. Thus he advocates that not all human life is of equally sacrosanct. [288]This view of Peter Singer is often criticisedas dehumanising man to points of consciousness that makes him indistinguishable from animals. The views of Peter Singer if accepted then killing of disabled persons will be justified wherein there would be no place in this world for the meek and the weak. However his views are in sharp contrast to the views of Ronald Dworkin who asserts that human life is sacred taken from religious point of view and from a secular point of view. His writings reveal the convergence of both religious and secular thought that' human life is sacred', though the reasoning behind both may be different[289].

Dworkin, on his discussions on the debates surrounding abortion and euthanasia, asserts that both views establish the intrinsic worth of human life.

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[285] Warwick Fox, *Towards a Transpersonal Ecology: Developing New Foundations for Environmentalism*, State University of New York Press, USA (1995), p.11.

[286] "Human babies are not born self aware or capable of grasping their lives over time. They are not persons. Hence their lives would seem to be no worthy of protection …." Peter Singer, *Rethinking Life and death: The Collapse of Our Traditional Ethics,* St Martin's Press, New York (1994), p.210.

[287] There are also views that the term 'persons' is species neutral. John Harris, *The Value of Life-An Introduction to Medical Ethics*, Routledge & Kegan Paul, London (1st edn., 1985), p.9.

[288] Peter Singer, *Rethinking Life and death: The Collapse of Our Traditional Ethics,* St Martin's Press, New York (1994), pp.130-131.

[289] Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom,* Vintage Books, USA (1994), pp.68-74.

While religious views are easy to understand since they seek to stress on the notion that all living things are the products of divine design, the secular view is a bit complex, since they are based on individual notions and convictions about whether, why and how human life is sacred. However he stresses that all people acknowledge the intrinsic worth of human life irrespective of the line of reasoning. According to him, just like certain things and events are valuable in themselves though people may want it or not, so is human life. Dworkin states that certain things are valuable in themselves and independent of a beneficial relation to anyone or anything. Again he holds that something may be valuable in itself thou not of any value to anyone. This view stands opposite to the view expressed by Michael Perry, who states that something is valuable only when related to someone Moreover, Perry states that human life can be stated to be sacred only when it has got religious backing[290] .Accepting that the origin of the concept is religious, Dworkin rejects the thesis that religion only can properly explain what is "sanctity", holds that intrinsic value is both necessary and sufficient condition for sacredness. He asserts that something is sacred or inviolable, when its deliberate destruction would dishonour what we ought to honour. The crux of his argument is that human life is sacred not only because we are biologically and viewed in terms of sentience superior but also due to the fact we have a deliberate creative force. He cites an illustration for this in the sense that both the decision to have a child and the decisive role played by parents in shaping the character, capacity and personality throws light on the sacredness of human life. Thus, just like we show reverence to human art, each human life can be reverenced for its unique and intrinsic value .However, he advocates that in cases where personal ethics confront,[291] the state has to allow each individual to follow their dictates of conscience, even if their ethical decisions may be

[290] "The conviction that every human being is sacred, is in my view, inescapably religious –and the idea of human rights, is therefore in eliminably religious" Michael J. Perry ,*The Idea of Human Rights: Four Inquiries* ,Oxford University Press, New York , (1998), p.12.

[291] Dworkin while speaking on abortion states that until the advent of sentience and other capacities fetus lacks interest of their own, a state policy restricting abolition to this limit is justifiable since it respects life. Thus when man acquires the status of capable of having interest of his own, his life becomes valuable.

abhorrent to others.[292] Thus to him true adherence to this concept, is that all of us be permitted to decide on moral issues like euthanasia or abortion based on our own interest. To him, human life is sacred due to the creative contribution of both nature and humanity itself.[293]However, Dworkin's conception is criticised as on one hand saying that human life as a value independent but at the same time attributing certain characteristics as unique to human life and thereby treating it as having intrinsic value.[294]For RaimondGaita, the value of human life cannot be quantified since humans are so precious, hence humans owe unconditional respect.[295] The International documents relating to human rights consciously avoid the term 'sanctity' because the common interpretation to the term 'sanctity' is understood in terms of religion rather than secular.[296] Hence major international documents relating to human rights declare that the rights enumerated in these documents recognise and sought to achieve the worth of human person.[297] By the use of the terminology worth of human person the intention of the document framers may probably be to resolve the ideological differences between the theological view and secular view .The views of Dworkin may be equated with Rawls, who speaks of reflective equilibrium when there are variety of views with definite justification then an overlapping consensus is to be arrived in a pluralistic society[298]. Dworkin's thesis on life does not stick to complete adherence to this self-evident foundational principle namely sanctity of life but his understanding of the concept is regarded as fitting this concept to current practices and thereby

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[292] When he speaks of permanently demented persons, he tries to establish that state can make advance directives. If prior to the onset of dementia, a person makes a will that when there is a total mental deterioration his life should be terminated, thus he can decide on his best interest even though others may not agree. Thus individual's autonomous choice is to be respected than unacceptable moral paternalism.

[293] Ari Kohen , The Problem of Secular Sacredness*:* Ronald Dworkin*,* Michael Perry and Human Rights Foundationalism, 5, *J.Human Rights* 235 (2006).

[294] Lee Patrick ,"Personhood, Dignity, Suicide and Euthanasia, *N.C.B.Q.* 337 (2001).

[295] Raimond Gaita, *A Common Humanity: Thinking about Love and Truth and Justice,* Routledge (2002), p.23.

[296] The Preamble of UDHR reads",…..Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the….."

[297] Roberto Andorno*,* Human dignity and human rights as a common ground for a global ethics, *J. of Medicine and Philosophy 6* (2009) .

[298] John Rawls, *Political Liberalism,* Columbia University Press, USA (1993), pp.158-168.

attempting to make these practises good practises[299].

Conclusion

Obliterating contours of sacred Vs secular with regard to conception of life:

Philosophical views on human life pinpoint the fact that there cannot be a consensus as to the meaning, value or outlook on life. The philosophical pendulum swings from one extreme end to the other extreme end on the conception as to life. This leads to uncertainty in one's efforts to find a meaning to the concept of life. Philosophy merged with religion has quite often attempted to give an answer to questions on life. But at the very same time one finds that secular and scientific approaches have been able to give a more pragmatic and empirical view on our inquiry on life. Thus conceptual tensions do exist in this inquiry.

The arguments or the reasoning behind the sacred and secular or scientific philosophical views may have a staring difference but it is a reality that one finds both the schools accepting that human life has got intrinsic worth. There are views that the conception of sacredness of life is relevant since it perpetuates ethical behaviour. Questions as to the existence of god or not is irrelevant since it is based on human consciousness and are totally subjective. Secular or sacred conceptions are just concepts which throw light on our understanding of our life and our existence. These concepts lead us to the fact that human life has got intrinsic worth and that each human being deserves respect and love from his fellow being. Hence sanctity of life postulates the element of recognition of the intrinsic worth of human life. For believers this recognition might be based on their religious beliefs and culture which they follow while for non- believers it may be based on personal moral convictions. The Scientific philosophers also could not make a study devoid of attributing any relevance to human life. Under philosophical approach it is found that there were a transition of thoughts ranging from man being treated as a natural being , a rational being, spiritual being, political being ,

[299] Harman Gilbert, *Three trends in Moral and Political Philosophy, a*vailable at http://www.princeton.edu/~harman/Papers/Trends.pdf (visited on 3-12-2008).

a social being and a moral being. These thoughts reveal that man is a being with a rational capability to understand the value of not only his own existence but also to understand the value of life of his fellowmen and the entire universe in which he exist. Sanctity of human life thus postulates respect towards fellow beings. It postulates man as sovereign entity in his personal realm and thus an autonomous entity, thus capable of taking rational decisions and also man as a part of the collective whole which cast him a responsibility to respect the life of all other beings.

Canons of loyalty and care as a moral requirement exist among every human relationship and are recognised as a prerequisite by all schools of thought. The recognition of intrinsic worth of human life encompasses within it the spirit of brotherhood among fellowmen which conditions individual relations be it the patient-doctor or the scientist/researcher and the research subject. This sense of love and care to fellow men and beings can be treated to be the essential attribute of man which adds to the intrinsic worth of human life. The underlying substance of the concept is that human life has got intrinsic worth since humans have got the unique capacity to comprehend that all life including his has got that worth and thereby live in conformity with his fellowmen. All world religions highlight this though in different modes due to racial, cultural, geographical and other external factors[300]. Thus the religious, secular and scientific thoughts converge on the aspect life of man is distinct and hence respect for human life and recognition of man as an individual and as a part of collective whole is essential for sustenance of human life per se.Even great religious seers like SreeNarayana Guru have asserted that the path to true knowledge is the acceptance of the intrinsic worth of the life of fellow men.[301] This is equally true in case of secular reasoning as well.

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[300] See *Rig Veda* S*anhit*a Book 1 Hymn CLXIV, verse 46, John 10:16 New Testament *Living Bible*, 3.84,The Holy Qu'ran 3.84.

[301] "Of the same liking :- this is my liking:
There's liking thine, and another's liking too;
even so
Liking – wise severally misconceptions arise.
Know, one's own liking is the other's liking."

Thus this concept is a self-evident, independent and universal concept .It reflects a covenant which man enters with another man. To ask the meaning of sanctity of life is to explore so as to find the actions and abstentions that come from adherence to this covenant.[302] This limitations do exist in our search for knowledge be it medical, scientific or any discipline. This concept is the epitome of all ethical rules and norms which govern human relations. Hence this principle is considered as establishing the intrinsic worth of human life which forms the edifice of human rights jurisprudence.

Note: We have likes. All of them are of the same kind. There is no difference between the kind of loves I have and what others have. Many wrong ideas arise on the basis of people's likes. Better think that all are of similar significance. verse 21, Sri Narayana Guru, Atmopadesasathakam' *The Song Of The Self,* Dr K. Sreenivasan (trans.), Jayasree Pub., Kerala(1994), p.55.

[302] Paul Ramsey, "The patient as person*",* in Robert M. Veatch (Ed.), *Cross- Cultural Perspectives in Medical Ethics,* Jones & Bartlett Pub., USA (2000), p.99.

Chapter 3

Sanctity of Human Life as the Basis of Human Rights Jurisprudence

Sanctity of human life postulates that human life has got an inherent value which is universal and equal and its importance cannot be overridden by other considerations. This principle has a bearing on the Human Rights philosophy since it conveys the meaning of respect for the inherent worth of the life of fellowmen. Though various international instruments provide an array of rights, the content of human rights concept has been a subject of speculation, since there is no consensus as to the actual meaning of the term. Intuitive moral philosophers claim that the definition or meaning of human rights are futile since they involve moral judgments that must be self evident and that are not further explicable.[1] Other moral philosophers, while attempting to explain the content of human rights, try to focus on the purpose and consequences of human rights. The definition to the term "rights" is itself controversial[2] since its colour and content keep shifting like a chameleon and the term describes a variety of legal relationships[3] and thereby the degree of protection varies. However, a philosophical inquiry into the content of human rights helps one to decipher the degree of protection available, priorities to be afforded to various rights in various situations, the extent of derogations etc.

Human rights are commonly understood as a set of moral guarantees which finds its justification in the realm of moral philosophy. These rights accrue as a

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1 Jerome J. Shestack, "The Philosophical Foundations of Human Rights," 20 *H.R.Q.* 201 (1998).

2 Available at http://plato.stanford.edu/entries/rights-human (visited19.10.2011).

3 Sometimes *right* is used in its strict sense of the right holder being entitled to something with a correlative duty in another. Sometimes *right* is used to indicate an *immunity* from having a legal status altered. Sometimes it refers to a *privilege* to do something. Sometimes it indicates the power to create a legal relationship. Though all of these terms are considered as rights, they involve different levels of protections.

result of one being a human being. Thus these rights seek to establish and reinforce the premise that human life has got a value which is self-evident and requires respect without any distinction. In order to understand the nature and content of the rights and why these rights are being recognised and bestowed on humans alone, one needs to look into the moral reasoning and justification behind these rights. It is found that these rights recognise admittedly the intrinsic worth of the life of man and recognise that the respect for human life and its worth are the epitome of the human rights concept.

3.1 Sanctity of Human Life and the Jurisprudential Discourse on Human Rights

Most of the discussions on the philosophy of human rights have always centred on the concept of sanctity of life. The fundamental feature of this concept i.e., equal respect for all human lives could be found in the views of the ancient stoics,[4] who held that by nature humans were equal.[5] It was Cicero, who for the first time used the word, "*dignity*" to express the notion that humans have a special status by virtue of being humans when he compared man with other creatures. Later on, the term, "*dignity"* signified that human life had a worth or status which has to be recognised by every legal system that exists.[6] The origin of human rights concept is often traced to Greece but it could be found that it was the Romans who recognised certain universal rights that extended beyond citizenship

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[4] Seneca, while addressing the principle of equality of all human lives, cast an example wherein he says that a slave, though his body may by misfortune be under the control of the master, yet his mind is completely independent and free and this compels him to act rationally in certain circumstances like matters of crimes where he may not obey his master. Thus he sought to establish a rational independence and equality in human nature, for all humans be it the slave or his master. See Lucius Annaeus Seneca, *Debeneficiis*, Book III, available at www.gutenberg.org/catalog/world/readlife?fkfiles=1453523 (visited on 12-12-2011).

[5] Marcus Tullius Cicero, *On the Laws (De Legibus),* Book I, section 62, David Fott (trans.), available at http://www.nlnrac.org/classical/cicero/documents/de-legibus (visited on 21-12-2011).

[6] Cicero points out that man is superior in nature to cattle and other beasts since animals do not have thought except for sensual pleasure and this they are impelled by every instinct to seek. But man's mind is nurtured by study and meditation, he is always either investigating or doing and he is captivated by the pleasure of seeing and hearing. Though man is inclined to sensual pleasure, he is little too susceptible to attractions of pleasure. According to Cicero, sensual pleasure is quite unworthy of the dignity of man and we ought to dispose it and cast it from us. Marcus Tullius Cicero, *De Officiis* Book 1, XXX Walter Miller (trans.), available at www.constitution.org/rom/de_officiis.htm (visited on 13-3-2012).

pursuant to *Jus Gentium* (law of nations). According to the famous Roman jurist Ulpian, natural law is nature's gift to Romans irrespective of the fact that state recognises it or not. But the earlier natural law thinkers[7] were of the view that nature has bestowed certain immutable rights on individuals, but had nevertheless accepted that these rights were bestowed on man since it was the divine will[8] and that man is the product of divine creativity. Totally alienating divine hand as the force behind the worth of human life, the 18th century natural law theorists gave a secular colour to the concept of human life. This view was the result of the Reformation movement in which thinkers like Martin Luther professed the idea that man had the liberty of conscience to have faith or not[9] but he should have respect and concern for all human beings. Thus the notion of man as an autonomous being took its birth. Hugo Grotius, the Dutch Philosopher also viewed man as an autonomous individual endowed by nature with certain inalienable rights. Grotius affirms that this can be discovered by man alone, since man has the right reason to understand and perceive the worth of his life. Certain arguments advanced by him[10] gave an impression that natural law was not

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7 St. Thomas Aquinas, Summa Theologica , Part I, Article XII, in Robert Maynard Hutchins (Ed.), *Great Books of the Western World,* vol. IXX & XX, Encyclopaedia Britannica (1971), p.61. See also Thomas Hobbes, Leviathan, Part I, in Robert Maynard Hutchins (Ed), Great *Books of The Western World*, vol. XIII, Encyclopaedia Britannica, USA (1971), p.91.

8 "Everything in nature, insofar as they reflect the order by which God directs them through their nature for their own benefit, reflects the Eternal Law in their own nature." St Thomas Aquinas, *Summa Theologica,* Book I &II, Robert Maynard Hutchins (Ed.), *Great Books of the Western World ,* vol. XIX & XX, Encyclopaedia Britannica, USA (1971), p.91.

9 "Furthermore, every man runs his own risk in believing as he does and he must see to it himself that he believes rightly. As nobody else can go to heaven or hell for me, so nobody else can believe or disbelieve for me; as nobody else can open or close heaven or hell for me, so nobody else can drive me to belief or disbelief. How he believes or disbelieves is a matter for the conscience of each individual since this takes nothing away from the temporal authority the latter should be content to attend its own affairs and let man believe this or that as they are able and willing and constrain no one by faith is a free act." Martin Luther, *Concerning Temporal Authority: To what extent it should be obeyed,* (1523), part II, available at https://www.lutheransonline.com/lo/522/FSLO-1330610522-111522.pdf (visited on 23-3-2012).

10 "What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that this is no god or that the affairs of him are of no concern to Him." Hugo Grotius, *The Law of War and Peace* (1625), Prolegomena XI, available at http://www.lonang.com /exlibris/grotius/gro-100.htm (visited on 24-2-2012).

dependent on theology[11] while others[12] stressed that natural law is a part of divine law. However, when one deciphers his writings it is a fact that he had always attempted to relate natural law with divine law but stressed that human life was sacred and that man was an autonomous being with a rational outlook. This view was anthropocentric rather than a blind outlook based on theism. Accepting the conception of Hobbes that man is a social being with a unique capacity to socialize,[13] Pufendorf stresses that natural law is the product of reason alone.[14] He exhorts that the will to socialize arose in humans due to their intense concern for their own self preservation which can only be achieved with the help of fellowmen. For this he advocated certain duties of man towards another, namely:

1. Respect and concern for the value of the life of fellowmen.

2. Do not harm others.

However, he gave a justification for the existence of any government or law on this premise but often stressed that human life is sacred. Thus he did not attempt to totally negate religion from natural law of justification but attempted to give an independent secular outlook through his natural law of philosophy. Natural law theorists stressed that nature has bestowed on man certain inalienable and immutable rights which are self evident conveying that human life has got intrinsic worth. The Enlightenment era witnessed a libertarian's exposition by the famous jurist John Locke, who gave an eloquent thesis on the evolution of rights, more specifically on natural rights. Hobbes stated that in the absence of a "common power to keep them in awe," human beings would behave so as to

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[11] Alexander Passerin D'Entreves, *Natural Law: An Introduction to Legal Philosophy*, Transaction Pub., USA (2009), p.16.

[12] In Prolegomena XI itself he says that God as our creator and that we should obey Him and owe him for what we are, so that he showers rewards for us and what we have, since He is extremely good and powerful. Hugo Grotius, *The Law of War and Peace* (1625), Prolegomena XI, available at http://www.lonang.com/exlibris/grotius/gro-100.htm (visited on 24-2-2012). See also Hugo Grotius, *The Truth of the Christian Religion,* Le Clerc (Ed.), John Clarke (trans.), William Baynes, UK (1829), available at http://www.ccel.org/ccel/grotius/truth (visited on 25-2-2012).

[13] Howard P. Kainz, *Natural Law: An Introduction and Re-examination,* Open Court Publishing Co., USA (2004), pp.38-40.

[14] Samuel Von Pufendorf, *The Two Books on the Duty of Man and Citizen: According to the Natural Law,* Book I, Oceana Publications, USA (1964), p.17.

create a state of war. Man was being conceived as solitary, poor, nasty, brutish and short and hence the only right humans possess is the right of self–preservation.[15] Unlike the conception of Hobbes, for Locke, in state of nature, man is not lawless. According to him, even in the state of nature all men are by nature free, equal and independent in the sense that they are born with certain "inalienable" natural rights prominent among them being the right to life, liberty and property.[16] Though in this state there were no normatively binding human law, the law of nature[17] obligates humans to act for the preservation of mankind, hence no one may "take away or impair the life or what tends to the preservation of the life, the liberty, health, limb or goods of another."[18] However in this state, not all men chose to live within the confines of natural law and there were threats to the liberty of others. Hence man entered into a social contract (compact) wherein state (government) was formed to guarantee the rights of others. For the mutual preservation of lives and naturally endowed rights human beings surrendered to the state and the social contract entered implies not the surrendering of those inalienable rights but the right to enforce these rights since the state's failure to secure these rights justifies a popular revolution. Thus Locke observed that individuals should be free to make choices about how to conduct their own lives as long as they do not interfere with the liberty of others. Thus, respect for the life of fellowmen which is the basis of sanctity of life forms the foundation of human rights jurisprudence. Locke's prophecy had strengthened the

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[15] Thomas Hobbes, *Leviathan*, available at https://ebooks.adelaide.edu.au/h/hobbes/ thomas/h68l/ (visited on 27-8-2014).

[16] Locke stated that the law of nature entails the existence of natural rights to life, liberty and property: life, because the preservation of mankind requires individuals not to take their own or others lives; liberty, because all men are by nature equal and hence possess the equal right to (their) natural freedom, without being subjected to the will or authority of any other man and property because every man has a property in his own person" that entitles him to labour of his body and the work of his hands,'' such that whatever" he removes out of the state that nature hath provided and left it in, he hath mixed his labour with and joined to it something that's his own and thereby makes his property". John Locke, "An Essay Concerning the True Original, Extent and End of Civil Government", in Robert Maynard Hutchins (Ed.), *Great Books of the Western World*, vol.XXXV, Encyclopaedia Britannica, USA (1971),pp.25-42.

[17] Criticism exists that there is a doubt that in Locke's interpretation the natural law takes precedence over natural rights and that Locke by giving importance to individual rights placed man in isolation, lacking any moral ties to others in society, available at http://www.nlnrac.org/earlymodern/locke/educational-materials (visited on 3-4-2012)

[18] *Ibid*.

notion that sanctity of life is the basis of human rights. This view of Locke had profound impact on philosophers like Rousseau and Adam Smith who justified their version of social contract. This philosophy of Locke was taken by Thomas Jefferson to draw up the American Declaration of Independence. Though it is a fact that Locke's theory had an enduring effect on the development of human rights, it was strongly criticised by philosophers like Edmund Burke,[19] David Hume[20] and Bentham who felt that such an explanation to evolution of rights would lead to substitution of legislation by declarations and proclamations of natural rights.[21] For Bentham, right is the child of law; from real law comes real rights; but from imaginary laws, from 'law of nature,' come imaginary laws, from 'law of nature' come imaginary rights

> *....Natural Rights is simple nonsense, 'natural and imprescriptable rights (an American phrase).....(is) rhetorical nonsense, nonsense upon stilts*."[22]

It can be thus inferred that the problem of natural law theory is that the rights which can be regarded as natural may keep varying from one philosopher to another and that granting of a priori rights was shutting the eyes on realities. However, it cannot be overlooked that the natural law thinkers always consider that law had an inevitable connection with morality and that the legal validity has to pass the test of morality.

The notion that rights emanate from the actions of the state and that if we want rights we have to create it by virtue of law was first established by Jeremy

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[19] Edmund Burke, *Reflections on the Revolution in France,* in J.G.A. Pocock (Ed.), Hackett Pub., USA (1987), p.32. He criticized the drafters of the French Declaration of the Rights of Man and of the Citizen for proclaiming the monstrous fiction of human equality which he argued serves but to inspire "false ideas and vain expectations in men destined to travel in the obscure walk of laborious life."

[20] David Hume, An Enquiry Concerning Human Understanding, in Robert Maynard Hutchins (Ed.), *Great Books of the Western World,* vol. XXXV, Encyclopaedia Britannica, USA (1952), p. 460, stated that natural law and natural rights are unreal metaphysical phenomenon.

[21] Available at http://www.britannica.com/EBchecked/topic/275840/human-rights (visited on 6-5-2012).

[22] Jeremy Bentham, Anarchical Fallacies- Being an Examination of the Declaration of Rights issued during the French Revolution*, The Works of Jeremy Bentham*, vol. II (1843). Available at http://oll.libertyfund.org/titles/1921 (visited on 7-6-2012).

Bentham.[23] His idea of liberty was subjected to the general interest or happiness. According to his contemporary John Stuart Mill, man is conceived by Bentham as a being susceptible to pain and pleasures and governed in all his conduct partly by different modifications of self interest and passions prompted by selfishness.[24] Hence he viewed on human actions and their nature generally in a given society rather than on the intrinsic worth of human life. Hence the naturalist preposition that nature has endowed man with certain inalienable rights have been rejected by him saying it as imaginary and unreal, thereby holding the view that each human action is governed by its consequence. His pragmatic approach of an empirical analysis was the result of the influence of the writings of David Hume who was of the view that no theory of reality was possible without the knowledge of experience.[25] In order to judge a human action he formulated the fundamental axiom "the greatest happiness of the greatest number."[26] He argued that man was not in any way superior to other beings due to the existence of the power of reasoning since according to him, then, human infants and adults with certain disabilities might fall short too. This view was later affirmed by his contemporaries like Peter Singer. Thus liberty, according to Bentham, is '*chimera' in the world of politics*[27] and liberty as an ideal of free, autonomous individual as that of the naturalist view was rejected by him. It could be inferred that these ideas of liberty prompted Bentham to make a scathing attack on the French Declaration of the Rights of Man and the Citizen 1789, where he called it as a code perpetuating anarchy drawn in the name of the charter of rights. His critical view on natural rights may seem similar to that of Karl Marx whose views

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[23] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), available at http://www.econlib.org/library/Bentham/bnthPML6.html (visited on 7-6-2012).

[24] John Stuart Mill , *Dissertations and Discussions- Political, Philosophical and Historical'* vol. III, available at http://www.laits.utexas.edu/poltheory/jsmill/diss-disc/bentham/bentham. s03. html (visited on 19-7-2012).

[25] David Hume, An Enquiry Concerning Human Understanding, in Robert Maynard Hutchins (Ed.), *Great Books of the Western World,* vol. XXXV, Encyclopaedia Britannica, USA (1952),p.456.

[26] JeremyBentham, *A Fragment on Government,* F. C. Montague (Ed,), Clarendon Press, (1891), p.35.

[27] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), available at http://www.econlib.org/library/Bentham/bnthPML6.html (visited on 23-7-2012).

were found to be incompatible with the concept of human rights, though the reasoning of both is drastically different and in fact Karl Marx criticised Bentham's findings.[28] It can be found that if Bentham's approach is accepted then there would be no place for individual rights since the majority would trample the rights of the weak minority. However it cannot be denied that the Benthamite approach was quite different and secular when compared with the views of the religious utilitarians like William Paley who took the resort of god to address the basic issue of how to harmonize the interest of individuals who are only motivated by their own happiness, with the interest of the society as a whole.[29]

However, it is worthwhile to observe that the philosophical reasoning of John Stuart Mill on the subject of individual liberty is unique in the sense that he did not lay down his thesis taking resort to naturalist theory nor to metaphysical concepts, but treats utility as the ultimate appeal on all ethical questions. Mill believed in the ultimate freedom of individuals to act as they wish, so long as they cause minimal or no harm to others since this would promote[30] utility in the largest sense, grounded on the permanent interests of man as a progressive being.[31] He based his prophecy not on the notion that human life has got intrinsic worth but that man is a free[32] being who requires to grow and develop on all sides according to the inward forces which make it a living thing. He believed that humans were

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[28] Karl Marx, *Capital*, vol.I, Progress Publishers, Moscow (1978), p.571.

[29] "The method of coming at the will of God, concerning any action, by the light of nature, is to inquire into the "the tendency of the action to promote general happiness" This rule proceeds upon the presumption, that God Almighty wills and wishes the happiness of his creatures; and consequently that those actions, which promote that will and wish, must be agreeable to him; and contrary." William Paley*, The Principles of Moral and Political Philosophy* (1785), available at http://oll.libertyfund.org/titles/703 (visited on 1-9-2012).

[30] "The object of this essay is to assert one very simple, (which is) entitled to govern absolutely the dealings of society with the individual....That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self- protection. That purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." John Stuart Mill, *On Liberty* (1859), available at http://www.utilitarianism.com/ol/one.html (visited on 23-9-2012).

[31] *Ibid.*

[32] John Stuart Mill observed thus: "Among the works of man, which human life is rightly employed in perfecting and beautifying, the first in importance surely is man himself." *Ibid.*

interdependent by nature[33] and recognises that man as a moral agent is capable of making restraints on his actions for a harmonious existence. However his conception of harm principle seem similar to that of Kantian imperative but the confusion arises as to where we are to draw a boundary so as to distinguish between conduct that is self regarding and conduct that involves others.[34] It can be inferred that he insisted on human autonomy and self determination in the sense that he declared that*, "Over himself, over his own body and mind, the individual is sovereign."*[35] Thus humans have the power of individual decision making over the self. Viewed in this context, the advances in genetics how far it may be applied to one is based on one's own conscious decision making.

The positivist school did not believe that sanctity of human life has a bearing on the practical operation of a legal system. John Austin, the positivist through his command theory tried to distinguish between divine law and man-made law and gave an interpretation to law '*as it is*' rather than '*ought to be*.'[36] He maintained that moral precepts or religious notions should not hinder us in our understanding on the operation of law.[37] He maintained that law must be obeyed no matter we like it or not[38] or however immoral it may be or even though it may disregard the individual. The definition of law by Austin thus gives an impression that human rights is the product of positive law[39] and that it is not based on notions such as the intrinsic worth of life of humans. Hans Kelsen was averse to studying legal science through the naturalist metaphysical ideas. Hence his 'science of law' is addressed by him as pure theory of law since he wanted to study law through logical deductions in law

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[33] John Stuart Mill stated thus "all that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of the people living together in a community". *Ibid.*

[34] Ogunkoya Duotun, "John Stuart Mill's "Harm Principle" as the Foundation for Healthy Social Relations", 4 *Journal of International Social Research* 518 (2011).

[35] *Ibid.*

[36] John Austin, *Province of Jurisprudence Determined*, Wilfred E. Rumble (Ed.), Cambridge University Press, UK (1st edn., 1995), p.13.

[37] In the second, third and fourth lectures and finally in the fifth lecture, Austin distinguishes divine law from his positive law. *Ibid.*

[38] *Ibid.*

[39] John O' Manique, "Development, Human Rights and Law", 14 *H.R.Q.* 389 (1992).

itself which is often regarded as a Kantian method.[40] Though he was averse to using values and morals in making a legal analysis, he believed that this gets reflected in certain norms which gets clustered and later formulates into a ground norm, which is the basic norm on which the entire structure of law rests. Thus he placed strong reliance on positive law made by state rather than individual as the basis of all laws. This line of thinking divorcing the legal system of its moral foundations was no doubt subjected to ridicule, but history had witnessed the results of the adherence to the anti-Semitic edicts of the Nazis which were regarded by them as positive law.

It is found that the classical positivist, H. L. A. Hart in his exposition on law did not totally attack the naturalist philosophy. He believed that to understand law or legal system, there is a need to analyse empirically the social facts and realise that there is a minimum content to natural law theory to understand law.[41] His theory is based upon the idea that all men enjoyed equal rights which is based on natural law from which we derive the moral relationship which men have with each other. The element of equality which he stresses is often understood as being influenced by the writings of Hobbes.[42] Thus he claims that if we can recognise the existence of at least one basic or natural right, it is the equal right to liberty. This forms the basis of all rights i.e., all rights are derived from this concept. Thus, recognition of the fact that all men have equal rights[43] conditions the conduct of an individual. Thus in essence Hart argues that this recognition of equal rights[44] gives rise to two major principles:

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[40] Shivji G. Issa, *The Concept of Human Rights in Africa,* Codesria Book Series, London (1st edn., 1989), p.48.

[41] H. L. A. Hart, *The Concept of Law* Oxford University Press, New York (1993), p.171.

[42] William C. Starr, "Law and Morality in H. L. A. Hart's Legal Philosophy" 67 *Marq. L .Rev.*, 685 (1984).

[43] "Even the strongest must sleep at times and when asleep, loses temporarily his superiority. This fact of approximate equality, more than any other, makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation. Social life with its rules requires such forbearance is irksome at times; but it at any rate less nasty, less brutish, and less short than unrestrained aggression for beings thus approximately equal. *Id.,* p.191.

[44] "For although on my view all men are equally entitled to be free in the sense explained, no man has an absolute or unconditional right to do or not to do any particular thing to do or to be treated in any particular way; coercion or restraint of any action may be justified in special conditions consistently with general principle. So my argument will not show that men have any right (save the equal right of all to be free) which is "absolute," "indefeasible" or"

1. The right or forbearance on the part of all others from the use of restraint or coercion against the individual.

2. Man has got the liberty to do any action except that it does not coerce, or restraint or is not designed to injure other persons.[45]

He thus proposes to establish the fact that there exist a relationship between man and man which lies at the ebb of the concept of sanctity of human life. This preposition enabled his contemporary Joseph Raz, to hold that human rights as such express the worth of all human beings.[46] He was of the view that human rights are self-justifying rights since they tend to establish the fact that human life is valuable unconditionally and equal universally.[47] It is worthwhile to note that Hart conceived that there was no indispensable connection between the content of law and morality. He was of the firm view that existence of legal rights and duties may be devoid of moral justification.[48] This led to a debate between him and Fuller, and later Fuller's student Ronald Dworkin.[49] Fuller argued that morality is the source of law's binding power. Every legal system has to follow 'principles of legality' more known as 'inner morality of law'[50] if the laws in it are to be just and fair. Regimes which repudiate the inner morality of law were not entitled to be called legal systems. He cited the Nazi regime in Germany as an example.[51] It is found that though Hart sought to alienate morality from law, he had unconsciously treaded into the area of morality when he insisted that there

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imprescriptible." H. L. A. Hart, *"*Are there Natural Rights*?"*64 *The Philosophical Review* 175 (1955).

45 *Ibid.*

46 Joseph Raz, Human Rights in the New World Order, Columbia Public Law and Legal Theory Working Papers, Paper 9175(2009), available at http://lsr.nellco.org/columbia_pllt/9175/ (visited on 2-10-2012).

47 "The importance of human rights, I suggested is in affirming the worth of all human beings and in distributing power away from the powerful to everyone, and to any group or association willing to advocate and promote the interests of ordinary people." *Ibid.*

48 *supra* n.41, at p.8.

49 Ronald Dworkin, Law's Empire, in Scott J. Shapiro, *The Hart-Dworkin Debate: A Shor*t *Guide of the Perplexed, a*vailable at http://www.law.yale.edu/documents/pdf/Faculty/Shapiro_ Hart_ Dworkin_Debate.pdf (visited on 10-10-2012).

50 Lon L. Fuller, *Morality of Law*, Yale University Press, New Haven (1995), p.153.

51 Lon L. Fuller, "Positivism and Fidelity to Law-A Reply to Professor Hart", 71 *Harv. L. Rev.* 652 (1958).

should be an impartial application of rules in a legal system[52] and again his insistence that minimum content to natural law[53] is that he believes in the fundamental moral norm i.e., respect for human life and absolute equality of human lives. He insisted mutual forbearance and compromise for peaceful coexistence.[54] This depicted his commitment to the concept of sanctity of life.

The sociological school did not however focus on the concept of the sanctity of life but rather insisted on obtaining a just equilibrium of interests among prevailing socio-economic conditions of time and place. Though they did not speculate on the intrinsic value of human life they placed individual interest in a higher pedestal which is expected to have a just balance with societal interest. Instead of self-assertion consistent with a like assertion by others the maximum satisfaction of human wants of which self assertion is only one (though it is the most important) is given stress by this school.[55] It can be found in the writings of Roscoe Pound that man is being characterised as a free living being and has got the claim to assert his individuality with a free will and reason. Liberty was the free will in action. Hence it was the business of the legal order to give the widest effect to the declared will and to impose no duties except in order to effectuate the will or to reconcile the will of one with the will of others by a universal law.[56] Thus, by taking a holistic approach, he attempts to built a strong edifice for the claim of human rights. However, it can be found that this line of thinking was first designed and articulated by Emile Durkheim who took complete resort on the thesis that man's relation to society is expressed by the location of sacred power within each individual as opposed to those outside him. He conceived a principle called "*cult of individual"*[57] in which he finds human sanctity not intrinsically sacred as popularly

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[52] *supra* n.41, at p.202.

[53] *supra* n.41, at p.189.

[54] *supra* n.41, at p.191.

[55] Roscoe Pound, Law and Liberty, in William Allan Nelson et al. (Eds.), *The Harvard Classics-Political Science,* vol. XV, Charles W. Eliot (Ed.) , P.F. Collier & Sons, New York , (1909-1914), p.336.

[56] Roscoe Pound, An *Introduction to the Philosophy of Law*, Universal Law Publishing Co., Delhi (6th Indian Reprint, 2009), p.79.

[57] "The characteristic sacredness with which the human being is now invested .....is not inherent. Analyse man as he appears to empirical analysis and nothing will be found that suggests this

regarded but it is invested or rather consecrated by the society upon him.[58] Thus when he termed man as sacred,[59] he was in fact calling the modern form of collective conscience the cult of individual. This form of reasoning he believed that on sanctity of life would not only enable each individual to feel respect for not only his own right but also of all other human beings, thereby ensuring a restriction and control over individuals.[60] This line of reasoning by Durkheim is found to be the most convincing since it attempts to give an empirical analysis based on rational principles but it is found that he confesses that existence of god is not necessary to treat human life as sacred and even goes to the extent of saying god is not essential for religion to exist and to be followed.[61] Moreover it provides a rational framework for human rights to exist in the modern society. It can be found that contemporary thinkers especially the German thinker Niklas Luhmann while addressing the question of recognition of human rights by modern society has taken the support of Durkheim's view of sanctity wherein he holds that the word sacredness has a social function to perform[62] and that human rights is to be treated as a social institution with this specific social function i.e., minimum respect to fellow beings for sustenance of society.

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sanctity; man is a temporal being. But...the human being is becoming the pivot of social consciousness among European peoples and has acquired an incomparable value. It is society that has consecrated on him. Man has no innate right to this aura that surrounds and protects him against sacrilegious trespass. It is merely the way in which society thinks of him, the high esteem that it has of him at the moment, projected and objectified. Thus very far from their being the antagonism, the individual and the society which is often claimed moral individualism, the cult of the individual, is in fact the product of the society itself. It is society that instituted it and made of man the god whose servant is." Emile Durkheim , The Determination of Moral Facts, in Emile Durkheim (Ed.), *Sociology and Philosophy,* D. F. Pocock (trans.), Free Press, New York (1974), pp.58-59.

[58] Mark S. Cladis, "Durkheim's Individual in Society: A Sacred Marriage", 53 *J. Hist.Ideas* 71 (1992).

[59] Emile Durkheim defined the term sacred thus: "sacred things are simply collective ideals that have fixed themselves on material objects" and he attempts to explain sacredness thus, "they are only collective forces hypothised that is to say, moral forces; they are made up of the ideas and sentiments awakened in us by the spectacle of society and not of sensations coming from the physical world." Emile Durkheim, *The Elementary Forms of Religious Life*, Book I, Joseph Ward Swain (trans.), George Allen & Unwin Ltd., London (1915), pp. 36-37.

[60] Francis Westley, "The Cult of Man: Durkheim's Predictions and New Religious Movement*",* 39 *Sociological Analysis* 138 (1978).

[61] *Id,.* at p.30.

[62] Gert Verschraegen, "Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory", 29 *J. Law &Soc.* 264 (2002).

3.2. Modern Approaches on Human Rights and the Concept of Sanctity of Life:

It is found that key human rights conventions reflect the moral Universalist foundation namely sanctity of life and human dignity. The contemporary thinkers irrespective of the fact whether they support the utilitarian school or positive school of thought, accept these moral values as enduring, eternal and universal. They believed that every positive legal system has to recognise these values lest they may decay. This probably was the result of Kantian notion of man and the corollary to it the philosophy of categorical imperative. He professed that man was unique in terms of capacity due to the inherent reason in man and was morally autonomous in nature which is a universal phenomenon. The reasoning of Kant transcended the socio-cultural barriers and justified the concept of human rights and worth of life as a universal phenomenon. In fact Kant's conception that human worth or dignity had a non-religious fervour which found great support later. The prominent neo-Kantian philosopher, John Rawls also stressed that:

> *"each person possesses an inviolability founded on justice that even the welfare of the society cannot override.....therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interest.*[63]*"*

He believed in the rational capability in humans to recognise the worth of his fellowmen and thereby create an atmosphere of mutual respect and adherence of rights. Though he recognises the inviolable quality of human life, he proceeds to explain the concept of human rights on the basis of social nature of humans in the practical world rather than on the basis of the concept of sanctity of life. However it is worthwhile to observe that Rawl's view on human rights was not based on the individual as the highest in moral order[64] but it viewed human rights as a practical solution conceived by society and hence institutionalized human

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[63] John Rawls, *Theory of Justice,* Belknap Press, Cambridge (1971), pp. 3-4.

[64] Available at www.chrgj.org/docs/cblegalpracticepaper.pdf (visited on 03-12-2012).

rights.[65] However, philosophers like Alan Gewirth who spoke of man as a rational purposive agent[66] did not attempt to explain the basis of human rights on the basis of the concept of sanctity of life, though Gewirth stressed that freedom and well being are conditions for man to behave rationally and purposively. Thus, he argues that one cannot enjoy freedom unless he recognises[67] that others also have similar freedom.[68] This view seems to be contrary to the view of Nietzsche[69] who believed that humans are unequal by nature. Certain writers stressed that human dignity is synonymous with the sacredness of life or the intrinsic worth of human life[70] and therefore insisted that a value based policy approach in analysing human rights concept is essential. They believed that certain values which establish dignified human existence are immutable at all times[71] and the International Human Rights have to attempt to strengthen these values which forms the base of human rights. These views lead one to the illuminating fact that sanctity of life concept is the ground norm on the basis of which the entire legal framework of human rights rests and are universal in nature. The view that human rights are universal in nature was contested by cultural relativists, who held that human values far from being universal, vary according to different cultural perspectives and its compliance depends on the State's discretion depending on its cultural tradition. Condemning universal values, Johan Gottfried Von Herder introduced the concept of "*Volksgeist*", the spirit of people. Each nation speaks in the manner it thinks and thinks in the manner it speaks, hence a sound civilization must express the national character.[72] This principle does not seek to promote

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65 John Rawls, "The Law of Peoples", 20 *Critical Inquiry* 68 (1993).

66 Louis P. Pojman, "Are Human Rights Based on Equal Human Worth?", *Philosophy and Phenomenological Research* 616 (1992).

67 "Act in accord with the generic rights of your recipients as well as yourself." Alan Gewirth, *Reason and Morality*, University of Chicago, USA (1978), p.10.

68 Alan Gewirth, "Ethical Universalism and Particularism", 85 *J. Phil.* 283 (1988).

69 Nietzsche F. W., *The Antichrist,* H. L. Mencken (trans.), Alfred A. Knoff, New York (1923), available at http://www.gutenberg.org/files/19322/19322-8.txt (visited on 6-11-2012).

70 Oscar Schachter, "Human Dignity as a Normative Concept", 77 *A.J.I.L.* 849 (1983).

71 Myers S McDougal et al., "Human Rights and World Public Order: A Framework For Policy Oriented Inquiry", 63 *A.J.I.L.,* 267 (1969).

72 Johan Gottfried Von Herder, *Another Philosophy of History and Selected Political Writings*, Ioannis D Evirigenis & Daniel Pellerin (Eds. & trans.) ,Hackett Pub. Co., Indianapolis (2004), p.36.

respect for individual as individual but as a member of a social group. It is however a fact that culture is a stuff which one learns after one's birth whereas it is a fact that respects towards life is a principle which cannot be bound by language, colour or creed. Replacing the metaphysical argument on sanctity of human life and rejecting the utilitarian notions, Ronald Dworkin argues that the basis of human rights has a definite premise. He states that the deepest moral assumption is that there exists a natural right for all men and women to an equality of concern and respect, a right that they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and justice.[73] This is termed as '*egalitarian plateau'* by other thinkers.[74] This libertarian's view rests on the premise that each human life is intrinsically and equally valuable and that each person has an inalienable personal obligation for identifying and realizing value in his or her own life. Moreover, this principle perpetuates the state to treat its citizens with equal concern and respect.[75] Dworkin feels that if a man has the right to do something, it is not appreciated if we stop it but when the exercise of this right violates other's rights, the government can interfere with it. This view is more or less similar to the opinion of J. S. Mill who asserted that "pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it."[76] It is found that the very same view was put into action in the French Declaration of the Rights of Man and of the Citizen in 1789.[77] Dworkin's attempt to borrow a metaphor on rights from the game of bridge, '*rights as trumps'* is famous in the sense that it establishes the fact that personal rights do not have meaning if they

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[73] Ronald Dworkin, *Taking Rights Seriously,* Harvard University Press, USA (1978), pp.180-184.

[74] Adam Swift, *Political Philosophy: A Beginners' Guide for Students and Politicians*, Polity Press, Cambridge (2006), p. 97.

[75] Alexander Brown, "An Egalitarian Plateau? Challenging the importance of Ronald Dworkin's Abstract Egalitarian Rights", 13 *Res Publica* 257 (2007).

[76] John Stuart Mill, *On Liberty,* (1859) available at http://www.utilitarianism.com/ol/one.html (visited on 23-9-2012).

[77] Article 4 reads" Liberty consists in being able to do anything that does not harm others: thus, the exercise of natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law", available at www.conseil-constitutional.fr/conseil-constitutional/root/bank (visited on 27-8-2014).

are susceptible to being overridden by all social goals but only by a goal of special urgency.[78] This establishes the fact that Dworkin like Rawls and Nozick had enduring faith in personal autonomy. He believed that the worth of one's life is determined not only by his birth but also how one leads life. In his work, '*Sovereign Virtue: The Theory and Practice of Equality*[79]' Dworkin expresses the view that human beings are responsible for the choices they make in life. This libertarians view of life is also found in the writings of Morris and Linda Tannehill who claimed that man has a right to ownership over his life and therefore also his property, since he invested time (i.e., part of his life) in it and thereby made it an extension of his life. However they feel that, if man initiates force to the detriment of another man, he alienates himself from the right to that part of his life which is required to pay his debt. It is said thus:

> "*Rights are not inalienable, but only the possessor of a right can alienate himself from that right- no one else can take a man's right from him."*[80]

This view of overstress on individual rights made the views of libertarians, especially Dworkin, susceptible to criticism[81] that liberalism is too much preoccupied with rights rather than duties.[82] It can be safely affirmed that if Kant's moral philosophy was the stimulating force behind the drafting of major human rights declarations and movements, Dworkin's philosophical reflections gives a hope for resolving contemporary ethical and human rights issues plaguing the world. However he lists a number of values which coexist and cohere while practically exercised but also admits that these values conflict at certain instances. His principle of *'Unity of value*' establishes the fact that intrinsic worth of human life is the epitome of all moral values and it can resolve all issues of moral

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78 *supra* n.63, at p.11.

79 Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality,* Harvard University Press, USA (2002), pp. 287-288.

80 Morris & Linda Tannehill, *The Market for Liberty,* The Ludwig Von Mises Institute, Albama (2007), p.11.

81 The critics of liberal premises were called communitarians who vociferously raised their concern over the stress on individual rights rather than duties and called for a balance to be struck.

82 Douglas Hodgson, *Individual Duty within a Human Rights Discourse,* Ashgate Publishing Ltd., Australia (2003), p.210.

pluralism[83] and the apparent conflict between liberty and equality. This view of Dworkin may at certain points seem to be more or less similar to the views of John Finnis,[84] who held that certain human goods or values which are self evident need to be respected by every legal system if it is to survive.[85] However Dworkin feels that the two principles—intrinsic worth of human life and equal concern for the lives of others—are nothing but human dignity. This constitutes the foundation of human rights.

Most of the human rights discourse pin point two major approaches to the concept of human rights, namely the interest theory approach and the will theory approach. Western philosophy has always tended to treat man as having a primary instinct of preservation of self interest. This line of thinking began with Hobbes and was admitted by philosophers like John Finnis, James Nickel etc. Finnis termed that human rights have instrumental value since they seek to secure necessary conditions for human well being. He identified seven fundamental interests which he termed as basic forms of human good, as providing the basis of human rights which need to be accepted by law.[86] But it is found that the view of James Nickel [87]distinct in the sense that he directly admitted that it was the self

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[83] The well-known conflict between freedom and equality is based on distribution of resources. If we feel that people are of equal value as human beings but also that people should be free to keep what they worked for, we must try to respect both values; we must try to see in what ways equality and freedom need to be qualified to respect both values. He asserts that value is what makes sense of how we act as individuals, how we relate to others, and how we construct our lives; and he argues for the integration of these values which leads to the ultimate principle of human dignity. Thus all true values form an interlocking network and cohere harmoniously which is the basis of human rights. Ronald Dworkin, *Justice for Hedgehogs,* Harvard University Press, Cambridge, London (2013), pp.118-119.

[84] We find that Dworkin and Finnis lay down the notion that a plurality of values which exist conjointly to form the value of life. But Dworkin identifies intrinsic worth of life or human dignity as the basic fundamental value upon which all other values emerge but Finnis finds seven basic goods and not one single principle as the fundamental value. According to Finnis, when there is a conflict between values the actor has to see how far the application of value can not only promote the well being of others but the actor himself. John Finnis, *Human Rights and Common Good : Collected Essays- vol III*, Oxford University Press, New York, 293 (2011).

[85] John Finnis, *Natural Law& Natural Rights,* Oxford University Press, New York(2011), pp.64-67.

[86] The seven fundamental interests which he claimed was that – life and its capacity for its development, the acquisition of knowledge, as an end in itself, play, as the capacity of recreation, aesthetic expression, sociability and friendship, practical reasonableness, the capacity for intelligent and reasonable thought process and lastly, religion or the capacity for spiritual experience.

[87] James W. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*, University of California Press, California (1987), p.92.

interest of man that prompted men to respect the rights of his fellowmen. It is found that these thinkers tried to emphasise the concept of human rights on the fact that man is a being capable of having certain interests which are primary and inalienable. Though no worthwhile discussions on the sanctity of human life concept can be found yet it can be inferred that they stressed on respect for the life of fellowmen. However, Amartya Sen a noted Economic philosopher,[88] asserts that conditions for a minimal decent life is socially and culturally relative. He is of the view that though the fundamental interest may be identical, the protection to be afforded may vary. Thus interest based approach is distinct from the will based approach which stresses on human capacity. H. L. A. Hart, Alan Gewirth etc. construed man as a being with certain attributes and capabilities but they failed to relate it with sanctity of human life. However, discussions on human rights directly or indirectly touch the essentials of sanctity of human life which stresses on the respect for inherent value of human life, not only the life of the individual but also respect for the life of fellowmen.

Conclusion

The philosophical reflections as to the basis of human rights reveal the inherent tension between the metaphysical arguments and the secular arguments on the concept of the sanctity of life. But it is found that throughout the discourse of philosophers on the subject, it is found that intrinsic worth of life has been accepted as the basis of the existence of human rights. Value of human life has been placed at the highest pedestal. Respect for the value of the lives of fellowmen and concern for one's own life is conceived as the basis of human rights. Thus it can be said that human rights are the universal egalitarian expressions which establish the fact that human beings have certain inherent rights which are immutable at all times. Some scholars argued that human rights concept based on this foundational principle as mere fictions[89] and not practically enforceable while others cited instances to prove that human rights concept is a

[88] Amartya Sen, "Universal Truths: Human Rights and the Westernizing Illusion", 20 *Harward International Review* 40 (1998).

[89] Patrick Loobuyck, "Intrinsic and Equal Worth in a Secular Worldview. Fictionalism in Human Rights Discourse", 3 *J.S.R.I.* 58 (2004).

reality which human history would reveal. Some writers point out that the confusion or anxieties with regard to human rights and their universality is actually the confusion between universality and absoluteness of rights. This is found in the words of Upendra Baxi that nothing about the logics of universality of human rights renders human rights absolute since the logic of universality entails interdependence of human rights.[90] Thus the principle that human life has got an inherent worth is self evident which no legal system can deny is a fact, but the question which confronts is whether this principle is viable and respected and adhered at all times. Questions which follow it are whether every legal system has to take into account the concept for its survival or rather can a legal system afford to ignore this concept? This necessitates an analysis of legal systems which had taken into account this concept in their legal scheme.

[90] Upendra Baxi, *The Future of Human Rights,* Oxford University Press, India (2nd edn., 2002), p.185.

Chapter 4

The Concept of the Sanctity of Life and Its Application in Legal Systems

The claim that human life is sacred and therefore deserves to be treated with reverence is often breached than honoured. These breaches have changed the very course of history. This moral norm could be justified from both religious and secular perspectives. The history of the past two centuries reveals that there has always been an attempt to enrich and expand this concept in various ways. The sanctity of human life is a fundamental human value recognised by all societies. Most societies have had the tradition of following the golden rule of *'Do unto others as you would have them do unto you'*.[1] This principle involves the element of respect for the individual which is the core of the concept of life's sacredness. It involves the element that each individual has a right to just treatment and reciprocal responsibility to ensure a just treatment of others.

The concept of the sanctity of life has made life inviolable and forms basis of human rights. It prohibits intentional killing. There are three main competing approaches which justify the concept of the sanctity of life. The first one is vitalism; the second is the quality of life approach and the third principle is the intrinsic worth of human life. Vitalism is an approach which tries to establish that human life is the supreme good and one should do everything possible to preserve it. Thus it seeks to emphasise that human life is to be preserved at any cost. The quality of life approach on the other hand stresses that there is nothing inherently valuable in human life, since it is only as an instrumental good. Its value depends on meeting a particular quality threshold. The value of human life is grounded on the principle that, certain lives are not worth living, it is right intentionally to

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[1] *Holy Bible*, Mathew 7:12, Luke 6:31.This golden rule is found in all major religions especially Christianity, Hinduism, Buddhism, Jainism, Sikhism, Bahai faith, Zoroastrianism etc.

terminate them, whether by act or omission. The third principle is the intrinsic worth of human life. It specifies that all humans possess, by virtue of their common humanity, an inherent, in eliminable and inalienable worth. The radical capacities in humans and their ability to exercise them may differ according to age (infancy or senility) or disability but the right to be not killed is enjoyed regardless of inability or disability. Thus, it is found that though life is a basic good, it is not an absolute good.[2] The principle advocates prohibition of intentional killing but at the same time it does not have an injunction to preserve life at all costs. It denies that human life is an absolute good but stands against intentional killing. Thus it is found that in most of the legal systems, right to life is meant to be taken as a qualified right but with the status of the most basic fundamental right.

It is a fact that all legislations, rules or norms, emanate from a system of values.[3] Legislative process makes a choice of values from competing perceptions and grants preference to one over the other. The sanctity of life concept encompasses within itself not only the worth of human life but also how far the individual has to respect the worth of other humans. Hence it is the epitome of individual liberty and equality principle. And all legislations in their claim of upholding the moral values cannot afford to ignore the concept.

There could be societies which may have different value perceptions and emphasis based on preferred objectives of social life. It is said that ancient societies were formed for the primary purpose of protection from fear and hence the ancient law codes like the Hammurabi code[4] stressed on the principle of retribution rather than modern versions of the sanctity of life. The Code graded punishments depending on social status of an individual i.e., based on whether a person is a slave or freeman.[5] Though certain rights and obligations were recognised for the king, the code cannot be seen as a complete guarantee to the

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2 John Keown*, The Law and Ethics of Medicine – Essays on the inviolability of Human Life,* Oxford University Press, Oxford (1st edn., 2012) pp. 4-6.

3 *supra* n.50, at pp. 19-42.

4 G. R. Driver & John C. Miles, Kt (Ed. & trans.), *Legal Commentary on the Laws of Hammurabi-The Babylonian Laws,* vol. I , Oxford University Press, Oxford (1952), pp.54-111.

5 *The Code of Hammurabi, King of Babylon,* Robert Francis Harper (trans.), available at http://www.humanistictexts.org/hammurabi.htm (visited on 15.9.2014).

whole of the people same rights as available for the ruler. Religious scriptures like Torah and biblical mandates also laid down the moral code of conduct. Ancient societies though contained recognition of rights, they were not based on the notion that a human being has a set of certain inviolable rights simply by virtue of the fact that he belongs to human species. The recognition that humans have inherent worth irrespective of status, birth, religion and respect for individuals in the egalitarian sense of being the same for everyone was absent in these legal systems. However modern legal systems are seen to incorporate the concept of the sanctity of human life as the basic standard for recognition of individual liberty by the state.

4.1 The Sanctity of Human Life as a Fundamental Norm to Test the Validity of Laws in a Modern Legal System

The principle of the sanctity of human life can be said as fundamental postulate on which moral and legal rules are developed to regulate human conduct. This principle is basic to any society and its rejection would endanger the humankind as such. The principle, in fact, includes the notion that human life is precious though mysterious and is worthy of respect and protection. Its worth is not to be determined by subjective or utilitarian concerns on the worth of life. The principle mandates that human life may not be taken without adequate justification and basic human nature may not be radically changed. The religious underpinnings on the sanctity of human life concept might probably be the compelling reason for treating the concept as absolute in nature. But it is found that though the doctrine chiefly forbids the intentional taking of life, it does permit death to occur as a side effect of permissible action.[6] Motive is irrelevant but killing is permissible provided the element of fatal intention is absent.

Quality of life as a concept and the sanctity of life concept need not be considered as diametrically opposite to each other but quality of life is essentially a part of the sanctity of life since it is based on the sanctity of life. The concept of

[6] Richard Huxtable, "D(en)ying Life: The Sanctity of Life Doctrine in English Law", *Retfærd* (2002), *available* at http://www.retfaerd.org/gamle_pdf/2002/3/Retfaerd_98_2002_3_s60_81.pdf (visited on 7.12.2013).

the sanctity of life, though theologically approved, does not deny that man cannot control the world and exercise dominion over it and take the responsibility for his conduct. Thus, the assumption that the sanctity of life principle completely bars exception and hence absolute is the improper method of understanding the concept but in fact it establishes that human life has got intrinsic worth whether god given or otherwise and it is the responsibility of man himself to recognise and acknowledge the same since he has got the responsibility of maintaining it. The notion that life is entrusted to man by god means that he is deemed a responsible decision maker, a transformer and a builder of all that is given to him by god. Man is responsible for his actions in this world and cannot put the burden on god. When a doctor operates a patient, can it be said that a doctor is intruding into the work of god? Similarly, on matters relating to the application of life supporting mechanism, can it be regarded an intervention into the grand design of god? Hence there are certain limits to which the notion of absolute inviolability may be associated with the sanctity of human life.

Man may not always use his knowledge and power wisely so that he will perpetuate human welfare. Hence this principle, though being termed as elusive and slippery, is a fundamental norm on the basis of which all moral norms and legal rules are validated. The indeterminate nature of this concept does not seek to answer what to do in particular cases but provides standards to be followed when we appraise rules governing the issues. This was the view expressed by Kant when he said about the nature of his formulation *'the categorical imperative'*[7] that it is not a rule of conduct but a formula for testing rules of conduct.[8] The very same can be said about the sanctity of human life. It cannot be treated as a rule as such but as a fundamental norm for judging the value of other norms – moral and legal – in a society. The principle is a spectrum of values ranging from the preservation of human species to the inviolability of human body, and man as an individual (personal, emotional, spiritual) to man as a social being. Each aspect of

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[7] See http://www.britannica.com/EBchecked/topic/99359/categorical-imperative (visited on 10.9.2014).

[8] Available at http://www.qcc.cuny.edu/SocialSciences/ppecorino/default.htm (visited on 15.9.2014).

human life and each stage of human life requires appropriate rule system exhibiting different dimensions of this basic principle which can address areas of concern. It is found that the concept establishes the principle that humans ought to encourage respect and foster his fellowmen in order to sustain their own survival. Hence the principle can be treated as a test to the survival of any legal system and as a primary norm to every law under the legal system. Different terms like 'worth,' 'dignity' etc are applied to test the validity of laws made under it. Any law touching on any aspect of human life needs to reflect this principle and the test for the validity of the law is to what extent the law is attempting to uphold the values embedded in it.

4.2 Practical Application of the Concept in Modern Legal Systems

Sacred and secular views on human life have greatly influenced and are still influencing the functioning of legal systems. Both Common law systems and Civil law systems have been greatly influenced by the concept of the sanctity of human life. The dignified moral status of humans subject to law has been accepted by all types of modern legal systems. The notion that persons possess this status not by a particular relevant act but due to the fact that this status is inherent in each individual by virtue of he or she being a human being came to be recognised by all major legal systems. This can be understood when a practical evaluation of the application of the concept in modern legal systems is undertaken.

4.2.1 Constitutionalism and the Sanctity of Life

The concept of the sanctity of human life or respect for inherent worth of human life has been ingrained into many constitutional schemes by the use of the terminology "*human dignity."* The endowment of human dignity entitles every individual equal respect and consideration for his personality by the state as well as from fellowmen. This serves as a basis for establishing not only equality of individuals before the law but also serves as limitations on state power. Constitutionalism embodies the conviction of the necessity of limiting state power by legal means by way of recognising individual rights. Thus recognition of certain inalienable rights by constitutions serves as major limitation on

institutionalised governmental powers.[9] The sanctity of individuals and the protection of their rights is the matrix of Constitutionalism.[10] This serves as a limitation on governmental powers in all legal systems and thereby creates accountability of public authorities. The major elements of Constitutionalism are democracy, rule of law and recognition of basic rights.

4.2.2 Democratic Ideals and the Concept of the Sanctity of Life

The democratic ideals had its basis in the Judea-Christian notion of the concept of the sanctity of life. According to the Hebrew holy book, which is the Christian Old Testament, the Hebrews are the product of god's creativity. In fact Christian gospels stressed on the importance of people's love for God, their neighbour, their enemies and themselves. Equality of all human beings which is the basis of Christian gospels is the central idea of democracy.[11] Democracy is understood as equal power for everybody or equal power for each and all.[12] The protestant ideas on respect for human life strengthened the importance of the individual. The Reformation contributed to the growth of democracy. Socrates and Plato studied about the position of individual within a community while Aristotle attempted to assert the underlying principles of democracy as upholding of liberty.[13] The Roman contribution of the universality of law also helped in the

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[9] This seems the reason Americans were greatly influenced by the words of Jefferson for Declaration of Independence 1776, when he stated that governments derive their powers from consent of the governed; all men are endowed by their creator with certain inalienable rights; among these are life, liberty and pursuit of happiness and the governments are instituted to secure these rights. See Paul K. Conkin, *Self –Evident Truths,* Indiana University Press, Bloomington (1974), p.1.

[10] Renata Deshkoska, "Constitutionalism and Transition: Case study of the Republic of Macedonia"*, a*vailable at http://www.juridicas.unam.mx/wccl/ponencias/16/283.pdf (visited on 13.12.2013).

[11] Arnold J. Toynbee, *Democracy in the Atomic Age- The Dyason Lectures* , Oxford University Press , Melbourne (1957), p.7.

[12] Giovanni Sartori, *Democratic Theory,* Oxford &IBH Publishing Co., India (1965), p.90.

[13] "The basis of a democratic state is liberty; which according to the common opinion of men, can be enjoyed in such a state: - this they affirm to be the great end of every democracy. One principle of liberty is for all to rule and be ruled in turn, and indeed democratic justice is the application of numerical not proportionate equality ; whence it follows that the majority must be supreme , and that whatever the majority approve must be the end and just . Every citizen, it is said, must have equality and therefore in a democracy the poor have more power than the rich, because there are more of them, and the will of the majority is supreme. This then, is one note of liberty which all democrats affirm to be the principle of their state. Another is that man should live as he likes. This, they say, is the privilege of a freeman, since, on the other hand,

development of democratic thoughts.[14] The Roman laws had an influence on the development of democracy since the Roman laws stressed that all citizens have the right to equal treatment under law. Moreover the Justinian Code established the idea of '*a government of law and not of men.*'

The early democratic development in England which commenced in the form of trial by jury, which began in the 12th century, and which later led to development of common law was largely influenced by the Christian conception of the sanctity of human life. Common Law held that life, liberty and property could not be taken away by illegal or arbitrary actions and this was based on biblical mandates. The Magna Carta of 1215 and the Petition of Rights of 1628 which stressed on the enumeration of individual rights acted as the first step towards a limitation on state power. The acceptance of Bill of Rights in 1689 recognised the principle that the king was subject to law and recognised that the individual has certain rights which the state should recognise and respect. It established the fact that for just governance recognition of the worth of the life of the subjects is a pre requisite. Thus, recognition of individual rights as the basis for limitation on state power and the predominance of respect for individual worth gained acceptance in England which had an impact on other countries especially with written Constitution like America.

The era of enlightenment focussed on the primary question of how men should be governed. John Locke, Voltaire and Rousseau contributed to the development of Constitutional jurisprudence. The Declaration of the Rights of Man and Citizen adopted in 1789, the stepping stone of French Constitutionalism, was based on *The Social Contract* of the French Philosopher Rousseau, and the separation of powers espoused by Montesquieu. The Declaration affirms by an open declaration on *"the natural and imprescriptable rights of man to liberty,*

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not to live as a man likes is the mark of a slave. This is the second characteristic of democracy, whence has arisen the claim of men to be ruled by none, if possible, or, if this is impossible, to rule and to be ruled in turns; and so it contributes to the freedom based on equality." Aristotle, Politics, Book VI, Robert Maynard Hutchins (Ed.), *Great Books of the Western World,* vol.IX., Encyclopaedia Britannica, USA (1971), p.590.

[14] R. M. MacIver, *The Web of Government,* The Free Press, New York (1965), p.136.

property, security and resistance to oppression."[15] It sought to establish the notion that every system of governance and its legal system are expected to confirm itself to the protection of the inalienable rights of man.

It established equal rights of all human beings thereby putting an end to special rights of nobles and the clergy. Thus the egalitarian notion embedded within the concept of the sanctity of human life that all lives are of equal worth and hence distinction between individuals in granting rights is meaningless came to be recognised. It firmly asserted the principle of popular sovereignty thereby restricting monarchy.[16]

Alex De Tocqueville in his book, *Democracy in America* explores that it was the puritans or the group of English protestants who established for the first time the principle of sovereignty in the Fundamental Orders of Connecticut[17] and identifies the Christian view of the concept of the sanctity of life and natural law[18] as the ideals on the basis of which liberty rests.[19] The Declaration of Independence, 1776 echoed the philosophy of Locke on the belief in certain inalienable rights for man. The Constitution adopted in 1787, incorporated separation of powers, checks and balances and federalism, thereby preventing tyranny and upholding liberty. Thus American democracy by placing

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[15] Article 2 reads: "The aim of every political association is the preservation of the natural and imprescriptable rights of man. These rights are liberty, property, security and resistance to oppression." *Declaration of the Rights of Man and of the Citizen*, August 26, 1789, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf (visited on 17-9-2014).

[16] Article 3 reads: "The principle of any sovereignty resides essentially in the Nation. No corporate body, no individual may exercise any authority that does not emanate directly from it." *Ibid.*

[17] Fundamental Orders of Connecticut (1639) is a small document which describes the government set up by the Connecticut River towns. Tocqueville observes on p. 37 of the book that "the legislators of Connecticut' begin with the penal laws, and strange to say, they borrow the provisions from the text of Holy book. Alex De Tocqueville, *Democracy in America,* Philips Bradley (Ed.), vol. I , Alfred A. Knopf , New York (1946), p. 37.

[18] "Concerning liberty, I observe a great mistake about that. There is a twofold liberty, natural (I mean as our nature is now corrupt) and civil or federal. The first is common to man with beasts and other creatures. By this, man, as he stands in relation to man, hath liberty to do what he lists; it is a liberty to evil as well as to good……..The other kind of liberty I call civil or federal; it may also be termed moral, in reference to the covenant between God and man, in the moral law, and the political covenants and Constitutions, among men themselves. *Id.,* at p. 42.

[19] *Ibid.*

constitutional limits on power has been able to uphold democratic ideals of legal control over political power.

No special rights came to be recognised to any class of individuals which sowed principle to respect and recognise each and all without any distinction which is affirmed by the concept of the sanctity of human life and came to be the solid foundation of democracy.

In India, democracy has been held to be accepted from ancient period even before Athens city states developed it.[20] The concept of collective decision making existed in the grama panchayats. The makers of the Constitution found that the multitude of caste, creed, and religion, could only thrive in a democratic set up so that the aspirations of all sections of people get reflected. Parliamentary democracy and Universal adult suffrage concepts recognised equal individual worth. The Preamble of the Constitution asserted the solemn resolution of the *people to constitute India into Sovereign, Socialist, Secular and Democratic Republic* which indirectly meant each and every human being living in India has got the right to determine the fate of the government. Thus the starting proclamation itself emphasizes the ultimate authority of the citizens of India.[21] Moreover, it is found that all the powers of the government arises from the will of the people mentioned in the Constitution and the citizens decide with whom should the power be entrusted through periodic decision making by way of elections. Thus individuals have worth and this enables effective participation by everyone in deciding those who are going to govern. Popular sovereignty, an element inherent in democratic ideal, takes its root from the concept of the sanctity of human life.

As it is rightly[22] identified, democratically elected governments have accountability when compared to other systems and attempt to respect basic rights since in most of the systems the executive is held accountable to the judiciary and

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[20] Shri Vishwambhar Dayal Thripathi made this observation on 9-11-1948. See *Constituent Assembly Debates– Official Report*, Book II, vol. VII , Lok Sabha Secretariat, New Delhi (1950),pp. 369-370.

[21] K. P. Chakravarti, *Words & Phrases under the Constitution,* Eastern Law House, Calcutta (1986), p.77.

[22] Sabine C. Careyet et al., *The Politics of Human Rights: The Quest for Dignity,* Cambridge University Press, UK (2010), p.132.

legislature. This seems true with regard to the Indian experience. The danger of possible oppression by majority government in democracy is limited and controlled by recognising basic rights. The Constitution affirms the basic principle that every individual is entitled to enjoy certain basic rights by virtue of being a human being. Hence enjoyment of these rights is not based on popular rule. The organs of power may not be given excessive power to make or expunge a law at their sweet will, hence the basic rights of citizen's act as a check on autocratic rule by majority. Thus it is found that the power to govern is based on the constitutional directives and the exercise of power by the majority is also subject to the rule of law. In Kesavananda Bharti v State of Kerala[23], the Supreme Court held that democracy is the basic feature of the Constitution and it cannot be amended and that it includes free and fair elections. Thus the decisive role played by each individual in the structure of governance illustrates the extent to which the concept of the sanctity to human life is given predominance in democratic systems.

4.2.3 Rule of Law as the Basis of Sound Legal System and the Concept of the Sanctity of Life

Though the Roman tradition of law cannot be regarded as egalitarian it implanted the rule of law concept with the idea that natural law (universal rights of man) can be the basis for positive law (man-made law).[24] Rule of law upholds the concept of sanctity and dignity of the individual.[25] Reaffirming faith in rule of

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[23] Kesavananda Bharati v State of Kerala A.I.R 1973 S.C 1461. Justice Shelat and Grover, while listing out the basic elements of the constitutional structure, held that democratic form of government as the basic feature. (Para 599) p. 1603. Justice Hegde & Mukherjea held that, "Adult suffrage, the acceptance of the fullest implications of democracy is one of the most striking features of the Constitution" (Para 504 at p. 1569) and continued to observe on the relevance of realization of basic freedoms in a democratic way thus: "Our Constitution envisages that the State should without delay make available to all the citizens of this country the benefits of those freedoms in a democratic way. Human freedoms are lost gradually and imperceptibly and their destruction is generally followed by authoritarian rule. That is what history has taught us. Struggle between liberty and power is eternal. Vigilance is the price that we like every other democratic society has to pay to safeguard the democratic values enshrined in our Constitution." (Para 682 at pp. 1628-1629).

[24] Available at www.democracyweb.org/rule/history/php (visited on 14-2-2012).

[25] Dicey quotes the view arrived in the Colloquium held in 1857 in Chicago in which he stated thus, "The rule of law is an expression of an endeavor to give reality to something which is not readily expressible; this difficulty is due primarily to identification of the rule of law with the concept of right of man." AV Dicey, *Introduction to the Study of the Law of the Constitution,* E.C.S. Wade (Ed.), Macmillan & Co. Ltd., Great Britain (1962), p. 109.

law, the Magna Carta of 1215 in England can be seen as the first major step which set the limits on the state to interfere in the life of man.[26]

Respect for an individual's life and liberty came to be recognised and the state's power to interfere with the same was subject to law which was the gist of the charter.[27] The later development in Britain led to the adoption of the principle in its Constitutional Scheme thereby recognising the state as the protector of individual life and safety.[28] The recognition of prerogative writs, especially Habeas Corpus, threw light on the fact that individual liberty and worth of life should be recognised and protected by different institutions of the legal system. Institutions establishing, applying and interpreting the law are bound by law and any violation of rights by them could be punished under law. Hence individual right to life is recognised by all major sound legal systems in the world and its violation can be done only as per the procedure established by law. Modern democratic legal systems follow the principle of the rule of law in practice.

The English Common law system can be said to be mainly based on decisions of courts[29] and these were based on the sustenance of the rule of law. Thus, individual liberty was sought to be protected through the common law system.[30] The English Constitution being an unwritten one developed its human rights initially by way of common law[31] until formally it enacted the Human

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26 *Id.,* at p.99.

27 "No free man shall be taken or imprisoned or diseased or exiled or in any way destroyed nor will go upon him nor send upon him , except by the lawful judgment of his peers or by the law of the land." Magna Carta, available at http://www.constitution.org/eng/magnacar.htm (visited on 10.12.2013).

28 "The absolute rights of every Englishman, (which, taken in a political and extensive sense, are usually called their liberties,) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human….." William Blackstone, *Commentaries on the Laws of England,* Book I , Edward Christian Esq. (Ed.), A. Strahan and W. Woodfall, London (15th edn), p.127.

29 Rupert Cross & J.W. Harris, *Precedent in English Law*, Clarendon Press, Oxford (4th edn.), pp.165-166.

30 *Infra* n.89.

31 R v Horseferry Road Magistrate's Court ex P. Bennett (1994)1 AC 42 Lord Griffith observed "the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse countenance behavior that threatens either basic human rights or rule of law."

Rights Act of 1998 which has taken the shape of the Human Rights Act 2000. The predominance given to sustenance of liberty through habeas corpus writs was recognised and it is found that in Britain,[32] this resulted in incorporation of Article 5 in the European Convention on Human rights implemented through the 1998 Human Rights Act. Although the provision has nothing to do with any prerogative writ, they are most conveniently explained alongside habeas corpus so that the remedies protecting personal liberty may be seen together.[33] This leads to the inference that even without a written constitution with a catalogue of rights, English system recognised that individual liberty should be sustained thereby limiting arbitrary exercise of power by the state.

The rule of law principle leads to the acceptance of judicial review[34] as an active device for protection of rights. Moreover, it can be said that rule of law creates institutional morality for the legal institution in a legal system.[35] Besides, it was observed by some writers that the phrase connotes several expressions including brotherhood of man and human rights.[36] The essential attributes of good laws are that which allows each individual sufficient room to be a person who can think and evaluate, and to carry out his own plans about life with sufficient restraint so that others may also equally have the opportunity to enjoy their life.

American Constitutionalism conveys the notion that all are equal before the law and equally subject to the legal system and its decisions. Thus the American Constitution recognises the egalitarian principle while carrying law into effect. Thus, when one examines the American Constitutional principles that each individual possesses equal rights by nature,[37] it is found that this is based on the

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[32] Ian Loveland , *Constitutional Law, Administrative Law and Human Rights: A Critical introduction,* Oxford University Press ,Oxford (5th edn.), p.87.

[33] H.W.R. Wade & C.F. Forsyth, *,Administrative Law,* Oxford University Press ,Oxford (10th edn.), p.593.

[34] Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. *Ibid.*

[35] Jeffrey Jowell, "The Rule of Law Today*" i*n Jeffrey Jowell &Dawn Oliver (Eds.), *The Changing Constitution* Clarendon Press, Oxford (1996), p.58.

[36] As stated by Dr R.M. Jackson," Machinery of Justice in England' referred in J.F. Garner*, Administrative Law,* Buttersworth, London (1974), p.21.

[37] Fifth Amendment and Fourteenth Amendment

concept of respect for the inherent worth of human life. So the concept of the sanctity of human life finds a practical expression under American constitutional ideals. In fact, the 1776 Declaration of Independence reiterated the belief of the American system in the Christian conception of the sanctity of life concept, when it proclaimed thus:

> *"We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, That among these are life, liberty and the pursuit of happiness- That to secure these rights, Governments are instituted among Men deriving their just powers from the consent of the governed...."* [38]

The view that the Declaration is based on the Christian viewpoint is set aside by writers, arguing that it is also found in secular philosophical ideals.[39] These words echoed in the preamble of the Universal Declaration of human rights. The words in the declaration postulates that fundamental rights are not granted by the government but are inalienable and inherent to each individual. It is found that early Americans sought the assistance of the Bible to make civil laws, which began with the Mayflower compact of 1620. The Mayflower compact sowed the fundamental seeds of democracy and recognition of individual liberty and equality principles. The compact can be considered as endorsing the views of Locke who stressed on the social contract between those who govern and the governed for upholding natural rights of life, liberty and property.[40] However, this does not

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[38] On July 4, 1776, Thomas Jefferson conceived these ideas. However, these ideas are believed to be taken from a short piece of note written by Samuel Adams, "Rights of the Colonists as Men.'' The note of Samuel Adams include, "Just and true liberty, equal and impartial liberty, in matters spiritual and temporal, is a thing that all men are clearly entitled to by the eternal and immutable laws of God and nature, as well as by the law of nations and all well- grounded municipal laws, which must have their foundation in the former…The natural liberty of man is to be free from any superior powers on earth, and not to be under the will or the legislative authority of man, but only to have the law of nature for his rule." Verma M. Hall, *The Christian History of the Constitution of the United States*, The Foundation for American Christian Education, San Francisco (1980), pp.365-366.

[39] Harries Richard, "The Complementarity between Secular and Religious Perspectives of Human Rights" in Nazila Ghanea et al. (Ed.), *Does God Believe in Human Rights? Studies in Religion, Secular Beliefs and Human Rights,* vol. III, Martinus Nijhoff Publishers, Netherlands (2007), p.19.

[40] Locke was of the view that inalienable rights of individuals form the basis of all rightful governments. He was stressing the aspect that individuals possess these rights simply by virtue of their humanity. They antedate the existence of any government. John Locke, An Essay Concerning

mean that the American legal system recognised the concept of the inherent worth of human life at every phase of its existence. The famous Dred Scott case[41] and Slaughterhouse cases[42] illustrate how a country today known as the champion of human rights and human dignity failed to take into account these principles in matters of racial discrimination and slavery. In Jones v Van Zandt[43] the court held slavery as constitutional thereby equating man with property. But the very same court through Justice Field in his dissent in Munn v State of Illinois,[44] while interpreting "*life*" held that "human life is not mere animal existence but dignified existence." While discussing "liberty" the court observed thus:

> *"It means freedom to go where one may choose and to act in such manner not inconsistent with equal rights of others, as his judgment may*

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the True Original Extent and End of Civil Government, Robert Maynard Hutchins (Ed), *The Great Books of The Western World,* vol. XXXV, Encyclopaedia Britannica ,USA (1971), pp. 25-55.

[41] Dred Scott v Sandford 60 U.S 393 (1857) the court ruled that slaves as chattels or private property could not be taken away from their owners without due process.

[42] Slaughter house cases 83 U.S 36 (1873) Three cases are discussed in this decision namely, (1) The Butcher's Benevolent Association of New Orleans v The Crescent City Livestock Landing and Slaughter house co (2) Paul Esteben et al & The Livestock Dealers and Butchers Association of New Orleans v The State of Louisiana, ex rel S Belden Attorney General, The Butchers Benevolent Association, New Orleans v The Crescent City Livestock Landing & Slaughter House Co. The Case began in 1869, when the Louisiana legislature passed a law creating and granting a monopoly to the Crescent City Livestock Landing &Slaughter house Co to slaughter animals in the New Orleans vicinity. In exchange for exclusive operating rights in New Orleans, the Crescent City Co was to comply with various state provisions governing among other things, quality of facilities and products, output volume and price of livestock. The Company was also required to allow independent butchers to work on its ground at a set rate. The state of Louisiana claimed the measure promoted health and safety by centralizing and improving slaughterhouse production. Critics speculated the measure was designed to facilitate political patronage. In any case, the law banned all other slaughterhouses from operating in New Orleans. A group of the local butchers challenged this, arguing that the law violated the "privileges and immunities" clause of the newly enacted fourteenth amendment. The butchers claimed that the state deprived them of the 'privilege' of operating slaughter house companies. The Supreme Court held that the law was constitutional and it did not deprive them of equal protection and due process rights. The reasons given by the court can be summarised as follows:

1) The 13th amendment (outlawing slavery), the 14th amendment (protecting citizenship rights and liberties) and 15th amendment (enfranchising ex- slaves) were passed with the narrow intent to grant full equality to the 'slave race.' Thus, to the court, the 14th amendment only banned the states from depriving blacks of equal rights, as a racial group; it did not guarantee that all citizens regardless of their race, should receive equal economic privileges by the state. (2) The court held that the butchers were not deprived of their property without due process of law because they could still earn a legal living in the area by slaughtering on the crescent city company grounds.

[43] 46 U.S 215(1847)

[44] 94U.S113 (1876) .

dictate for the promotion of his happiness-that is to pursue such callings and avocations as may be most suitable to develop his capacities and give them their highest enjoyment."[45]

However, the smouldering issue of slavery was overcome by the Americans with a series of amendments in the Constitution, especially the 13th amendment which officially proclaimed the renunciation of slavery and the 14th amendment which secured the voting rights for the slaves. But then, one wonders how a country with the theoretical foundation of natural law tradition based on sanctity of human life accepted the slavery system and continued with it for centuries together. The acceptance of republicanism[46] as a political value system by American civic thought can also be regarded as one among the reasons for the renunciation of slavery. Republicanism[47] stresses liberty and inalienable rights as its central values while at the same time expecting the citizens to be independent in their performance of civic duties. John Adams identifies it with rule of law concept.[48] The belief in civic virtue as the willingness of the individual to sacrifice his private interest for the good of the community which in turn was to be derived from individual's private interest was thought[49]as the basis of republicanism. James Madison in Federalist paper51 justified the Constitutional precautions to be taken for sustenance of liberty based on human nature.[50] Hence, as auxiliary

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45 The case relates to public regulation of private business. Justice Field was on dissent.

46 Republicanism is a political ideology, which is derived from the word republic but different in meaning to the word 'republic' since it makes liberty and inalienable rights as the main values but at the same time asserts that people as sovereign and rejects inherited power. It gives stress to civic responsibilities.

47 Article IV of the American Constitution assures this aspect.

48 John Adams in 1787 defined republicanism as,' a government in which all men, rich and poor, magistrates and subjects, officers and people ,masters and servants, the first citizen and the last, are equally subject to the laws."

49 This feeling of civic duty can be found in the words of John F Kennedy,' Ask not what your country can do for you, ask what you can do for your country' in the dramatic call to the American people to honor the core republican value of civic duty. Garry Hart, *Restoration of the Republic: The Jefferson Ideal in21st Century America* , Oxford University Press, USA (2002),p.7.

50 " What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and the next place obliges it to control itself. A dependence on the

precautions the Constitution has provided for enumeration of powers, separation of powers, federalism and principle of checks and balances.

The separation of powers doctrine of Montesquieu based on Christian belief that an unrestrained human heart moves towards civil and moral degeneration had an impact on the American founding fathers.[51] This prompted them to accept the separation of powers doctrine within their Constitutional scheme. Montesquieu believed that concentration of powers leads to its abuse and hence power should be a check to power.[52] This prophecy was extended to the functioning of governmental mechanism based on the life of man or rather human nature. Montesquieu observed thus on human nature to abuse powers:

> "*Man as a physical being, is like other bodies governed by invariable laws. As an intelligent being, he incessantly transgresses the laws established by god and changes those of his own instituting. He is left to his private direction, though limited being and subject like all finite intelligences to ignorance and error...*"[53]

Montesquieu recognised the inherent dignity of human life[54] and called for division of governmental powers. This principle was extended, thereby federalism was accepted which obliges the government to control itself.[55] The system of checks and balances promote a congenial relationship and more responsiveness between different parts of governmental mechanism. The value of the application of the sanctity of life principle in practice is that it would avoid totalitarianism as

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people is no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." Available at www.Constitution.org/fed/federa51.html (visited on 9-12-2014)

[51] Augusto Zimmermann, "God, Locke and Montesquieu: Some thoughts concerning the religious foundations of modern constitutionalism", 1 *The Western Australian Jurist* 7 (2010).

[52] *Ibid.*

[53] Baron De Montesquieu, *The Spirit of Laws*, Book I, Thomas Nugent(trans.), Franz Neuman (Ed.) Hafner Pub. Co., USA (1949), p.3.

[54] Montesquieu observes thus about the nature of man and comments that man is unique among the mortals. He observes that "Man, that flexible being, conforming in society to the thoughts and impressions of others, is equally capable of knowing his own nature whenever it is laid open to his view and of losing the very sense of it when this idea is banished from his mind." *Ibid* at p. 18.

[55] Candace H. Beckett, "Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of our Government" *William and Mary L. Rev.* 646 (1988).

of that of Hitler's regime wherein dominance over all the powers of the state led to tyranny.

Apparent contradictions in principle and practice of rule of law do not negate the overall importance of the principle since the awful consequences of the breakdown of tyrannical governments makes the importance of the principle self-evident. Hence rule of law means those laws which recognise human worth and freedom.[56] Hence the Preambular words of Universal Declaration of Human Rights[57] seek to establish the necessity of respecting rule of law by all legal systems. It states thus:

> "*Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."*[58]

Therefore, recognition of the rule of law in democratic forms of governments is meant to uphold the values of constitutionalism thereby sustaining the basic rights of individuals. Rule of law lays down a code of ethics which improves the quality of life of individuals and puts restriction on the use of public power. The view that Constitutionalism abhors absolutism is not only true in case of American or British Constitutionalism but it is true in the case of India and other countries.

The Indian Legal system had accepted the concept of the rule of law from ancient Hindu conception of human life and dharma. The concept of dharma has been equated with the concept of the rule of law. Though a watertight definition cannot be given to the concept of dharma yet certain insights as to what constitutes dharma has been given in ancient texts.[59] Dharma postulates human virtues such as love, trust, compassion, truthfulness, righteousness, tolerance, beneficence,

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[56] Available at http://www.brandeis.edu/programs/southasianstudies/pdfs/rule%20of%20law%20full%20text.pdf of law full text pdf (visited on 23-8-2013).

[57] Available at www.un.org/en/documents.udhr (visited on 16-9-2014).

[58] *Ibid.*

[59] See Brihadarnyaka Upanishad, Madhukanda, Chapter I, Sec IV, mantra 14, The Mahabharata, Karnaparva, Book VIII, section 69 and in Santiparva Book XII, Markandeya Purana, Chapter CLXXXVIII, verses 12-17.

sacrifice, forgiveness, and rationality.[60] These virtues constitute human dignity and worth and the phrase '*Dharmo rakshati rakshitah*'[61] upholds that these are essential for the sustenance of the individual and the state alike.[62] The true knowledge about oneself and the worth of one's life and the life of others[63] can be secured according to Hinduism only by adhering to dharma.[64] The deep commitment of India to the concept of the rule of law or dharma is depicted in the adoption of the national flag and the state emblem specifying the need to adhere to the rule of law concept.[65] The twenty four spokes in the wheel represents the virtues which not only stresses on the sanctity of human life[66] but also the sanctity of life as such.[67] The rule of law

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[60] R. R. Kishore, "End of Life Issues and Moral Certainty: A Discovery through Hinduism", *Eubios Jnl. of Asian and International Bioethics* 210 (2003).

[61] Chapter VIII, Sloka 15. It is being translated as "Stricken justice surely strikes back, defended, Justice defends. Therefore, never strike at justice, lest justice, stricken, wipes us out." Patrick Olivelle, (Ed. &trans.), *Manu's Code of Law- A Critical Edition and Translation of the Manava Dharmasastra,* Oxford University Press (2009), pp.167-168.

[62] We find that manavadharmasastra contains different code of conduct prescribed as a part of dharma for different castes. This questions its legitimacy as it opposes the principle of the sanctity of life which contains the notion of equality.

[63] "Assemble speak together: Let your minds be all of one accord,

As ancient gods unanimous sit down to their appointed share.

The place is common, common to assembly, common the mind, so be their thought united.

A common purpose do I lay before you, and worship with your general oblation.

One and the same be your resolve, and be your minds of one accord.

United be the thoughts of all that all happily agree"

Rig-Veda, Book X, Hymn CXCI Available at http://www.sacred-texts.com/hin/rigveda/ rv10191. htm (visited on 9-12-2014).

[64] S. K. Purohit, Ancient *Indian Legal Philosophy: Its Relevance to Contemporary Jurisprudential Thought*, Deep & Deep Pub., India (1994), p.36.

[65] S. Radhakrishnan in the Constituent Assembly debates describing the significance of the colour and chakra in the national flag related the adoption of chakra as the commitment to national flag. He observed that Bhagwa or saffron denotes renunciation or disinterestedness. Our leaders must be indifferent to material gains and dedicate themselves to their work. The white in the centre is the light, the path of truth to guide our conduct. The green shows our relation to the plant life here on which all other life depends. The Ashoka wheel in the centre of the white is the wheel of the law of dharma. Truth or satya, dharma or virtue ought to be the controlling principles of those who work under the flag. Again, the wheel denotes motion. There is death in stagnation. There is life in movement. India should no more resist change, it must move and go forward. The wheel represents the dynamism of a peaceful change. *Constituent Assembly Debates – Official Report,* Vol. I-VI, Book I , Lok Sabha Secretariat, New Delhi (1991), pp. 745-746.

[66] Available at https://archive.org/stream/The_Age_of_Imperial_Unity/HistoryIndianPeople _djvu.txt (visited on 12.03.2014)

[67] Love for all beings, courage, patience, peacefulness, kindness, goodness, self-control, selflessness, truthfulness, justice, mercy, graciousness, humility, empathy, sympathy, Supreme

permeates the entire fabric of the Indian constitution and it is one of the basic features[68] of the Indian Constitution.[69] Though there is no express provision in the Constitution relating to the acceptance of the rule of law concept, there are provisions in the Constitution which specifies all the laws made by the Centre and the State have to be in conformity with the Constitution and should not violate the Fundamental Rights Charter in the Constitution.

In India, Rule of law is understood as laying down an ethical code for the exercise of public power which is based on certain values, wherein the quality of life of individuals in the state is improved.[70] In Kesavananda Bharati v Union of India[71] the court held that the dignity of the individual secured by the various freedoms and basic rights in part III and the mandate to build a welfare state based on Part IV is the basic feature.

However, history has witnessed situations in which the doctrine has not received a just consideration from the courts of law[72] as in the famous Habeas Corpus case.[73] In fact, in the very same case, the dissenting note of J. Khanna signified that the concept of the sanctity of life as the basis of the rule of law.[74] He observed thus:

> "*Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of higher values which mankind began to cherish in its evolution from a state of tooth and claw to a civilised existence. Likewise the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. The idea about sanctity of life and liberty as well as the*

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knowledge, Supreme moral, Love, Hope, trust or faith in god or nature are the virtues the twenty spokes in the wheel represent. Love for all beings denotes respect for all life.

68 Kesavananda Bharati v State of Kerala A.I.R 1973 S.C1461 at p.1603.

69 M. P. Jain & S. N. Jain, *Principles of Administrative Law,* Lexis Nexis Buttersworth, Nagpur (2010), p.20.

70 I. P. Massey, *Administrative Law,* Eastern Book Company, Lucknow (5th edn.), p.25.

71 Kesavananda Bharati v State of Kerala A.I.R 1973 S.C1461at p.1603. *See* para 599.

72 B. M. Gandhi (Ed.), *V. D. Kulshreshtha's Landmarks in Indian Legal and Constitutional History*, Eastern Book Company (2009), p.493.

73 ADM Jabalpur v Shivkant Shukla A.I.R 1976 S.C 1207

74 See Para 525-536, 575, 593.

principle that no man shall be deprived of his life and liberty without the authority of law are essentially two facets of the same concept. This concept grew and acquired dimension in response to the inner urges and nobler impulses with the march of civilisation...According to even the theory of social compact, many aspects of which have now been discredited, individuals have surrendered a part of their theoretical unlimited freedom in return for the blessings of the government. Those blessings include governance in accordance with certain norms of life and liberty of citizens. Such norms take the shape of rule of law."[75]

Thus in India courts have consistently recognised the essential connection between the principle of rule of law and the concept of the sanctity of human life.

4.2.4 Constitutional Recognition of Certain Rights as Inalienable and Fundamental by the Legal Systems

There is an inextricable link between democracy and protection of individual rights. Without an effective protection of life, liberty and physical integrity of individuals, democracy cannot exist.[76] Moreover, constitutional history reminds us that whatever be the form of government the laws should respect the individual lest the government may soon wither away. Therefore, most of the legal systems tried to incorporate a charter of rights which the states need to respect and protect. A classic example of this view is that of the German Constitution which guarantees human worth and dignity in its constitutional arrangements soon after the fall of the autocratic dictatorship rule.[77] Respect for human autonomy and individual inviolability was recognised as inevitable for sustenance of any legal system. Even in legal systems such as the British Constitution though having an unwritten Constitution based on the principle of

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[75] Para 528 at pp.748-749.

[76] M. Cherif Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions", 3 *Duke J. Comp & Int 'L* 235 (1993).

[77] Article 1 reads: 1 Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. 2 The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world...."Basic law for the federal republic of Germany,1949.

Parliamentary sovereignty, still human dignity and equal citizenship formed the foundation.[78] Instead of using the term '*sanctity'* most of the legal systems accepted the term *dignity*. This may be due to two reasons:

Firstly, by using the term *sanctity* the cleavage in the line of reasoning to covey the essence of the worth of human life becomes prominent and this may lead to failure of properly understanding the concept.

Secondly, the word dignity directly conveyed that human life has a special status by itself and that the word gave much flexibility to interpret.

The French Declaration of the Rights of Man 1789 gave a liberal meaning to the concept of liberty in terms of the sanctity of life according to which it means "*the power to do anything that does not injure others."*[79] Thus it is found that the concept of liberty is in fact based on human dignity and worth. The term *dignity* is often understood differently according to popular assumptions, and is hence concluded as a slippery concept.[80] As a universal presumption it is often linked with the inherent worth of each individual. Such an assumption is understood by virtue of a person's humanity and not depending on a person's intelligence, status etc. The other assumption is based on intrinsic human worth i.e., a presumption of human equality. The political and social movements also contributed to the stress on the worth and special status of human life which stressed the abolition of slavery. The Catholic social view of human worth and the humanist view of human worth were accepted by different legal systems in their constitutional scheme so as to avoid totalitarianism and class war and thereby sought to recognise this principle explicitly or implicitly in their national constitutions.[81] The English Constitution though un-codified till date was evolved based on the principle that, *no one should* have *power over others unless and until*

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[78] Available at www.ajol.info/index-php/pely/article/views 43470/27025 (visited on 13-12-2013).

[79] A. B. M. Mafizul Islam Patwari, *Fundamental Rights and Personal Liberty in India, Pakistan and Bangladesh*, Deep & Deep Pub., India (1988), p.23.

[80] Neomi Rao, "Three Concepts of Dignity in Constitutional *Law", Notre Dame L. Rev.* 196 (2011).

[81] Christopher Mc Crudden, "Human Dignity and Judicial Interpretation of Human Rights*"*,19(4) *Eur.J.Int L.* 655 (2008).

that power and the conditions of its use have been defined.[82] Constitutional history reveals that in 1100, Henry I issued a coronation charter also known as Charter of Liberties[83] wherein respect for individual rights was recognised and there was a promise by the ruler to observe the feudal code so as to prevent abuses against barons and the church.[84] The Magna Carta of 1215 was a reassurance that certain rights are not terminable and it is considered as the first great constitutional document in the history of the world which protected the individual against the oppression of the state. By the end of the 13th century it was found that the British monarch was treated as someone who serves people and common law started to be fair and rational based on Judeo Christian ethical teaching that, *no one is above the law, not even the king*. This feeling prompted assertion of individual rights and liberties which the state should respect that eventually led to the Petition of Rights, 1628 and the Declaration of Bill of Rights, 1689. The declaration enunciated that certain principles such as an individual's rights and liberties are birth rights which extend beyond constitutional document or strategy. It also affirmed that governments gain their legitimacy only from the consent of the governed. The basic tenet of the Bill of Rights is based on the principle: '*treat others as you would like to be treated'* which is found in the Bible.[85] The British Bill of Rights stressed that Englishmen possessed certain immutable civil and political rights which the state has to recognise and protect at all times. Apart from this, the Habeas Corpus Act of 1641 provided that "*no man could be put on trial except before the courts by due process and writ original according to the old law of the land*." This ensured freedom from arbitrary arrest. The stress on freedom from cruel and inhuman punishments, freedom to petition against the crown etc. pointed out the fact that certain rights which stem from the concept of human worth and dignity need to be respected and protected by the state. Moreover, it is

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82 "The so- called liberties of the subject was really implications drawn from the two principles that the subject may say or do what he pleases, provided he does not transgress the substantive law, infringe the legal rights of others……." Lord Simonds, *Halsbury's Laws of England,* vol. VII, Buttersworths & Co. Ltd., London (1954), pp.195-196.

83 Available at http://www.britannia.com/history/docs/charter.html (visited 6-12-2012).

84 This coronation charter is said to be the mandate of Christ found in the Holy Bible. Luke 22: 26: "The one who rules should be like one who serves."

85 See, Luke 6:31, The *Holy Bible.*

clear that the common law rights are a product of long evolved social values which are judicially articulated and interpreted. Its roots strike deep into the soil of the national ideas and institutions which were greatly influenced by Christian ideals of the sanctity of life.[86]

The fact that for the recognition of certain basic rights there is no need for a single codified document such as a written constitution is clearly established through British experience.[87] The Australian Constitution also followed the British System in this aspect.[88] The philosophy that individuals are free to do whatever they like unless it is within the four corners of law is equally recognised in this legal system.[89] Hence no need for a separate charter of rights since liberty can be exercised freely unless it does not violate the freedom of others duly recognised by law. The common law system based on Christian assumption on the sanctity of life protected liberty.[90] However, arguments existed that the British conception of liberty was residual in nature unlike the US system since the conception of liberty is based upon the principle of legality. That is, it is based on the idea that the citizen enjoys the freedom to do as he or she likes and that any interference with individual liberties must be justified by law.[91] It is found that English system recognised man as autonomous and respect for individual right is paramount[92] which resulted in accepting the European Convention of Human

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86 C.K. Allen, *Law in the Making, Clarendon* Press, Oxford (1964), p.71.

87 T.R.S. Allen, "In Defense of the Common Law Constitution : Unwritten Rights as Fundamental Law", LSE Law, Society and Economy Working Papers 5/2009, available at www.lse.ac.uk/collections/law/wps/WPS2009-05_Allan.pdf (visited on 6-11-2013)

88 M.P. Jain, *Indian Constitutional Law,* vol I, Lexis Nexis Butterworth (2010), p.1179.

89 Entinck v Carrington (1765) EWHC KB J98 the court held that no person is punishable in body or goods without a breach of law.

90 Blackstone explained that God when He created matter and ended it with a principle of mobility, established certain rules for the perpetual direction of that motion-so, when He created man and endued him with free-will to conduct himself in all parts of life, He laid down certain immutable laws of nature whereby that free- will is in some degree regulated and restrained, and gave him also the faculty of reason. Sir William Blackstone, *Commentaries on the Laws of England,* Book I, Edward Christian (Ed.), Astrahan, Britain (15th edn.), p.38.

91 Douglas W. Vick, "The Human Rights Act and the British Constitution", 37 *Texas International Law J.* 340 (2002).

92 A. V. Dicey in his book *Introduction to the Study of the Law of the Constitution*, described the right to individual freedom as "part of the Constitution because it is inherent in the ordinary law of the land and one which can hardly be destroyed without a thoroughgoing revolution in the institutions and manners of the nation. *supra* n.50, at pp. 200-201.

Rights which necessitated the passing of the Human Rights Act 1998. It is found that there were no hurdles for the system to accept the international convention requirement since the legal system from time to time has recognised and respected the basic rights of man. The British legal system, however, had an impact on in other legal systems, especially the American counterpart in recognising the basic rights of man. The proclamation in the Magna Carta of 1215 that "*we will sell to no man, we will not deny or defer to any man either justice or right,"*[93] had a great impact on the development of the need for codification of rights in America also. In the American constitutional history, the Declaration of Independence, 1776 can be considered the open declaration that man enjoyed certain inalienable rights by virtue of being a human being. The US Supreme Court in Butcher's Union Slaughterhouse Livestock Co v Crescent City Livestock Landing Co[94] was of the view that in our intercourse with our fellowmen certain principles of morality are assumed to exist, without which society would be impossible. Hence certain inherent rights lie at the foundation of all actions and upon recognition of them alone free institutions can be maintained. The Declaration of Independence, 1776, acknowledges the fact that man possesses certain inalienable rights since he was divinely created based on the Christian assumption of the sanctity of life. The assertions in the Declaration on the rights of mankind had an impact not only on the development of political thoughts in America but on the whole world. The expression in the declaration '*posterity*' conveys the intent that man has the obligation not only to respect the rights of his fellowmen but also the rights of future generations. *Life, liberty and pursuit of happiness* were listed among the 'inalienable rights' or sovereign rights of man.[95] In the Virginia Declaration of Rights 1776, the forerunner to the Declaration of Independence, the very first

[93] "To no one will we sell, to no one deny or delay rights or justice", available at http://www.constitution.org/eng/magnacar.htm (visited on 10-12-2014).

[94] Butchers Union Slaughter House Co v Crescent livestock landing Co 111US 746 (1884). See pp.756-757.

[95] The text of the second section of the Declaration reads: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain inalienable rights that among these are Life, Liberty and the pursuit of Happiness."

Article[96] stressed that men are created equal and enjoy certain inherent rights. The similarity between the Declaration of Independence and the Virginia Convention is that in both, the rights to life, liberty and equality were given prominence as inherent and inalienable rights. These expressions are found in the Fifth[97] and Fourteenth amendments[98] of US Constitution and in Article 3 of Universal Declaration of Human Rights.[99] These words echoed considerably in legal documents of other countries, especially in France,[100] Germany,[101] Canada[102] and Japan.[103] The Americans were the first in importing the concept of inalienable rights of man into the world of Constitutionalism and did not stop in reciting these rights in an ornamental fashion in the preamble but adopted them as a part of the

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[96] Article I reads-"That all men are by nature equally free and independent, and have certain inherent rights of which , when they enter into a state of society, they cannot, by any compact ,deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

[97] "No person shall be held to answer for a capital , or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury , except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life ,liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[98] Section1 of the Fourteenth Amendment reads -"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[99] Article 3 of UDHR proclaims that "Everyone has the right to life, liberty and security of person."

[100] The French Declaration of the Rights of man 1791 declared that the end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are Liberty, Property, Security, and Resistance of oppression. The preamble of the Constitution of the Fifth Republic1958 affirms the attachment of the French people to the declaration. Anup Chand Kapur & K. K. Misra, *Select Constitutions,* S. Chand & Co. Ltd., India (1956), p.352.

[101] Basic Law of the Federal Republic of Germany 1949 chapter 1 declares the basic rights of man. Article1 reads: "Human Dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."

The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. Article 2(2) reads- Every person shall have right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to law. Article 3 guarantees equality before law.

[102] The Canadian Charter of Rights declares protection to life, liberty and security of citizens.

[103] Chapter III Article 13 of the Constitution of Japan 1947.

Constitution which could serve as a legal limitation on the powers of different organs of the government.[104] The American Constitutionalism reveals that fundamental rights are not granted by the Government but are inalienable and inherent to every individual antecedent to the state. However, popular dissatisfaction to the non inclusion of these rights into the body of the Constitution resulted in the first ten amendments to the Constitution popularly known as Bill of Rights.

The Civil Rights Movement in America[105] is a glaring illustration of how a country wedded to the concept of the sanctity of life on which the entire structure of constitutional liberties are guaranteed, could not keep up[106] the assurances it made and affirmed. The inhuman phase of devaluing human life through racial discrimination,[107] segregation,[108] slavery, discrimination against women[109] was resisted by the legal system[110] by bringing about amendments to the Constitution,[111] several legislations[112] and through judicial review.[113]

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[104] Durga Das Basu, *Human Rights in Constitutional Law,* Wadhwa & Co., Nagpur (2nd edn., 2005), p.53.

[105] The Civil Rights Movement in America is generally known to have taken place between 1950-1970.But the actual resistance can be seen from 1850 itself.

[106] Plessy v Ferguson 16 U.S 537 (1896) the US Supreme Court upheld racial segregation.

[107] Loving v Virginia 388U.S 1 (1967) held that laws that prohibit marriage between races as unconstitutional.

[108] Brown v Board of Education347 U.S 483 allowed the de segregation of schools.

[109] In Minor v Happersett, 88 U.S 162 (1875) the Court rejected an attempt to cast a ballot in a Missouri election. The Court stated that the "Constitution of the United States of America does not confer the right of suffrage upon anyone." In addition the court said, "Women were excluded from suffrage in nearly all the States by the express provision of their constitutions and laws."

[110] Heart of Atlanta ,Motel v United States 379 U.S 241 (1964)prohibited segregation in business activity.

[111] The 19th amendment abolished women discrimination in matters of voting. The Thirteenth Amendment abolished slavery. Fourteenth Amendment banned racism since it contained the equal protection clause. The Fifteenth amendment secured the right to vote to everyone irrespective of race, color etc.

[112] There were several Civil Rights legislation starting from 1875 but the prominent was theCivil Rights Act 1964 which stopped segregation and discrimination in public places. The Voting Rights Act 1965 guaranteed the right to vote.

[113] Donald O. Dewey, *Union and Liberty: A Documentary History of American Constitutionalism,* McGraw- Hill, New York (1969), p.286.

The US Constitution, though silent on the term human dignity or worth,[114] speaks of rights protecting the same.[115] Courts have consistently interpreted that the Eighth Amendment had incorporated the fundamental principles of human worth and dignity.[116] The incorporation of the *Due Process Clause*[117] *and Equal Protection Clause*[118] in the Constitution directly answers the question of how far the concept of the sanctity of human life has been accepted and incorporated in the American Constitution. These clauses had armed the courts to extend the power of judicial review to establish substantive rights not actually articulated in the Constitution.[119] Again the '*equal protection clause*' tried to ensure that laws of a state must treat an individual in the same manner as others in similar conditions and circumstances. It curbed racial discrimination persisting in the American civil life. The principle of equality as found in the Constitution is based on the Christian assumption of the fact that men and women are created in God's image and that they are equally human before God.[120] Thus the concept of the sanctity of human life was accepted in letter and spirit by the American legal system which is evident in the speech of Abraham Lincoln's Gettysburg Speech.[121] The Americans were the first to bring out the world's first international human rights instrument of a general nature even before the Universal Declaration of Human Rights came into existence, namely the American Declaration of the Rights and Duties of Man, 1948. In the resolution adopted at the ninth International Conference of American States the commitment of the Americans to the concept is revealed. The concept

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[114] Vicki C. Jackson, "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse", 65 *Mon.t L. Rev.* 16 (2004).

[115] 8th Amendment to the Constitution.

[116] Lawrence v Texas 123 S.Ct.2472 (2003) the Court held that State ban on sodomy violates Due Process Clause.

[117] The Fifth and the Fourteenth amendments of US Constitution contain the clause. It states that life, liberty or property cannot be denied except by the due process of law.

[118] The Fourteenth amendment to the Constitution contains the clause. It states that no state within its jurisdiction shall deny equal protection of laws.

[119] Lochner v New York 198 U.S 479 (1905)

[120] Genesis1:26-27 *supra* n. 35.

[121] "Four score and seven years ago our fathers brought forth on this continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal. We are engaged in a great civil war, testing whether that nation, or any nation so conceived and dedicated, can long endure." Abraham Lincoln, Gettysburg Address quoted in H. M. Seervai, *Constitutional Law of India*, vol. I, Universal Book Traders, India (2002), p. 435.

of sanctity of human life and the need to respect the inherent worth of human life is expressed in the preamble itself. The preamble stresses on the right-duty relationship and stresses on respect for the basic rights of man.[122] Article1 specifically mentions the right to life.[123] Again, the principle of equality which found expression in the Declaration and in the Constitution[124] finds expression in the 1948 declaration also. In fact, the recognition that man possessed certain inalienable rights was propelled by President Franklin Roosevelt in 1941 in the Atlantic Charter [125] and that was the driving force behind the framing of international instruments protecting human rights.

The Indian Constitution specifically lays down its pledge to uphold human dignity in the preamble and aim at the overall development of individual personality. Part III of the Constitution enumerates the fundamental rights and provides the means by which these rights are enforced as fundamental rights themselves. The machinery to enforce fundamental rights tests the validity of all laws and administrative actions on the touchstone of fundamental rights. The courts have consistently held that it is the "sacred" duty of the Court to safeguard fundamental rights and that it would be a 'sacrilege' to whittle down these rights[126] since fundamental rights are of a transcendental character.[127] Prof Seervai observes that the enumeration of fundamental rights in our Constitution even provoked the attention of countries like England to seriously consider the need for enumerating basic rights. In fact, in 1960, Canada enacted a Bill of Rights with a noble

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[122] "All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another. The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty. Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.

Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources…." Preamble American Declaration of the Rights and Duties of Man,1948

[123] Article I reads: Every human being has the right to life, liberty and security of his person.

[124] See Article1Section2, Section 9 and the Fourteenth Amendment.

[125] Roosevelt proclaimed four basic freedoms that could never be abridged namely, freedom of speech and expression, freedom of worship, freedom from want and freedom from fear.

[126] Basheshar Nath v CIT, Delhi and Rajasthan A.I.R 1959 S.C 149. See, observation Bhagwati J. para 21 at p 160.

[127] Pandit M. S. M. Sharma v Sri Krishna Sinha A.I.R 1959 S.C395. See para 39 at p.416

preamble.[128] The *concept of entrenching*[129] *basic rights* represents a major trend in the modern democratic thinking. Though initiated in America, it had its impact in India too.[130] The Supreme Court happened to observe the purpose of enumerating fundamental rights as for protection basic human rights.[131] However, there are countries with bill of rights but with no power of judicial review still enforcing basic rights.[132] But in India, the vehicle of Judicial Review can be seen as a basic force behind the enforcement of fundamental rights.

The availability of Article 14,[133] Article 21[134] etc. to any person and allowing rights under Article 15, Article 16, Article 19, Article 29 and Article 30 to citizens alone reveals the presence and recognition of inalienable rights under the Indian Constitution.[135] Again, the fact that fundamental right is available only to the State and not to private individuals except where state supports such private action makes the fundamental rights stand as superior and inalienable to the other category of rights.[136] The non applicability of the doctrine of waiver with regard to the fundamental rights establishes its eminence in the constitutional arrangement.

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[128] *supra* n. 121, at p.370.

[129] Entrenchment means that the guaranteed rights cannot be taken away by ordinary law. It needs a more formal procedure by way of a Constitutional Amendment.

[130] M. P. Jain, *Indian Constitutional Law,* Lexis Nexis Buttersworth, Wadhwa, India (6th edn.), pp. 1175-1176.

[131] Chairman, Railway Board v Chandrima Das, A.I.R 2000 S.C 988 at p.997 the court observed that," The purpose of this part is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the government at the centre or in the State,"

[132] The Fifth Republic of the French Constitution does not arm the court to annul laws as infringing basic rights, if any unconstitutionality of proposed law arises, the President may obtain advice of the non-judicial body namely the Constitution Council.

[133] Article 14 reads "The State shall not deny to any person equality before law and equal protection of laws within the territory of India."

[134] Article 21 reads, "No person shall be deprived of his life and personal liberty except according to procedure established by law."

[135] Article 15 deals with prohibition of discrimination on the grounds of religion, race etc especially in public places, Article 16 deals with equality of opportunity in matters of public employment, Article 19 deals with protection of freedoms such as speech and expression, assembly, association, movement,, trade, business or occupation, residence Article 29 deals with protection of the interests of minorities and Article 30 deals with rights of minorities to establish and administer educational institutions.

[136] *supra* n.104, at p.61.

The concept of the sanctity of human life permeates the Constitutional fabric of every legal system. Any political system, if it has to survive, has to respect and adhere to this basic norm. The entrenchment of basic rights seeks to uphold basic rights. Recognition of basic human rights in a legal system is the hallmark of constitutionalism. From British experience it is quite clear that there need not be a written constitution for recognition of human rights. Constitutions of countries like Australia, America and India have a charter of rights enumerating basic rights. The German Basic law, 1949 declared its commitment towards dignity and inherent worth of human person. This has been followed by many countries.[137] The Polish Constitution 1997,[138] the Constitution of Spain,[139] the Namibian Constitution 1990[140] and the Israel's Basic law[141] declared that all freedoms emanate from the worth of human life and human dignity. Certain writers[142] found that human rights emanate from the dignity of human person and hence deserve recognition in their constitutions. Therefore, most of the constitutions today have adopted in their legal system recognition of this basic value or norm, namely the sanctity of life. Recognition and incorporation of inalienable rights itself is not sufficient, its application and interpretation are important which have been done by courts of most of the legal systems constantly give content to the term "life."

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[137] Article 10 and Article 39 (1) of the South African Constitution, Article 1 and Article 13 (1) of the Portuguese Constitution, Article 24 of the Ethiopian Constitution 1994, Article 10 Columbian Constitution 1991.

[138] Preface of the Polish Constitution 1997: "We call upon those who will apply this Constitution for the Third Republic to do so paying respect to the inherent dignity of the person….."

Article 30 reads: "the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens."

[139] Article 10 reads: "the dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others are the foundation of political order and social peace."

[140] Preface of the Namibian Constitution-"recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace."

[141] Section 1 Israel's Basic Law- Human Dignity and Liberty 1992-"Basic Human Rights in Israel are based on the recognition of the value of the human being and the sanctity of his life and freedom."

[142] Henk Botha, "Human Dignity in Comparative Perspective", 2 *STELL. L.R. 171,200* (2009).

4.2.5 Constitutional Interpretations to Claims of Competing Interests on "Life" and the Concept of the Sanctity of Life

The right to life is recognised by many modern constitutional schemes as a basic right along with liberty and equality. For instance, the American Constitutional scheme does not specifically enumerate the right to life as a basic right. The emergence of the right to life as a part of the 14th Amendment arose in the cases relating to abortion, capital punishment, euthanasia etc. For instance, an overview of the various decisions on abortion reveals the commitment of the Constitution and the different organs of the government in recognising the right to life. Discussions on euthanasia, capital punishment etc. are dealt later.[143]

As for abortion, the question whether prenatal humans are human persons from the moment of conception and whether they enjoy the right to life has been a heated subject of debate in issues involving abortion, euthanasia, capital punishments etc. The primary issues in this area are whether there is an absolute inviolable quality in human life. The question arises as to how far the Constitution affirms the sanctity of life principle. In Jane Roe v Wade [144] the court struck down abortion laws restricting abortion prior to viability as unconstitutional, prohibiting most restrictions in the first trimester and only health related restrictions in the second. The court held that a mother had a right to abortion until viability. In the later cases the court placed additional restrictions on abortion in the first trimester[145] and also in the specific procedures followed in abortion procedures.[146] The Court however in Planned Parenthood v Casey [147] used dignity or intrinsic worth of life to support the women's right to abortion. On the basis of this, the court evolved right to privacy as an unremunerated right.[148] From these

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[143] *See* Chapter 3&4.

[144] 410 U.S 113 (1973)

[145] Planned Parenthood of South Eastern Pennsylvania et al v Casey 505 U.S 833 (1992)

[146] Gonzales v Carhart 550 U.S 124 (2007)

[147] *Ibid.*

[148] In Planned Parenthood Case the court observed, "…Our precedents have respected the private realm of family life which the state cannot enter… These matters , involving the most intimate and personal choices a person may make in a life time, choices central to personal dignity and autonomy are central to personal dignity and autonomy are central to the liberty protected by

decisions it is clear that the principle of the sanctity of life is not regarded in America as an absolute principle at all times. The thorny issue revolves around two views on abortion. The first view involves the notion that life begins at conception and hence protection to unborn starts from that stage just as in the case of an adult.[149] Based on the present day medical science viewpoint, at the moment of fertilization when the sperm and ovum unite a unique individual or zygote is created with its own unique genetic pattern. Hence it deserves respect from that point onwards. Others argue that life begins at birth; hence laws restricting abortion interfere with the right of a woman to decide what her own best interest is.[150]

The decision of the court in Jane Roe v Henry Wade[151] and Doe v Bolton[152] raised huge concerns among the theological circles, especially the stance on Christian assumption on sanctity of human life and secular pro life activists worldwide. This prompted attempts to overcome the decision in the US by way of amendments[153] and legislations.[154] The major concern raised was that the decision subverts the concept of the sanctity of life. The very same issue came up before the German Supreme Court, [155] and the Court tackled the issue by holding that the unborn have a right to life guaranteed under the Constitution and struck down the law which legalized abortions in the first three months. It rejected the "term solution" suggested in Roe's decision. The difference in the way of

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the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning of the universe and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state."

[149] Opponents of abortion use the label "pro life" to define their cause.

[150] Supporters of Jane Roe v Wade identify themselves as "pro choice."

[151] 410 U.S 113 (1973)

[152] 410 U.S 179 (1973)

[153] Several Human Life Amendments have been proposed in Congress since 1973, the Hatch-Eagleton Amendment1983 is prominent among them. All these amendments were attempts to overcome the decision.

[154] The sanctity of life Act , a bill introduced in 1995 ,Stockman bill 1995,We the People Act2011 etc were attempts made by prolife activist to overcome the decision of the US Supreme Court in Roe v Wade.

[155] BVerfGE, 39, 1 (1975), Robert E. Jonas and John D. Gorby (trans.) in *The John Marshall Journal of Practice and Procedure* available at http://groups.csail.mit.edu/mac/users/rauch/germandecision/german_abortion_decision2.html (visited on 26-6-2012).

deciding on the very same issue of abortion does not reveal that the sanctity of life principle has been abdicated by the courts in the US and that there is an absolute adherence of the principle in Germany but it is based on the recognition and assumption on the notion of beginning of life and on consequent levels of protection to be given. Moreover, it is based on the relative levels of respect of the rights of the mother and the life of foetus. The relative weightage given by a legal system to a particular issue for instance, abortion, reflects the country's assumptions on the concept of human life and its understanding on the sanctity of life of mother vis-a -vis the life of the foetus.

The decisions in several countries on abortion, euthanasia, capital punishment, genetic engineering etc revolve on the central notion '*Sanctity of life.'* The interpretations in these decisions reveal that sanctity of life concept cannot be related to specific normative value. The abortion of abnormal foetus is recognised by most of the legal systems. But then criticism is raised for the reason that it violates the sanctity of life. However, in interpreting the right of reproductive rights of mothers vis-a -vis the rights of the unborn foetus, the contest is between the different interpretations to the central concept of the sanctity of life. Jurist like Finnis believes that abortion is wrong not because the balance of interest[156] cut against it but because acts that take life in any circumstance including suicide, deny the fundamental value of life, and so are wrong independent of any theory of rights.[157]This perception on life seems unacceptable since the value of life, if it is to be understood, cannot be treated as totally inviolable and absolute at all times, factual reality places competing interests and claims and the state at this point, have to make a choice based on certain circumstances but ultimately the choice should be based on several factors including the rights and claims of persons involved, the social values involved, the circumstances in which each claim becomes pertinent and ultimately takes decision based on the common good.

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[156] R. M. Dworkin (Ed.), *The Philosophy of Law*, *O*xford University Press, UK (1977), p.13.

[157] *Id*., at p.138.

Total banning of abortion can lead to myriad problems like rise of illegal abortions, health and life of mother and foetus, etc. Hence countries follow restrictions based on socio-cultural ethos and based on social issues persisting. The refusal for abortion when the mother's life is at peril on the basis of the religious conception of the sanctity of life is unacceptable and protested at all times.[158] This shows that there is a total misconception on absolute inviolability as the basis of the sanctity of life by most of the legal systems which is based on religious explanations towards the sanctity of life. They result in the absolute ban of abortion which is impractical and improper. Countries have to modulate their legal system so that medical termination is allowed under certain conditions. Again, the issue of abortion spreads over science, ethics, law, religion etc. So the issue of controlling abortions recognises the legal exceptions based on the socio-cultural perceptions. For example, in India the Penal Code of 1860, declared induced abortion as illegal under section 312-316 IPC but due to the alarming rate of illegal abortions[159] prompted the passing of the Medical Termination of Pregnancy Act, 1971 recognising certain exceptional situations in which abortions are permissible. Concepts like '*mental health'* and '*foreseeable environment*' under Section 3(2) and Section 3(3) which prescribe circumstances in which abortion is legally permissible are vague and can be abused. Yet it is found that the Act has been quite successful in curbing illegal abortions which affect the life of the mother and the foetus alike.[160] Again, the rise of sex-selective abortion, made the anti abortion laws more restrictive. Thus the view of the US Supreme Court that the right of personal privacy emerging from the right to life cannot remain unqualified; hence the state can impose regulations based on '*compelling state interest.*'[161] This means that deprivation of the fundamental right such as

[158] The death of Indian mother in Ireland due to lack of legal sanction for abortion even when mother's life is at peril was condemned and protested.

[159] N. R. Madhava Menon, "Population Policies, Law Enforcement and the Liberalization of Abortion: A Socio- Legal Inquiry into the Implementation of the Abortion law in India", 16 *J.I.L.I* 634 (1974).

[160] Chidananda Reddy, "Does Abortion Law need a Second Look? ", 14 *C.U.L.R* 128 (1990).

[161] Jane Roe v Henry Wade 410 U.S113 (1973)

right to life can be done by the state except that the state has to prove the compelling objective which necessitated state regulation.

Therefore, the recognition of the mother's right to abortion within the permissible legal limits cannot be treated as a violation of the concept of the sanctity of human life. In fact, respect for the rights of unborn[162] was accepted by courts in the US in later cases. The decision of the court in Planned Parenthood of South Eastern Pennsylvania v Casey[163] wherein the court held that states may restrict the availability of abortions so long as the restrictions do not place an "undue burden" on the women's right to choose which depicted the commitment of the Constitution in seeking a fair balance of interests. This view is evident in the case of Pemberton[164] wherein Federal Judge Hinkle observed that the life of the unborn child whose life was paramount to the Constitutional Right of the mother when the mother refused caesarean delivery. Thus, the right to life is recognised as an inalienable right and its deprivation is subject to due process clause and equal protection clause which is found in the fifth and fourteenth amendments. Though right to life is not specifically stressed the courts in the US treated it as a fundamental right by virtue of the commitment of the American democracy[165] to the concept of the sanctity of life.

Most of the countries having written Constitutions have adopted the right to life and liberty. Yet it is found that the Indian Constitution is unique in the sense that through judicial articulation several substantive rights were deduced from this right alone by infusing into it the underlying principles under Article 14 and Article 19. Adopting the minority view in A. K. Gopalan's Case[166] that the terms *life* and personal liberty in Article 21 are not confined to physical security but would also include those freedoms enumerated under Article 19 which makes a human life meaningful, worthy and complete, the Supreme Court in Maneka

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[162] William Mae Weber v Aetna Casyalty & Surety Co 406 U.S 164 (1972) recognised the inheritance rights of unborn child.

[163] *supra* n.145.

[164] Pemberton v Tallahassee Memorial Regional Medical Centre, 66 F.Supp.2d 1247 (1999).

[165] From the words of Thomas Jefferson it is clear that America was committed to the concept of the sanctity of human life.

[166] A. K. Gopalan v State of Madras A.I.R 1950 S.C.27.

Gandhi case [167] set the platform ready to admit under Article 21 a big list of rights. In fact the court observed that respect for the individual is the backbone of all the fundamental rights guaranteed under part III and the objective was to achieve the maximum development of human personality and dignity. The court in Samtha v State of Andhra Pradesh[168] observed that:

> "*All human rights are derived from dignity of person and his inherent worth."*[169]

The Supreme Court in a plethora of cases tried to establish that ensuring quality of life is the constitutional mandate to the State and maintaining human dignity means ensuring quality of life and hence the sanctity of human life essentially encompasses within itself the quality of life. In Francis Coralie Mullin v The Union Territory of Delhi[170] the court observed that the term 'right to life' includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing, and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The court while interpreting Article 21 established that human life has got a dignified status[171] when compared to other beings [172] and that any action on the part of the state should take into consideration this dignified status.[173] Thus,

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[167] A.I.R 1978 S.C. 597.

[168] A.I.R 1997 S.C. 3297.

[169] *Ibid.* Justice Ramaswamy observed, See, para73 at p. 3328.

[170] A.I.R 1981S.C. 746 at p.753.

[171] In Chameli Singh v State of UP A.I.R 1996 S.C. 1051 it was observed that, "In any organized society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object." Observation by K. Ramaswamy, J., para7 at p. 1053.

[172] Kharak Singh v State of UP A.I.R 1963 S.C. 1295, see para 15 at 1301. See also Bangalore MT v Muddappa A.I.R 1991 S.C.1902 , at p. 1913 para 24.

[173] In Board of Trustees, Port of Bombay v Dilipkumar Raghavendranath Nadkarni A.I.R.1983S.C109 at p. 114 the Court observed that the expression 'life' does not merely connote animal existence or a continued drudgery throughout life. The expression 'life' has a much wider meaning. Therefore, where the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person, some of the finer graces of human civilization which makes life worth living would be jeopardized and the same could be put in jeopardy only by law which inheres fair procedures.

extolling human dignity, the court reminded that the dignity inherent in humans entitles them to be compassionate towards other beings, thereby recognising animal rights.[174] The Supreme Court in several decisions[175] while interpreting fundamental rights, especially the right to life, laid purposive reliance on directive principles of the state policy since it strongly felt that the right guaranteed under Article 21 includes the fine elements of quality of life as finding its expression in Part IV. The right to human dignity according to the court implied equal respect for every person as a human being was upheld by the court in Air India v Nargesh Meerza.[176] It is found that liberty cannot be divorced from equality and equality from liberty. The right to live with human dignity was recognised and enforced by the courts and its deprivation by the state can be justified only under a just procedure of law.

Several rights were evolved as emanating from Article 21 from the decision in Maneka Gandhi v Union of India[177] onwards which was available for not only protecting life but also for ensuring quality. However, certain views[178] seem to exist that the restrictive view of the Supreme Court in ADM Jabalpur,[179] led to the creative step taken by the Supreme Court in interpreting Article 21. Article 21 is a constitutional command to the state to preserve the basic human rights of every person.[180] Again, the view that the concept of the sanctity of life cannot be treated as absolute is true when one finds its expression in right to life guaranteed under Article

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[174] Animal Welfare Board of India v A.Nagaraja (2014) 7 S.C.C, 547.

[175] While interpreting Article 21 of the Constitution, the Supreme Court in Mohini Jain v State of Karnataka A.I.R 1992 S.C 1858, held that, 'The Directive Principles which are fundamental in the governance of the country cannot be isolated from the Fundamental Rights guaranteed under Part III. These principles have to be read into Fundamental Rights. Both are supplementary to each other.' See p.1864.

[176] A.I.R 1982 S.C1829.

[177] A.I.R 1978 S.C 597.

[178] J. S. Verma, *The New Universe of Human Rights,* Universal Law Publishing Co. Ltd., India (2004), p.31.

[179] ADM Jabalpur v Shiv Kant Shukla A.I.R 1976 S.C 1207 the court held that Article 21 is the sole repository of the right to life and personal liberty; and since Article 21 has been suspended during emergency, no writ petition could be entertained in respect of any right claimed by the detune.

[180] Durga Das Basu, *Indian Constitutional Law*, Kamal Law House, India (2011), p.265.

21 as a qualified right rather than absolute.[181] It is treated as the constitutional edifice of human rights jurisprudence in India.[182] And courts hold that every civilised society would definitely uphold the value couched in Article 21.[183] The notion that human rights derive from the inherent worth and dignity of the human person was accepted by the courts in India in their interpretation of Article 21 of the Constitution.[184] J Shelat in the landmark decision of Kesavananda Bharati v State of Kerala,[185] speaking on the basic feature of the Constitution, observed that the dignity of the individual secured by the various freedoms and basic rights under Part III constitutes the basic features of the Constitution which is not amendable. Fundamental Rights act as an effective check on the legislative and executive actions by virtue of judicial review. Thus by expanding the interpretation of Article 21 the locus standing principle was liberalized to the extent that paved the way for recognition and enforcement of public interest litigation. The courts have adorned the role of *parens patriae* to uphold liberty even when a matter is a non-justifiable issue.[186] This role has been accommodated from the English legal system where there is no charter of rights.[187]

The interpretation of Article 21 at the first instance though centred around the requirement of fair procedure, later on shifted to evolve new rights as emanating from the term 'life' and finally evolved a set of positive duties of the state corresponding to the rights of the individual as a human being.[188] Article 21

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[181] It is a right circumscribed by the possibility or risk of being lost according to the procedure established by law. See A. K. Gopalan v State of Madras A.I.R 1950 S.C 27.

[182] Sunil Batra II v Delhi Administration A.I.R 1980 S.C 1579.

[183] Kehar Singh v Union of India A.I.R 1989 S.C 653 See para7 at p.657

[184] Valsamma Paul v Cochin University A.I.R 1996 S.C 1011, at p. 1020.

[185] *supra* n.71.

[186] Charan Lal Sahu v Union of India A.I.R 1990 S.C 1480. The case pertains to exercise of parens patrie jurisdiction by Supreme Court with regard to compensation for Bhopal gas leak tragedy. *See*, para 37 & 63 at pp. 1507-1520.

[187] Liveridge v Anderson (1942) AC 206 In the House of Lords, Lord Atkin observed, "I view with apprehension the attitude of judges who on mere question or construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive…It has always been the pillars of freedom… that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

[188] *supra* n.130.

has been subjected to greater scrutiny by the Indian courts when questions of life and death have been subjected to judicial interpretation especially in terms of issues like abortion, capital punishment, euthanasia, suicide etc. While deciding on the issue of whether the right to die is included in Article 21, the apex court overruling its previous decisions[189] on the question, held, in Gian Kaur v State of Punjab,[190] that the right to life including the right to live with human dignity would include the existence of such a right till the end of natural life. This includes a dignified procedure of death. The court reiterated that the right to die with dignity at the end of life is not to be confused with the right to die an unnatural death. Acceleration of the process of death when it is certain and imminent, cannot be equated with the right to curtail the natural span of life. Thus suicide, according to the court, is unrelated to the sanctity of life principle. The court affirmed that by no stretch of imagination can extinction of life be read to be included in protection of life.

In C. A. Thomas Master v Union of India[191] the court considered the question of whether voluntary death by a person who is content and happy with life is guaranteed under Article 21. Holding that such voluntary termination of life as amounting to suicide the court observed that if such a right is construed as under Article 21 then the possibility of its misuse or abuse cannot be ruled out. The individual's perception on suicide is based on several factors such as his age, his moral atmosphere, his ethical convictions etc. However, when a state grants permission for suicide legally, the basic relationship between a human being and the state, and the contract which the state enters with the individual assumes significance.[192] Here the state considers giving prominence to momentary

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[189] In State of Maharastra v Maruti Shripati Dubal A.I.R 1997 S.C 411 Chenna Jagadeeshwar v State of Andhra Pradesh 1998 Cr. L.J 549 he court looked into the constitutionality of Section 309 IPC. In P. Rathinam v Union of India A.I.R 1994 S.C 1844 the court held that section 309 of IPC as unconstitutional since it was violative of Article 21 of the Constitution since Right to die was a part of right to life under Article 21, hence if sec 309 IPC is unconstitutional, any person abetting a commission of suicide by another was merely assisting the enforcement of Article 21, and therefore, Section 306 IPC penalizing assisted suicide is equally violative of Article 21.

[190] A.I.R1996S.C946

[191] 2000 Cri.L.J 3729

[192] Available at www.lawyersclubindia.com (visited on 6-6-2013).

impulses is subordinate to the interest of the individual as a member of the society. Hence, it is found that Indian courts' attitude towards the issue of suicide upholds the fundamental value of the sanctity of life as prominent and non-derogable which emphasises that self destruction is antithetical to preservation of life. However the decision of Gian Kaur[193] triggered a discourse on the legality of euthanasia, which culminated in the decision in Aruna Ramchandra Shanbaug v Union of India and others[194] in which affirming the opinion of Lord Keith in Anthony Bland's case[195] the Court held that the principle of the sanctity of life is not an absolute one and hence passive euthanasia is permissible. That is, withdrawal of life support system is permissible subject to certain legal requirements for a patient in permanent vegetative state. Conscious of the fact that there might be a misuse of this decision, the court articulated certain legal requirements before this is permitted such as the permission of close relatives, spouse, doctors and finally the approval of the High Court, subject to certain procedures laid down by the court in this decision. Article 21 gives protection to life and liberty to the extent mentioned therein. It does not recognise the right to life and personal liberty as an absolute right but again, it attempts to limit the scope of the right itself. Thus in nutshell, the absolute right by the definition given in Article 21 itself is qualified by the risk of its being taken away in accordance to the procedure laid down in law. It is found that the right under Article 21 is a basic human right which is recognised as being applicable to every human being by virtue of him being born as a man. The state can restrict this right only according to a fair procedure and hence curbs the power of the state when it interferes with the right. Thus the right to life is inherent in each individual and it needs to be respected and protected by the state.

Right to life and human dignity has been treated as the basic of all the human rights. In Constitutions like America, India etc. life or liberty can be taken away by the due process or as per procedure contemplated by law. International covenants recognise this right as a non–derogable right. Non–derogable means it

[193] *supra* n.190.

[194] (2011) 4 S.C.C454

[195] Airdale N.H.S Trust v Bland (1993)1All.E.R 821.

cannot be deprived except when an emergency arises in the state. For example, Article 6 of International Convention of Civil and Political Rights states freedom from arbitrary deprivation of life. This means that the term 'arbitrary' indicates that circumstances may justify the taking of life, where necessary, reasonable and proportionate. Hence it is found that the right to life is a qualified right and not absolute as often and commonly regarded.

4.3 Criminal law and the Concept of the Sanctity of Human Life

The foundational principles of criminal law are based on the concept of sanctity of human life. The state acts as the defender of the concept. Practical interpretation of the concept has also been based on the concept.

4.3.1 Evolution of Fundamental Criminal Law Principles in Different Legal Systems and the Sanctity of Human Life Concept

It was H. L. A. Hart in his exposition on "Law" expressed that law and morals should include specific content[196] and that content necessarily incorporates the survival of man as the primary concern over and above everything. However, it is a reality that every man considers his own life as pre eminent and important when compared to others. But there might arise circumstances wherein the lives of others may affect our interest or rights, or in fact our life itself. Hence any society must face the problem of when the life of some should yield to the claims or interest of others.[197] This tension is found in every civilized society and criminal law can be treated to be a body of formulations which enforce authoritative standards of values so that the respect for human life is maintained to the maximum. D. J. Gulligan in his famous work, *Law in Modern Society*[198] emphasizes that there is a social foundation for criminal law and that it embodies definite social values. Integrity of person and property warrants the special protection that criminal law and criminal justice provides. Thus the criminal law has two tasks which he identifies:

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[196] *supra* n.41, at pp.188-189.

[197] Sanford H. Kandish, "Respect for Life and Regards for Rights in the Criminal Law", 64 *California Law Review* 872 (1976).

[198] D. J. Galligan, *Law in Modern Society,* Oxford University Press, Oxford (2007), p.228.

a) To protect each person from the other

b) To sustain the foundations of society.

Thus it can be inferred that this function of law is possible only when a society recognises the sanctity of human life as of supreme value which is necessarily the foundation upon which any legal system operates.

The public law account of the Criminal justice system recognises state coercion as the central aspect of the Criminal justice system and treats the justification of criminal law in a different angle. According to Malcolm Thorburn:

> "*acting according to principles that treat the moral worth of all persons equally, my actions actually undermines my status as an equal to those among whom I live in the state of nature."*[199]

Liberal Constitutionalism offers a solution by creating law and state. Thus the use of force by state is justified in so far as it sets out the essential preconditions to a life in community with other free and equal moral persons.[200] The legal moralists claim that the state can use coercive power to enforce collective moral judgments of individuals and thereby justify criminal law. Patrick Devlin holds that humans cannot lead a meaningful existence outside society; hence law can be used so as to preserve shared morality in order to preserve society itself.[201] For this, he argued that even private acts should be subject to legal sanction if against collective morality. However, Hart objecting to Devlin's stance reiterated the harm principle of Mill and argued why should the conventional morality of a few members of the population be a justification for preventing people from doing what they want?[202] Thus he stated that unless something is harmful to the society, the state has no right to interfere with the lives of individuals. This debate was based on the Wolfenden Report 1957, of England which stated that homosexual acts between consenting adults should be

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[199] Malcolm Thoburn , "Criminal Law as Public Law", in R.A. Duff & Stuart Green (Ed.) *Philosophical Foundations of Criminal Law*, Oxford University Press, USA (2011), p.42.

[200] *Ibid.*

[201] Patrick Devlin, *Enforcement of Morals,* Oxford University Press, London (1967), p.69.

[202] *supra* n.196.

legalised, as it was not the business of law to make decisions on private moral issues. It can be found that the stance of Hart seems plausible since collective morality keeps changing from time to time and moreover no person or society knows what is "right' exactly.

Kantian Conception of individual as a responsible moral subject with a prior moral relation with the rest of humankind because of his rationality justified criminal law and punishment.[203] Hegel in his work "Philosophy of Right"[204] observed the need for criminal law wherein he said that there might arise a situation in which poverty leads to a loss of the sense of right and wrong and consequential violations of universal norms in a moral community.

Philosophers like Ronald Dworkin,[205] Joel Fienberg[206]and Joseph Raz also found that each individual should be treated as responsible for his or her own behaviour.[207] This philosophy is found to be contrary to the views of Nicola Lacey who claimed that criminal law exists for the fulfilment of certain basic interests such as maintenance of personal safety, health and the capacity to pursue one's chosen plan.[208] Of late, the minimalist approach[209] towards criminal law is for respecting the basic human rights of individuals. Thus respect for human rights is *the* basis of all the theories justifying the evolution of criminal law.

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[203] Immanuel Kant, *The Metaphysical Elements of Justice,* Hackett Pub., USA (1965), p.100.

[204] Hegel *G.. The Philosophy of Right,* Oxford University Press, London (1952), p.150.

[205] Ronald Dworkin, *Taking Rights Seriously,* Harvard University Press, USA (1977), p.180, stresses that each individual is entitled to equal concern and respect.

[206] Joel Feinberg, *Harm to Self- The Moral Limits of the Criminal Law,* Oxford University Press, New York (1986),p.54: "the most basic autonomy – right is the right to decide how one is to live one's life, in particular how to make the critical life decisions- what courses of study to take, what skills and virtues to cultivate, what career to enter, whom or whether to marry, which church if any to join, whether to have children and so on.."

[207] Joseph Raz states that "three main features characterize the autonomy based doctrine of freedom. First, its primary concern is the promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of an adequate range of options, and of the mental abilities necessary for autonomous life. Second, the state has the duty not merely to prevent the denial of freedom, but also to promote it by creating the conditions of autonomy. Third, one may not pursue any goal by means which infringe people's autonomy unless such action is justified by the need to protect and promote the autonomy of those people or of others." Joseph Raz, *The Morality of Freedom*, Oxford University Press, Clarendon Paperbacks, New York (1986), p. 425.

[208] Andrew Ashworth, *Principles of Criminal Law*, Oxford University Press, UK (6th edn., 2009), p.26.

[209] *Id.,* at pp. 31-34.

It is found that the basis of criminal law is the concept of sanctity of life which rests on the principle that all human lives have inherent value and man needs to recognise and respect the same in the evolution of criminal laws in most of the legal systems.

The history of crime begins in the first book of the Bible[210] which can be said to be at least seven thousand years before. The fundamental principle of criminal law regarding the protection of innocent against the danger of the offender escaping, can be traced to the views expressed by the Jewish Scholar Maimondes who have stated in 12th century that "it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent one to death."[211] Thus the basis of this principle is from Judaism. Roman law provided the English legal system with the input to distinguish criminal from civil law. Mens Rea began to be used after the 4th Lateran Council in 1215 during the Gregorian Reform. In 1230 Bracton was influenced by the Roman notion of "culpa" (fault) and from this period onwards we can find that judgments from courts reflected two components in crimes namely Actusreas (guilty act) and Mens Rea (guilty mind).[212] There were different stages in the development of penal liability. The first stage was however one of strict liability. A man was held strictly liable for any harmful effect by way of his conduct. The influence of the church led to the recognition of a mental element in criminal liability.

Blackstone stressed the need to recognise regulation of individual liberty for the benefit of others which was based on the Christian view of the sanctity of life and recognised the need for civil authority for the enforcement of the same.[213] The general power of judges to invent crimes and their constituent elements were clearly attributable to the absence of effective legislature. The judges were law makers for a relatively long period and they started inventing new crimes as and when need arose, and certain conducts were deemed as against public morals,

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[210] The Genesis account of Cain and Able depicts this.

[211] Moses Maimonides, *The Commandments (Seferha Mitzvoth*), Charles B Chavel (trans.), Soncino Press, London & New York (1967), p.271.

[212] Available at www.lawandliberty.org/justice.htm (visited on 6-6-2013).

[213] *supra* n.90, at pp. 129-140.

public decency and as public mischief.[214] This led to the development of common law crimes such as blasphemy, attempt, conspiracy, incitement etc. Through judicial decision making principles like punishment should be proportionate to the wrongful actions, justice should be retributive, sanctions should be vindicatory, remedial and compensatory, and the burden of proof beyond reasonable doubt etc. gradually emerged during this period. The basic principle of criminal law that one is considered 'innocent until proven guilty,' usually known as presumption of innocence, though found in the Digest of Justinian, came to be a major principle in common law jurisdiction. *It was based on the maxim, 'Eiincumbit probation qui'* –the onus of proving rests up on the man who affirms and was coined by Sir William Garrow in the 17th century. It is based on Christian notion that every human being's life has got sanctity whether he is an accused or an offender, and until he is proved guilty he is deemed to be innocent.[215] Though the Bible gives a description of the imprisonment of Joseph in Egypt it was in England that prison system got its birth. Until then penal transportation to colonies of Britain was the practice. However, the fundamental principle that a person can be punished for a criminal offence only based on law can be seen to have achieved prominence based on the principle of rule of law as developed in England. The English criminal law derives its fundamental principles from common law, though there existed codes to guide the criminal justice system. This had an impact on the colonies of England, especially America, who were heirs of English Common law tradition and absolute followers of strict liability principle. In the colonial period, the criminal system according to Friedman served as an arm of religious orthodoxy and so crimes like blasphemy, blue laws etc were said to have emerged.[216] After the Revolution and subsequent changes in the social and economic background of America, the legal system slowly withdrew from its

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[214] Available at http://catalogue.pearsoned.co.uk/assets/hip/gb/hip_gb_pearsonhighered/ sample chapter/1408279282.pdf (visited on 6-6-2013)

[215] Genesis 18:23-24 "Abraham drew near and said, "Will you consume the righteous with the wicked? What if there are fifty righteous within the city? Will you consume and not spare the place for the fifty righteous who are in it? …. What if ten are found there? Genesis 18:32He (the Lord) said, "I will not destroy it for the ten's sake".

[216] Lawrence M. Friedman, *Crime and Punishment in American History* , Basic Books, New York (1st edn.,1993), pp.31-33.

strong dependence on common law. Crimes came to be classified economically and penal statutes were tagged with economic offences as a result of industrialization.[217] Moreover, it was deemed that every crime is a moral wrong either inherently wrong or wrong because of its consequences[218] and hence criminal law is a moral law.

The American Criminal system is associated with underlying social and moral values which its Constitution tries to uphold. This is more or less same to Indian Criminal System which is enforced in tune with the Constitutional mandate. The basic principles of criminal jurisprudence in India can be seen to be associated with the fundamental notions of the intrinsic value of human life and respect for the life of all beings as found in the Vedic literature. Ahimsa or non violence is the fundamental tenet of Hinduism and hence the Hindu literature is saturated with ideas on ahimsa. Manu classified the types of offences and penal liability for the same.[219] However, he made no distinction between private and public wrongs. Murder, homicide etc. were treated to be private wrongs. But he recognised certain defences to criminal liability which is more or less in tune with the Indian Penal Code. Mistake of fact, consent, right of private defence etc was recognised as defences against the state.[220] The demerit of the system was that the punishment of the criminals differed according to the caste.

In Kautilya's *Arthasastra* there exists the provision for grounds on which arrest can be effected[221] and provisions for capital punishment.[222] Similarly,

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[217] Douglas W. Allen and Yoram Barzel, *The Evolution of Criminal Law and Police during the Industrial* R*evolution, available* at http://econ.washington.edu/user/yoramb/standard.pdf .

[218] Malum in – morally wrong in itself (e.g. murder, rape) and Malum Prohibito –wrong because society treats it so.

[219] Manu recognized assault, battery, theft, robbery, false evidence, slander, libel, criminal breach of trust, adultery, gambling and homicide as crimes. These offences are found in the Indian Penal Code.

[220] K. D. Gaur, *Text Book on the Indian Penal Code,* Universal Law Publishing House, India (4thedn.,reprint, 2012.), p.6.

[221] Book 4, chapter 6, section 81 contains provisions. (4.6.2)The arrest of a person may be affected on three grounds: sankabhigraha, arrest on suspicion, rupabhigraha, arrest when in possession of stolen goods, and karmabhigraha, arrest on consideration of the circumstances attending the crime. Aver long list is given of circumstances that would justify arrest on suspicion. Kautilya, *Arthasastra,* Part II, K. P. Kangle (Ed. & trans.) University of Bombay (1963), pp. 311-314. For interpretation of the provisions see K. P. Kangle, *Kautilya's Arthasastra Part III: A Study*, University of Bombay, Bombay (1965), p.235.

Crime under Islamic law was considered as an offence against god or ruler or private person and so a private affair between god and the offender, or king and the offender or the injured and the offender.[223] Interestingly, murder was not considered as a crime against god and could be compounded by way of blood compensation known as Diyyat or monetary compensation.[224] Several principles of English Criminal law and administration are found in the present in the Penal Code as drafted by Lord Macaulay in 1860. The Constitution contains a number of provisions for protecting the rights of the accused and for ensuring fair trial. We find that several principles have been developed into our Criminal law by virtue of the concept of the sanctity of human life or respect for the inherent worth of life. For example, Principle of Proportionality, that is, preference of less severe punishment when two different punishments are prescribed for an offence; imposition of penalty fairly equally i.e., on all and only those who deserve, crimes ought to be punished etc.[225] The offence of murder is usually associated with this moral precept namely sanctity of human life, which is the source of this social or legal rule.

4.3.2 Questions of Life and Death in Criminal Law and the Sanctity of Human Life Concept

Most of the legal systems in the world over have accepted that killing or intentional killing is an offence which deserves punishment which may be death penalty, imprisonment for life or imprisonment for a term or even compensation. But there remains certain acts which may more or less amount to taking of life of another which may be due to individual or societal necessity. The attitude and response of each legal system in these cases may vary according to the socio-cultural values accepted in their system. Questions relating to infanticide,

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[222] Chapter 11, section 86 contains the categorisation of different forms of punishment. For a person killing another during a scuffle death with torture is the penalty. In case death of the victim, death shall be the punishment. *Id* at p. 327.

[223] Shiv Kumar Dogra, *Criminal Justice Administration in India*, Deep & Deep Publications, New Delhi (2009), p. 29.

[224] See the Holy Quran 5: 54.

[225] Hugo Adam Budeau, *Capital Punishment.* Available at www.cas.umt.edu/phil/documents/bedau.pdf (visited on 3-9-2012).

abortion, suicide, euthanasia, imposition of death penalty etc directly triggers the discussions on whether it erodes the inviolability attributed to human life by the concept of sanctity of human life. It consequently raises the question of, what should be the legal attitude towards such human conduct. From the early periods of history, intentional killing has been condemned both morally and legally. In the cases of euthanasia, sterilization, abortion etc. law has to take an individual as a part of a social order and surrounded by social relations and man as an individual apart with a physical body and who has his own feelings, interests, bodily integrity, attachments etc. And it is this function of law which we often find has triggered legal discourses.

The Anglo American discourse on these issues have always centred around the famous work of Glanville Williams, '*Sanctity of life and the Criminal Law*' which explicitly dubbed the intervention of church in legislative endeavours of the state in these issues as retrograde, thereby affecting the interest of the state and the individual alike. This interference according to Williams was due to incorrect interpretation of the biblical directives on the sanctity of life.[226] He finds that law by completely adhering to the concept of inviolability of human life creates certain practical difficulties such as when a mother finding that she has given birth to an idiot child (or in his words a monster), kills it he doubts whether the society has the right to stand in judgment upon a mother placed in such a terrible predicament. He argues that in such cases should not liberty pursue?[227] By totally adhering to the concept of the absolute inviolability of human life, criminal law for centuries together has been treating it as a murder but according to him such circumstances warranty a 'humane treatment.' Thus he finds that the connotation of '*do not kill'* requires an interpretation based on the background of several factors, the important of which are religion, race, moral precepts of the given society, customs, laws of each particular society, moral practices etc. The courts have to take this into consideration while dealing with life and death issues. This

[226] In his discourse on suicide Glanville Williams, finds that Saint Augustine's stance against suicide was influenced by the historical events of his age rather than biblical directives. Glanville Llwelyn Williams, *The Sanctity of Life and the Criminal Law*, Faber & Faber Ltd., London (1958), pp. 230-231.

[227] *Id* at p. 31.

view seems more or less similar to the views of Benjamin Cardozo who, while probing into the nature of judicial process, was of the opinion that logic, history, custom, accepted standards of right conduct etc. influence the progress of law through judicial law making.[228]

The Anglo-American view on the mode of determination of questions pertaining to life-death issues is more or less similar. There are views that the terms 'sanctity of life' and 'human dignity' have been used by different cultures in different manner. The Anglo American system insists on the term 'sanctity of life' while the other European or continental countries especially Germany uses the term 'human dignity.' But in both systems these terms perform similar functions within their own cultural contexts.[229] The major question confronting the legal and social hemisphere of any state is whether life is an absolute value or can it be relative through other values. The Criminal law of the state is often confronted with articulation of rules, application and interpretation in this area. Different legal systems have incorporated different stances while dealing with these issues, especially euthanasia, abortion, sterilization, etc. based on their socio-cultural values.

A. Contraception and Sterilisation:

Malthus's concept of overpopulation as the root cause of poverty and the Christian assumption of the sanctity of human life were sources of controversial debate in England with regard to the use of contraceptives. Later the Bradlaugh-Besant trial[230] paved way for the acceptance of contraception or voluntary parenthood in England.

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[228] Benjamin Cardozo, *Nature of Judicial Process,* Yale University Press, USA (13 reprint, 1946), p.112.

[229] Kurt Bayertz, "Introduction: Sanctity of Life and Human Dignity", in Kurt Bayertz (Ed.), *Sanctity of life and Human Dignity*, Kluwer Academic Publishers, Netherlands (1996), p.11.

[230] Queen v Charles Bradlaugh & Annie Besant (1878) decided on June 18,1877 Queen Bench Division (specially reported) Free Thought Pub. Co., London, available at https://archive.org/details/cu31924031494275.

The English propaganda for birth control had an impact on most of the countries,[231] especially America. But the addiction of America to Christian assumption of the sanctity of life, led to criminal prosecution of Margaret Sanger, a birth control crusader in 1916, the states in America legislating against contraception and in fact the passing of a Federal statute, the Comstock Law, 1873 by the Federal government . [232] However in 1936, in US v One Package,[233] the Court of Appeals allowed physicians to legally mail birth control devices and information throughout the country. Later, in 1965 the US Supreme Court[234] overturned the Comstock Law and held the private use of contraceptives as a Constitutional right.[235] The tension between commitment to the value of the sanctity of life and the practical necessity of sterilisation as a social medicine to control population is visible in Anglo-American legal system.[236]

Similarly, sterilisation was generally regarded as invading the bodily integrity of a person. William Blackstone conceptualized body as sacred[237] and this view later developed[238] in medical jurisprudence as '*the principle of body*

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[231] Most of the continental countries except France were influenced by English philosophical thought. France followed her own history since contraception was common among French upper classes for centuries. And by 19th century it percolated to peasants despite religious prohibition.

[232] Anthony Comstock, a devout Christian was the force behind bringing this legislation which aimed at stopping trade in "obscene literature" and "immoral activities." It also targeted information on birth control devices, sexually transmitted diseases, human sexuality and abortion.

[233] 86 F 2d 737 (2nd Cir.,1936) as cited in Glanville Williams, *The Sanctity of Life and the Criminal La*w, Faber & Faber Ltd. , London(1958), p.51.

[234] Grisworld v Connecticut 381 U.S 479 (1965) as in Robert E. Cushman & Robert F. Cushman (Ed.), *Cases in Constitutional Law*, Meredith Corporation, New York (3rd edn., 1968), pp. 628-635.

[235] The court observed that birth control law unconstitutionally intrudes upon the right to marital privacy. Justice Douglas quizzed, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."

[236] Kristin Savell, "Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law", 49 *Mc Gill Law Journal* 1093(2004).

[237] This conception was based on the premise that no one has the right to meddle with another person's body even in slightest manner. William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edn. of 1765-1769*, vol. III, University of Chicago Press, USA (1979), p.120.

[238] In Collins v Wilcock (1984) 3 All. E..R 374 the court observed "the fundamental principle plain and incontestable is that every person's body is inviolate. It has long been established that

integrity'[239] to which common law such as trespass to body and criminal law such as assault, battery etc had their base.[240] In some legal systems, through series of judicial decisions and through legislations, sterilisation for contraception was made legal subject to consent[241] and free will being exercised by the parties while in other systems it is still not permitted.[242] This was essentially based on religious stress on the sanctity of human life wherein compulsory sterilisation for eugenics was allowed.[243] After the Second World War and the genocide policy of the Nazis practically the system of forced sterilization has been viewed as an international human rights violation.[244]

Thus it is found that when there is deviation from the path of the sanctity of life history reveals that the greatest atrocities to human lives will be caused. The fall of Nazi regime is a clear illustration of this. Nazi atrocities paved way for different legal systems to ponder on the need for recognition of rights legally and politically. In this context the new interpretation to the concept of human rights as political affirmations of desired human condition articulated in course of struggles assumes significance.[245]

B. Suicide:

'Intentional killing' of a person is always considered as a crime by most of the legal systems. Killing someone was a very serious offence indeed in Anglo-

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any touching of another person, however slight may amount to battery …… The breadth of the principle reflects the fundamental nature of the interest so protected."

[239] It refers to the concept of inviolability of the physical body and the relevance of personal autonomy and the self-determination of human beings over their own bodies.

[240] "Any treatment given by a doctor to a patient which is invasive (i.e., involves any interference with the physical integrity of the patient) is unlawful unless done with the consent of the patient. It constitutes the crime of battery and the tort of trespass to person," observed the court in Air Dale NHS Trust v Bland (1993) 1 All .E.R 821 at p. 881.

[241] Under Common law jurisdiction voluntary sterilization is considered legal. UK, America, South Asia, and the Caribbean allow it. In Civil law jurisdiction especially Continental Europe, historically it was an offence but now statutes exist.

[242] Available at https://www.engenderhealth.org/pubs/family-planning/ (visited on 17-9-2014).

[243] The California Eugenics program 1933 inspired the Germans.

[244] It has been treated as a crime against humanity by the Rome statute establishing International Criminal court.

[245] Manoranjan Mohanty, "Reconceptualising Rights in Creative Society", 42 (1) *Social Change-Journal of the Council for Social Development* 3 (2012).

Saxon England, but it was an offence primarily against the victim and the family rather than against the king.[246] But this may not always be true in the case of taking of one's own life. Historically, among the Englishmen suicide was a common law offence as observed by William Blackstone as 'self murder,' and hence punishable. Since a person who has committed the offence is beyond the reach of law, we find that the associated matters such as burial of the corpse, assisting the suicide and attempt to suicide have been treated by different legal systems. The reason for treating suicide as a crime is the direct result of the religious attribution of the sanctity of human lives. The writings of St Augustine and St Thomas Aquinas had formulated the view that the man who deliberately takes away the life given by the creator showed disrespect to god and hence is a sinner worthy of no salvation. This view on suicide had a slow change with the Renaissance and Reformation movements. Montesquieu and Voltaire argued in defence of individual right to choose suicide. After the French Revolution 1789, criminal penalties for attempted suicide were abolished in some countries.[247] England was a late comer in this regard. The views of Sigmund Freud that, the mental condition towards suicide may be due to natural, physical, and emotional factors paved the way to many countries decriminalising suicide. There are certain legal systems which criminalises suicide.[248]

The English Suicide Act of 1961 decriminalised the act of suicide so that those who failed in the attempt would no longer be prosecuted. But the intention of the British legislature was not to create a right to suicide since it stressed the fact under section 2 that abetting the suicide is a crime. A curious phenomenon is found under Section 2 of the Act which provides criminal liability for complicity in another's suicide, which is unique in the sense that the accessory incurs liability whereas the principal incurs none. The reason for such logic seems to be that, criminal law perceives a situation in which an abettor with malicious motive perpetrates the commission of the crime and should not be let free irrespective of

[246] T. B. Lambert, "Theft, Homicide and Crime in Late Anglo Saxon Law", *Past & Present – A Journal of Historical Studies* 9 (2012).

[247] France, Germany, Italy, Switzerland and Scandinavian countries followed suit.

[248] Pakistan, Bangladesh, Malaysia, Singapore and India.

the fact of success or failure of the criminal act contemplated. His intentional design for the commission of the crime is the reason for his criminal liability. The English Suicide Act creates liability for the abettor even though the person who has attempted the suicide is let free. The value here being protected by law is to prevent the actual cause for the wrong and its actual perpetrator is brought before law. The very same logic applies to the law in India and Britain[249] on Prostitution which makes Prostitution legal[250] but regards a number of related activities which perpetuates the wrong as crimes.[251] At times, law has to choose between different values and perceptions so that the maximum vice may be prevented. Assisted suicide is an offence in England. In America, some states endorse to the English position where as others follow a liberal approach to suicide. Attempt at suicide in India remains constitutional after the decision in Gian Kaur v State of Punjab.[252] The provision for punishment to a man for an attempt to suicide under section 309 IPC has been questioned not only on the grounds of morality but on its constitutionality under Article 21. The Law commission in its 156th report submitted after the Gian Kaur decision suggested that the provision be retained but the 210th report suggested its scrapping from the penal code. Thus, inconsistencies exist not only in the decisions of the courts on this point but also in the views of various committees and commissions. The courts and other agencies suggest the scrapping of the provision on the two major premises: firstly, that the psychological condition of the person who attempts the suicide is totally overlooked by the provision and secondly deterrence is not the solution but humanising the law is the need. However it needs to be understood that respect for the life of oneself as a human being is the primary requirement which has an

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[249] Cecile Fabre, *Whose Body Is It Anyway-Justice and Integrity of the Person,* Clarendon Press, Oxford (2006),p. 2.

[250] The Immoral Traffic (Prevention) Act, 1986 (PITA) amended the All India Suppression of Immoral Traffic Act 1956 (SITA) deals with Prostitution or sexual trafficking. It was brought into force by virtue of India ratifying the International Convention of Immoral Traffic in person and the Exploitation of the Prostitution of others, 1950. It does not abolish prostitution but contains lot of legal injunctions suppressing and preventing the same.

[251] It prevents soliciting in public places, kerb crawling, owning or managing brothels, pimping, pandering etc.

[252] *supra* n.190.

impact not only on the individual but on the other members of society. Thus this is an inherent element of the sanctity of life.

Suicide is considered generally as an unnatural way of putting an end to one's life which is disapproved by sound normal individuals of a society. It is a relevant consideration while interpreting criminal law principles that the society's notion of what the law is and what is the right should coincide. This applies strongly in offences involving life.[253]

Can individual autonomy be extended to the extent of extinction of one's own life is the pertinent question. The choice before law is individual autonomy or moral values and public policy. Viewed in this background, individual autonomy cannot be given weightage since permitting a person to unnaturally terminate his life due to his instinct is against the moral views of normal individuals who constitute the society. Suicide leaves a scar not only on the life of the particular person who commits it but also on the society in which he is a member. Deterrence is needed. Moreover, abetment to suicide is punishable in most of the legal systems but to leave scot free a person who commits such an act (even though a failure), demoralises not only himself but the society he lives in finds no prudent justification. This might be the reason earlier that the English law punished the person who survived after the suicide pact which he entered with another. Subsequently the Homicide Act 1957 made the survivor guilty of man slaughter instead of murder.[254] The social contract which a person enters with the state is that as a member of a given community he cannot be neglected and hence state deterrence is required. The normal corollary to such a presumption is the question that what moral grounding does a state has with regard to forcing a person to stay alive when the state is unable to provide him decent livelihood. But the moral standpoint of every state is the protection of life and the state cannot turn a blind eye to a person's attempt to kill himself.[255] The state has to choose

[253] K.N. Chandrasekhara Pillai, 'Comment on Rathinam v Union of India," 3 *S.C.C.J.* (1995).

[254] Croft (1944) I KB 295

[255] B. S. Yadwad & Hareesh S. Gowda, "Is Attempted Suicide an Offence?", 27 (2) *J.I.A.F.M.* 110 (2005).

between deterrence and rehabilitation. This may also seem the reason why states avoid deterrence.

The Indian Penal code seems to recognise the urge of self preservation which is the basis of human dignity. The code recognises that human life has got an intrinsic value which is generally accepted. This might be the reason why suicide came to be recognised as an offence. The Indian position seems to be correct that deterrence is the solution since Indian law under Article 21 holds that extinction of life cannot be read into protection of life. If the accused who had attempted suicide is prosecuted, then the factors which contributed and the persons who have led the accused to the attempt may be brought before the law and scrutinised.

C. Euthanasia or Assisted Suicide

The Anglo American views on abetment of suicide are more or less the same. Sec 2 of the Act of 1961 in England stresses that a person who, abets, counsels or procures the suicide of another or attempt by another to commit suicide is criminally liable.[256] The provision is silent on the question of suicide assisted by a physician. It therefore stresses that whoever provides assistance must be guilty. Assistance to suicide (whether the attempt is successful or not) is considered to be illegal by most of the legal systems[257] because the value of human life will be easily eroded in case the abettor is left free. However, the German law is an exception where motive behind assistance to suicide is irrelevant. Still, it needs to be proved that suicide was committed by exercising free will and if it is not so, the person assisted can be prosecuted. The English position to assisted suicide treads on a different route since the statute is silent on physician assisted suicides or cases of euthanasia in case of the terminally ill.

[256] Sec 2 reads: "A person who aids, abets, counsels or procures the suicide of another to commit suicide shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."

[257] Canada, Australia, Belgium.

The major question here then, is how far cases of Euthanasia[258] or physician assisted suicide be justified in the presence of a statutory hurdle as that of sec2 of the 1961 Act. Euthanasia has been classified based on actions, consent etc. Active euthanasia is stated to be a condition in which a person deliberately intervenes to end the life of a terminally ill person, who have no chances of recovery such as administration of lethal injections, drugs etc and passive euthanasia is a state where a person causes the death of an incurable patient, by withdrawing or withholding medicines or life supporting treatments knowingly that it might cause death. Thus it involves an omission of an act.[259] Based on the formulae of consent, Euthanasia, may be voluntary, involuntary and non voluntary and their legality varies accordingly.[260] Depending on the circumstances voluntary and non voluntary euthanasia under English Law are regarded as manslaughter (where somebody kills another person but circumstances can partly justify why they acted in this way) or murder. Involuntary euthanasia is usually considered as an offence of murder in most of the legal systems including that of England. Physician assisted suicide also is treated as a form of euthanasia wherein the physician provides the means by which the patient can end his life. Usually the physician will prescribe a lethal drug which is administered by the patient himself.[261]

Euthanasia finds no special position in the English Law. Instances of euthanasia are treated as murder or manslaughter. Added to this, Sec 2 of the Suicide Act 1961 creates a legal atmosphere against euthanasia. However , the prosecution of euthanasia is distinct in comparison to other forms of unlawful killing.[262] It is decided by the Crown Prosecution Service whether to prosecute it

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[258] Euthanasia is derived from the Greek word, "EU" which means 'good' and "THANATOS" which means death. Bringing together it means good death.

[259] Margaret Otlowski, *Voluntary Euthanasia and the Common Law,* Oxford University Press, Clarendon (1997), pp.5-7.

[260] Voluntary euthanasia is where a person makes a conscious decision to die and asks for help to do it whereas non voluntary is where a person is unable to give his consent and others take a decision because the ill person had previously stated a wish that his life be terminated at such circumstances. Involuntary euthanasia is where a person is killed though he may not have expressed the wish to die directly.

[261] D. V. K. Chao, N. Y. Chan & W.Y. Chan, "Euthanasia Revisited", 19(2) *Family Practice* 129 (2002).

[262] *Ibid*.

under the Act of 1961, on a case by case basis. However, the Director of Public Prosecution lays down the policy statement on the basis of which the prosecutors decide whether prosecution is required in "public interest" as set out in the Code for Crown prosecutors. Thus, to bring euthanasia as a crime, wide discretion is given to the prosecutors to decide whether the act of intentional killing will fit within murder or manslaughter as available under English criminal law. Murder is an offence under English common law and is considered as a serious form of homicide wherein, one person kills another with the intention to cause death or serious injury. The punishment for murder is life imprisonment. Based on the levels of fault, the defence or judge can claim for manslaughter whose punishment is lighter than the charge of murder wherein the jury is given the discretion to reduce the charge of murder to manslaughter based on mens rea and evidence. Euthanasia is an intentional killing primarily for the purpose of alleviating the sufferings and pain of the terminally ill. Hence the question whether euthanasia fits within murder or manslaughter is based on judicial discretion which is again based on mens rea.

The reference to the term 'malice' in the case of euthanasia is misleading since death is performed due to compassion. But taken together 'malice aforethought' covers different states of mind. Neither malice nor premeditation needs to be established. Thus it is found that in circumstances where a doctor deliberately responds to a patient's request to take active steps to bring about the death, the necessary intention requirement for murder gets established, since the doctor clearly intends to bring about the death. Though Criminal law principles treat motive as irrelevant and intention as the essential ingredient for murder or criminal liability, still common law tradition always upholds human life as sacred. Hence priority of personal autonomy on which 'consent' rests was never recognised as a defence for murder. According to common law traditions it is consent which makes laying hands on someone else lawful. Hence all medical procedures require consent which respects the body integrity of the patients.

Decisions to put an end to life, whether they are euthanasia or any other forms of the very same nature, which involves positive act to result in merciful

death or decisions involving withholding or withdrawal of treatment are often taken where consent is either unavailable or is a problematic one.[263] Here proxy consent or substituted consent comes in. There are ample chances for misuse if consent is made a valid defence. This is the reason why consent cannot be taken as a valid defence in cases of euthanasia.[264] Criminal law does not recognise imminent death as a defence to murder. Hence Criminal law does not recognise terminal illness as a defence to murder.

As for the liability of the doctor with regard to euthanasia the Supreme Court of New Jersey, in re Quinlan,[265] held that the removal of respirator from the patient, i.e., the termination of treatment pursuant to the patient's request does not make the doctor liable. Stressing on the patient's right to refuse treatment as a part of the right to privacy, the court refused criminal culpability for the doctor. However, the Californian Court of Appeals in Barber v Superior Court[266] held that in determining whether the doctor is under a duty to provide medical treatment becomes a debatable value, the patient, whenever possible, should be the decision maker. Thus the American position is quite clear. However, the English law on this subject, at times expresses its dislike to lay down strict guidelines since euthanasia is an aspect which requires a cautious handling on a case to case basis and views that a consistent uniform legal rule may produce grave consequences.

The arguments for and against euthanasia can be found as early as the 1950's i.e., the Williams-Kamisar debate on legalisation of euthanasia. Kamisar argued that the real objections to legalisation of euthanasia were not religious as Williams found , but one has to probe and look into the social consequences of such a legalisation before any attempt is made. Arguing in favour of his consequentialist framework, he stressed that he was not on absolute ban of euthanasia but reminded that to make a sea change to the law and social policy on

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[263] Cases of young children, patients with dementia, the confused old, mental health patients, unconscious patients etc.

[264] John Harris, "Consent and End of Life Decisions", *J. Med. Ethics* 11 (2003).

[265] 70 NJ 10,355 A.2d 647 (1976), available at http://euthanasia.procon.org/ source files/ In_Re_Quinlan.pdf.

[266] Barber v Superior Court (people) 147 Cal. App 3d 1006 (1983).

the subject should not be based solely on individual cases. Instead, it should be weighed against the risks and abuse such a legalisation (if any) may set forth. It is feared that if legalised, the dangers associated with euthanasia would be greater to the elderly, poor and the socially disadvantaged.[267] Finnis on the other hand asserts that human bodily life is the life of a person and has the dignity of the person. Every human being accordingly is equal in having that human life which is also humanity and personhood, and thus the dignity and intrinsic value. In sustaining human bodily life, in whatsoever impaired condition, one is sustaining the person whose life it is.[268]

The arguments on euthanasia are based on a novel value '*compassion towards sufferings*' which is embodied in the concept of respect for human life and its sufferings. This value has to confront with another value, 'preservation of human life,' which again is embodied in the concept of respect for human life. Respect for human life is the basis of the sanctity of life whether in theological or secular perspective. Here , the choice between the two confronting values has its basis in the sanctity of human life. Hence every legal system gives priority to these values based on their socio-cultural background and value preferences. Countries which had inherited the common law jurisdictions are found to be hesitant to legalise voluntary active euthanasia since their legal systems are ultimately based on the principle of respect for human life and preservation of human life. But the continental legal system gives prominence to self-determination as a value which is immutable at all times and which increases the worth of human life. Countries under the continental system have more prosecutor discretion when compared with common law jurisdictions. Countries like Belgium,[269] Switzerland, and Netherlands have legalised voluntary active euthanasia. Netherlands was the first country in the world to have accepted

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[267] Yale Kamisar, "Against Assisted Suicide-Even a Very Limited Form", *Mercy Law Review* 2(1995), p. 2, available at http://www.umass.edu/legal/Arons/Spring2007/397N/Kamisar.pdf (visited on 7-2-12013).

[268] John Finnis, "A Philosophical Case Against Euthanasia'', in John Keown (Ed.) *Euthanasia Examine- Ethical ,Clinical and Legal Perspectives ,* University of Cambridge, UK (1st edn.,1995), p.32.

[269] Belgium passed an enactment in 2002; Art 115 of the Swiss Penal Code exempts people who assist in suicide for honourable motives, etc.

assisted suicide and voluntary active euthanasia legally statutorily by enacting the Termination of Life on Request and Assisted Suicide Act, 2002. Netherlands could accept the argument for legal tolerance to euthanasia due to the interplay of several factors including cultural background, prosecution policies, judicial decisions and mainly doctor's practices.[270] Moreover, the Dutch Penal Code enacted in 1886 provides diminished punishment in cases of active voluntary euthanasia and the rationale behind this is that *murder violates the life of a particular person whereas killing on request is violation of the respect which is due to life in general*, even though the personal right to life is not violated.[271] Despite the penal prohibition to active voluntary euthanasia and assisted suicide nevertheless by the presence of defence of necessity or in medical context, foce majeure or emergency (noodtoestand) in the Dutch penal code,[272] the doctors could perform this act and escape liability. The Dutch courts also through a series of decisions developed certain exceptions to the penal prohibition in Article 293[273] and Article 294.[274] Dr Postma's trial[275] depicted that doctor's need to be protected

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[270] Judith A.C Rietjans et al., "Two decades of research on euthanasia from the Netherlands. What have we learnt and what questions remain?", 6 (3*) J. Bioeth. Inq.* 271 (2009).

[271] M. Driesse et al., "Euthanasia and the Law in the Netherland", 4 *Issues in Law & Med.* 385 (1988) referring to the Explanatory Memorandum for the Dutch Penal Code and Schmidst, H. J. Geschiedenis van het Wetboek van Stafrecht (History of the Penal Code of 1881), Vol. II, 440. *supra* n. 259, at p.393.

[272] Article 40 of the Dutch Penal Code provides that a person committing an offence under force majeure is not criminally liable.

[273] Article 293 of the Dutch Penal Code provides that a person who takes the life of another at that other person's express and serious request is punishable by imprisonment for a maximum of 12 years or by a fine.

[274] Article 294 of the Dutch Penal Code deals with assisted suicide and states that a person, who intentionally incites another to commit suicide, assists in the suicide of another or procures the means to commit suicide is punishable, where death ensues, by imprisonment for up to 3 years or by a fine.

[275] The Postma Case, Nederlands Jurisprudentie, 1973, No 183:558, District Court Of Leeuwarden, 21 Feb 1973 as cited in *supra* n. 259, at p.39. The case involved a doctor, Dr. Geetruida Postma who was prosecuted for ending the life of her mother. Dr. Postma's mother, was partially paralysed, had a cerebral hemorrhage, had trouble speaking and was deaf. She had unsuccessfully tried to commit suicide and had repeatedly expressed the wish tom die. In response to her mother's request she killed her mother by injecting her with fatal dose of morphine. Dr. Postma readily admitted that she had killed. At the time of the trial, quite a number of doctors had signed an open letter to the Dutch Minister of Justice that they had committed the same offence more than once. Dr. Postma was convicted under Art. 293 of the Dutch Penal Code but was only sentenced to a symbolic and conditional punishment. The Court indicated that active voluntary euthanasia would have been acceptable if it was performed in circumstances where the patient is incurably ill, experiencing unbearable

when confronted with two conflicting values such as doctor's duty to relieve pain and the duty not to harm. Meanwhile courts started developing guidelines [276] to relieve the doctor from criminal liability in such situations, since the Dutch medical practitioners are known for their integrity rather than commercial inclinations. However, the enactment in 2002 permitted euthanasia based on strict adherence of certain guidelines. The experience in Netherlands itself is that the development of law was more based on the right to self determination of patients. Countries which had inherited common law legacy based on Anglo Saxon law stressed on the sanctity of life as a value which cannot be violated at all times. The legal system of Netherlands is based on Civil law jurisdiction based on Roman law which is again based on written word derived from statute and are not from precedents. Traditionally, English laws gave more prominence in maintaining social order. Thus it superseded individual autonomy. Strict attitude to the inviolability of human life can be found in the evolution of common law. Heavy influence of ecclesiastical teachings which treated life as sacred meant law as for preservation of life which extended, even to the dying.[277] The principle that 'a person cannot consent to his or her death'[278] clearly demonstrates the extent to which English law recognised the sanctity of life principle. Similarly, the principle that 'no person can license another to commit a crime' has been a fundamental

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suffering, and requests the termination of his or her life, and provided that the termination is performed by the doctor treating the patient or in consultation with him or her.

[276] Alkmaar Case, Nederlands Jurisprudentie *Id.,*at n.271.

The Supreme Court legalized active voluntary euthanasia of a ninety five year old woman by Dr. Schoonheim since he had exercised reasonable medical standards before doing the same and the patient had an advance directive signed. Moreover, the doctor has written on the death certificate 'unnatural death' and informed the police of his actions. The Supreme Court did not convict the doctor and held that a doctor's duty to abide by the law and to respect the life of the patient may be outweighed by his other duty to help a patient who is suffering; there is no alternative but death. The court reiterated the best interest principle wherein the patient's interest should be the ultimate concern.

[277] J. Lucy Pridgeon, "Euthanasia Legislation in the European Union: Is a Universal Law Possible?", 2 (1) *Hanse Law Review* 49 (2006).

[278] In R v Donovan(1934) 2 KB 498 it was held that if an act is unlawful in the sense of being itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it.

common law principle recognised by English Courts[279] and followed by Common law countries[280] especially the American Courts.[281]

The legal hurdles for doctor's participation in active voluntary euthanasia got reflected in Dr. Cox's case[282] wherein the doctor was convicted for attempted murder of an elderly patient on whose request the doctor administered a lethal dose of potassium chloride. However this has not been the same with regard to passive euthanasia wherein the court recognised that a doctor who has in his care an incompetent patient was under no absolute obligation to prolong the life of a patient regardless of the circumstances or the quality of life of the patient.[283] This change of thought however is attributable as a result of the recognition of the right to refuse treatment by the courts following the common law.[284] Relying on the patient's best interest principle and right of self-determination the House of Lords in Bland's case[285] held that the discontinuance of life support or artificial feeding

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[279] Smith and Hogan's *Criminal Law,* David Ormerod (Ed.), Oxford University Press , New York (13th edn),p.88.

[280] Canada, Australia and New Zealand have enacted Criminal statutes based on these two principles.

[281] Turner v State 119 Tenn 663,671 (1908) as cited in *supra* n. 259, at p.20.

[282] R v Cox (1992)12 BMLR 38 (WinchesterCC)Cox ,a rheumatologist, was charged with attempted murder following the death of a seventy year old terminally ill patient who asked him to put her out of her misery. The deceased, who had been a patient of Dr Cox for 13 years, had rheumatoid arthritis, complicated by gastric ulcers, gangrene and body sores. She was crippled from her condition and in great pain. When pain killing measures failed to bring relief, Cox administered large dose of potassium chloride, twice the amount which would normally prove fatal and the patient died within minutes. Cox admitted that he had administered the drug but maintained that his primary intention was not to kill but merely to relieve the suffering. In sentencing Cox, Ognall J held that his conduct in administering a lethal injection to his patient had not only been criminal but also a betrayal of his unequivocal duty as a physician. Cox was given a 12 month prison sentence, but in recognition of the fact that the public interest would not be served by immediately jailing the doctor, the sentence was suspended.

[283] *supra* n.265.

[284] Re T (adult: refusal of medical treatment) (1992) 4 All .E.R 649 the court observed, 'An adult patient who….suffers from no mental incapacity, has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatment being offered….This right of choice is not limited to decisions others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even nonexistent. The law requires that an adult patient who is mentally and physically capable of exercising a choice must consent if medical treatment of him is to be lawful, although the consent need not be in writing and may sometimes be inferred from the patient's conduct or despite refusal of consent will constitute a civil wrong of trespass to the person and may constitute a crime.'

[285] *Ibid.*

did not amount to a criminal act because continuance of that intrusive life support was not in patient's best interest. Patient's best interest formula according the court means the unconditional right of a competent adult patient to make his or her treatment decision.[286] Devlin J in R v Adams[287] pointed out that shortening life constitutes murder and that the law does not take into consideration the defence of preventing pain but his Lordship went on to assert

> "*But that does not mean that a doctor who is aiding the sick and dying has to calculate in minutes or even hours, and perhaps not in days or weeks, the effect on the patient's life of the medicines that he administers or else be in peril of a charge of murder. If the first purpose of medicine, the restoration of health, can no longer be achieved, there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering , even if the measures he takes may incidentally shorten life.*[288]

Some writers comment that in this case the court adopted the doctrine of double effect which stems from the Catholic moral theology. [289]The principle of Double effect is based on the preposition that it may sometimes be morally legitimate to act while foreseeing, but not intending, an undesirable result of one's action, but it is never morally legitimate to act with the intention of producing the result.

In Re A (Children) (Conjoined Twins: Surgical Separation)[290] the court granted an application by the hospital for a declaration that it could lawfully carry out

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[286] Lord Mustill stressing on best interest formula observed," If the patient is capable of making a decision on whether to permit treatment and decides not to permit it his choice must be obeyed, even if on any objective view it is contrary to his best interests. A doctor has no right to proceed in the face of objection, even if it is plain to all, including the patient that adverse consequences and even death will or may ensue."

[287] (1957) Crim. L.R 365The case involved the prosecution of a doctor, John Bodkin Adams for allegedly murdered a patient. The Prosecution case was that Adams had deliberately killed an elderly patient by the administration of large doses of morphine and heroine in order he would benefit under her will. The defense was that it was for relieving the pain. Adam's was acquitted but J Devlin made a direction to the jury which is significant.

[288] The transcript of the instructions to the jury is found in Glanville Williams, *Sanctity of life and Criminal Law ,* Faber &Faber Ltd. , London(1958), p.289.

[289] Charles Foster et al., "The Double Effect Effect", 20 *Cambridge Quarterly Of Health Care Ethics* 56(2011).

[290] (2000) EWCA .Civ.254

separation surgery for conjoined twins, wherein one may only survive after operation. The court pondered on the options available since it knew that if no operation were performed both the twins would die. The formidable question was that whether the surgery was carried out with the knowledge that it was sure to result in the immediate death of a twin which would amount to murder. The court concluded that such a surgery would be lawful. Ward LJ concluded that where a doctor who faced conflicting duties towards two patients who were at risk, it was lawful for him to adopt the course which would be the lesser of two evils. Thus the court considered three possible defences i.e., lack of causation,[291] lack of intent and necessity,[292] overshadowed by a concept of quasi- self defence. The court stressed that the concept of the sanctity of life respects the integrity of human body and since the operation ensured it, no criminal action would entail. Though there has been several attempts of late,[293] in England for creating active voluntary euthanasia as a defence to murder, nothing concrete seems to have emerged.

The courts have always pointed out the difficulty to recognise consent and necessity as a defence to a criminal action of murder, in cases of euthanasia since there is difficulty to formulate it with precision. After the passing of the Human Rights Act 1998, the courts are often confronted with the issue of repugnancy between the domestic law with regard to euthanasia and convention rights in this matter. In R (pretty) v Director of Public Prosecutions[294] the question was whether

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[291] The surgery was not intended to kill a twin through operation although the death of a twin was an inevitable consequence of the operation .Though a twin's death would be foreseen as an inevitable consequence of an operation which was intended and necessary to save a twin's life, though the other twin's death would not be the intention of the surgery.

[292] Brooke L J in the decision spoke about the doctrine of necessity at page 240."According to Sir James Stephen there are three necessary requirements for the application of the doctrine of necessity: (1) the act is needed to avoid inevitable and irreparable evil (ii) no more should be done than is reasonably necessary for the purpose to be achieved; (iii) the evil inflicted must not be disproportionate to the evil avoided .Given that the principles of modern family law point irresistibly to the conclusion that interests of Jodie must be preferred to the conflicting interest of Mary, I consider that all three of these requirements are satisfied in this case."p240

[293] In 1936 an attempt to reform the law was made, thereafter in 1969 a bill was introduced in House of Lords by Lord Ragland, in 1976, a bill on passive euthanasia was introduced but failed, of late 2003-2006 Lord Joffe, four attempts were made to introduce a bill but failed.

[294] (2002)ECHR 427Mrs. Pretty suffered from motor neurone disease. She wanted to be able to enlist her husband's help to commit suicide. He was willing to do so, but only if he could be sure that he would not be prosecuted under Section 2 of the suicide Act. The DPP refused to

sec 2 of the Suicide Act 1961 was compatible with rights under Article 2, Article 3, Articles 8 and 9 ECHR. On the question whether the right to die could be derived from right to life under Article 2, the House of lords answered in the negative, stating that Article 2 is directed towards the protection of an interest different from that which persons have in "leading the life they want." It is concerned with and only with the preservation of life itself, its inviolability at the hands of public authority and the state's duty to protect it from being violated by the actions of third parties. Hence there is no violation of Article 2. Pretty argued that the refusal of the DPP to give an undertaking that her relatives will not be prosecuted on assisted suicide forces her to endure to the final phase of her incapacitating disease results in inhuman and degrading treatment for which the state is responsible.

Hence the view that it is a violation of Article 3 was rejected by the court stating that Article 3 does not provide a broad sweeping fundamental right to be "free from suffering" but only protects a few types of suffering from state officials which are intentional or instigated by them. The court also found that there was no violation of Article 9. The entire arguments centred on Article 8.[295] It was argued that absolute prohibition of assisted suicide was repugnant to right to respect one's private life. Thus the Strasbourg court agreed with the House of Lords that blanket ban on assisted suicide was not compatible with article 8. But it is in R (Purdy) v DPP[296] that a custom based policy statement should be made by the DPP indicating various factors for and against prosecution in this type of cases as this is required as per Art 8 of ECHR. However, when one looks into the decision of Pretty, it is found that the primary reason for not accepting the contentions of Pretty is that the court looked into the legislative intent of the suicide Act wherein

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give such an undertaking. She applied for judicial review of his refusal to do so or alternatively for a declaration that section 2 was incompatible with Article 8.

[295] Article 8 of the ECHR reads - "Right to respect for private and family life: 1 everyone has the right to respect for his private and family life, his home and his correspondence. 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals or the protection of the rights and freedom of others."

[296] (2010) 1 AC 345

section 2 is intended to protect the vulnerable and the court felt that it is for the states to assess the risk and the likely incidence of abuse if prohibition is withdrawn. The judicial trend with regard to euthanasia has undergone changes with the passage of time. As for the interpretation of compatibility of domestic law with Convention rights, it is based on margin of appreciation the individual states have been left with the option to decide the legal regime. Asserting that states have a wide margin of appreciation in this regard and that there are cases where public interest did not require prosecution, in R(Purdy) v DPP,[297] the court laid the law for the future. Courts in England continue to follow a cautious approach[298] with regard to prosecution to complicity to suicide. The prosecutorial discretion has been put to check by the existence of obligation under the convention. The English decisions do not treat the sanctity of life concept as an absolute but recognise that there can be restrictions at suitable situations with adequate safeguards. The American legal system was more flexible than the English legal system with regard to euthanasia. In re Quinlan[299] the New Jersey Supreme Court allowed the termination of treatment to a patient in permanent vegetative state as a part of the exercise of right to privacy guaranteed under the Constitution. The Court opined that there is a distinction between the unlawful taking of life of another and the ending of artificial life-support systems as a matter of self determination.

However, years later the Court in Cruzan v Director, Missouri Dept of Health [300] held that the primary objective of the state is preservation of human life and the action of the State of Missouri in rejecting the request of parents of a PVS patient was constitutional in the absence of "clear and convincing evidence" that the patient desired treatment be withdrawn. The Court in this case asserted that a competent person would have a constitutionally protected right to refuse life saving hydration and nutrition. This does not mean that an incompetent patient

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[297] *Ibid*

[298] Queen on the Application of Tony Nicklinson v Ministry of Justice (2012) EWHC 2381 the court observed that it was not for the courts to decide whether the law about assisted dying should be changed and if so what safeguards should be put in place.

[299] 70 NJ 10 ,355A.2d647(1976)

[300] 497 U.S 261 (1990)

should possess the same. The observation of the court regarding the question of consent by an incompetent is pertinent to the extent that when it said, "the Due Process Clause does not require a State to accept the 'substituted judgment' of close family members in the absence of substantial proof that their views reflect the patient's." This shows that the Court was keen that a strict vigil by the state is within the Constitution and that the right to self determination is subject to their primary conditions to be fulfilled before it can be exercised.

In Vacco v Quill [301] the court clarified that the right to refuse treatment was not grounded on the proposition that patients have a general and abstract 'right to hasten death' but on traditional rights to bodily integrity and freedom from unwanted touching. The twin cases, Compassion in Dying v State of Washington[302] and Vacco v Quill [303]firmly established the fact that there is no constitutionally protected right to assisted suicide. The Court observed that 'everyone regardless of physical condition, is entitled, if competent, to refuse unwanted life–saving medical treatment; no one is permitted to assist a suicide.'[304] American Courts have rationalised their stance against active euthanasia when they asserted that assisted suicide has never enjoyed legal protection and that the practice has been consistently disapproved for over 700 years.[305] This is true, when we find that the prosecution of Dr Jack Kevorkian popularly known as Dr Death. He was prosecuted for second degree murder in 1999 for assisting over 130 patients to die using his death machine Thanotron.[306] However, we find that states like Oregon have permitted physician assisted suicide bypassing the Death with Dignity Act 1994 and Courts have upheld it.[307]

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[301] 521U.S793(1997)

[302] 63USLW2569

[303] *Ibid.*

[304] *Ibid.*

[305] Cruzan v Harmon 760 SW2d 408 (1988)

[306] Hobbins v Attorney General, People v Kevorokian 205 .Mich App194 (1994) *See* also, http://web.archive.org/web/20030908034403/http://www.ascensionhealth.org/ethics/public/cases/case19.asp (visited on 7-2-2014).

[307] Gonzales v Oregon 546 U.S 243(2006)

The judicial and legislative decisions do not render a satisfactory explanation to the debate on euthanasia. In fact the Indian Supreme Court in Aruna Shabaugh Case held that withdrawal of life support and allowing nature to take its own course can be treated as an "omission" and not as an act and hence it is no penal liability. This is the position in England and is also followed by the American Courts. The administration of lethal drugs to hasten death i.e. active euthanasia is still a criminal act under these legal systems. In most of the jurisdictions, the patient's wishes are given more prominence due to common law tradition. Most of the courts in India, US and England apply the '*best interest formula'* in deciding on the permissibility of euthanasia which is abstract, not definite and at times inconclusive and thus have no consistency in decision making.

In India, the courts have expressed the view that a proper medical confirmation by a team of experts is required before passive euthanasia is allowed. Allowing the natural dying process is the best option but when terminally ill patients with unbearable suffering are the issue, law has to take the course which is acceptable to social standards of morality. It is at this juncture that we find a clash of interests and values but we find that both the arguments for and against euthanasia are based on the sanctity of life and dignity.

"Substituted judgment" in cases of euthanasia is not accepted in legal systems except in America. Even in America, we find that "substituted judgments" by relatives or family members are rarely accepted by law courts. Prolonging life by artificial means is deemed unreasonable, especially when the patient looses the hope of recovery. This is the reason why legal systems are, to a greater extent, permitting passive euthanasia.

Legalising euthanasia is a social experiment which would have serious repercussions on societal values and interests. The current practice of common law jurisdictions seems to prevent abuse of it, especially where criminal law is fundamentally based on the principle of the sanctity of human life.

D. Capital Punishment

The sanctity of life postulates respect towards life. The use of capital punishment can said to be extending from the beginning of recorded history. Thus, the basic question is how far the state is justified in imposing capital punishment to an offender especially, in a democratic state where the basis of the legal system itself is the sanctity of human life. As commonly understood, capital punishment or death penalty is a legal process whereby a person is put to death by the state as a punishment for an offence. All the religions and most of the secular philosophies surrounding life treat life as inviolable. The state is conceived as primarily the instrument by which human life is preserved and protected, however the major question is how the state itself can deprive human life which is generally held as sacred and inviolable? Religious[308] and philosophical reflections[309] on death penalty are mixed. The Code of Hammurabi and the Draco's code contained death penalty which was being prescribed for a variety of crimes. The Roman legal system also contained provisions which prescribed death penalty for capital offences.[310] It was Beccaria who put forth the first moral argument against death penalty.[311] In England, prior to the 19th century the number of crimes for which capital punishment was awarded was rather large. After 1861, capital punishment was restricted only to four crimes namely, murder, piracy, arson in the Royal Dockyards and high treason. This was primarily on the basis of the sanctity to human life. In 1957, the Homicide Act abolished hanging for certain kinds of murder but continued it for murder with theft, explosion or shooting, murder of police official, for a criminal who has committed murder

[308] In Christianity, the New Testament contains statements for and against death penalty. See Genesis 9:5-6, Romans 12:19, Thinkers like Martin Luther, Calvin, St Thomas Aquinas supported it. Quran under 5:32 verse 2:178 it is supported. Under Hinduism in Kautilya's Arthasastra (chapIV verse,2:178), Manusmriti it is supported but in Mahabharatha is against using it. (See., Section 257, Santiparva)Buddhism objects to it.

[309] Kant viewed that political society had a duty to enforce retributive justice. Rousseau felt that the subject ought not to complain if the sovereign demanded the subject's life. He considered death penalty proper when the criminal was beyond reformation.

[310] In ancient Roman religion Hebrew, an accused was treated as homosacer, the status of an outlaw who may be killed by anybody but will not be liable for murder. This persisted in Roman law and was considered legal.

[311] Quote by Cesare Bonesana, Marchese Beccaria, Of *Crime and Punishment* (1764), available at http://www.laits.utexas.edu/poltheory/beccaria/delitti/delitti.c02.html (visited in 26-6-2013).

more than once etc. There was an outcry against death penalty on the basis of the sanctity of life. Though on experimental basis it was abolished for 5 years in 1965[312] and for murder, it was permanently removed in 1969.[313] However, it was only in due course that it was abolished for other offences.[314] It is found that the reason for such a parliamentary gesture was due to the miscarriage of justice which had occurred due to faulty investigation and prosecution. A clear illustration of this is the faulty prosecution and conviction to death of Timothy Evans.[315] In another instance, i.e., the Derek Bentley case,[316] due to a wrongful conviction, a posthumous pardon was given to the person executed acknowledging miscarriage of justice. The Ruth Ellis case[317] evoked a serious feeling against the imposition of death penalty.

With England adopting European Convention on Human Rights(ECHR) and by virtue of its commitment, the Human Rights Act was a strategic move for complete ban of death penalty. Thus, imposition of death penalty not only offends the sanctity of human life concept but miscarriage of justice is a disaster to the concept. This was understood by the Englishmen.

However, this trend in England cannot be found in America, where law permits death penalty for first degree murder and for certain crimes. But the procedure for arriving at a decision is subject to strict judicial review. The American courts gradually shortened the list of offences in which death may be awarded and also exempted certain class of people from being imposed with this penalty through sensible decision making.

The views of Locke that although a person's right to life is natural and inalienable and whenever one violates the right of another it can be forfeited. The

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[312] The Murder (Abolition of Death Penalty) Act 1965.

[313] The Act of 1965 was made permanent.

[314] The Criminal Damage Act 1971 abolished it for offence of arson in royal dockyards, Armed Forces Act 1981 for espionage and the Crime and Disorder Act 1998, death penalty was abolished for treason and piracy with violence replacing it with the discretion to impose maximum sentence of life imprisonment.

[315] Available at http://www.innocent.org.uk/cases/timothyevans/timothyevans.pdf 1-10-2013).

[316] R v Bentley (1998) EWCA crime 2516

[317] Available at www.capitalpunishmentUK.org/ruth.html (visited on 1-10-2013).

offender by violating the life, liberty and property of another has lost his own right to life, liberty and property which justifies the imposition of death penalty. Thus, the imposition of death penalty was justified on the basis of the concept of the sanctity of life.

Capital punishment was suspended in America principally due to the decision of the United States Supreme Court in Furman v Georgia[318] wherein the court found that the imposition of death penalty in an unconstitutional manner as a violation of the Eighth amendment on the ground of cruel and unusual punishment. The court did not ponder on the rationale of the penalty but was worried about the inconsistent application of the death penalty on a variety of cases, especially of racial discrimination. In this case, the court was concerned about the intrinsic worth of the life of the prisoner. This prompted Justice Brennan to observe that when the state, even as it punishes, must treat its members with their intrinsic worth as human beings.

In Woodson v North Carolina[319] and Roberts v Louisiana[320] the Supreme Court forbade any state from punishing with mandatory death penalty under its laws for certain specific forms of murder like the murder of police officials. In the very same year i.e., 1976, the Supreme Court in Gregg v Georgia[321] laid down the procedure to be followed in cases where death penalty is to be awarded. The trial of capital offences was bifurcated into guilt innocence and sentencing phases. At the initial stage, the jury decides the defendant's guilt i.e., if the defendant is innocent or otherwise not convicted of first degree murder, death penalty is not imposed. At the second stage, the jury decides whether certain statutory aggravating factors or mitigating factors exist, thereby assessing the ultimate penalty i.e., either death or penalty for life, with or without parole. However, we find that the courts are reluctant to impose death penalty for rape. Death penalty exists for offences such as treason, espionage, military crimes etc. The court

[318] 408 U.S 238 (1972)
[319] 428 U.S 280 (1976)
[320] 428 U.S 325 (1976)
[321] 428U.S 153 (1976)

cautioned that strict compliance of the procedure is warranted; otherwise it would result in the violation of human dignity.

The US Supreme Court on the whole have been reluctant to declare death penalty unconstitutional though it had mentioned that if not properly implemented it falls within the ambit of the Eighth Amendment. The criminal justice delivery system with regard to cases where death sentence may be awarded is subject to acute judicial review at the state level.[322] Thereafter it is subjected to Federal collateral review wherein the accused gets a chance to defend himself so that miscarriage of justice may be avoided.[323] This process is applicable to a sentence of Federal Court also. The United States Code, the Civil Rights Act 1871 and Anti terrorism and Effective Death Penalty Act 1996 enable the convict to enjoy constitutionally recognised rights with regard to trial of cases involving capital crimes. Though different methods of execution are practised the judicially recognised mode of execution is administration of lethal injection.[324] The Court however leaves a choice to the prisoner to challenge the mode of execution of sentence.[325] The impact of human rights movement and[326] certain changes in the thinking on capital punishment has emerged though it had not accepted abolishing the penalty as such.[327] The American Convention on Human Rights has not sought for abolition of death penalty per se but imposes specific restrictions and prohibitions in its implementation. It was aspired that by imposing restrictions designed to delimit its application would lead to reduction of its use and gradual

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[322] At the trial stage, when the accused is sentenced to death, the case goes in for a direct review which can be treated to be equivalent to our appeal. This review court examines the legality of the findings of the trial court. Normally when a death sentence is affirmed, it is deemed final. But the accused has the option against the judgment which is known as collateral review. The accused can challenge in the collateral proceedings, grounds which could have been raised at the trial stage or direct review stage.

[323] Federal Habeas Corpus may be preferred by the accused who had been convicted at the state level. This is apart from the writ of Certiorari.

[324] Baze v Reez553 U.S 35 (2008)

[325] Hill v Mc Donough 547U.S 573 (2006)

[326] With the signing of ICCPR pregnant women are exempted from this penalty.

[327] US had made a reservation to Article 6, ICCPR. It had also made reservation to Article 37 of the UN Convention on Rights of Child.

disappearance.[328] However, the argument against capital punishment in American Courts have centred around the problem of execution of innocents due to miscarriage of justice, arbitrary and unusual way of implementation, delay and waste of judicial time etc. But this is not the case of the rulings by the Inter-American Courts on awarding death penalty. Article 4 of the Convention sets forth its commitment towards the sanctity of human life by declaring that the proclamation of life,

> *"every person has the right to have his life respected" but there after contains procedural limitations which state may impose in the enjoyment of this right. This procedural limitations are subject to not only judicial scrutiny encompassing legality but also other principles developed such as reasonableness, proportionality, necessity etc*[329]

Thus, the Inter American Courts attempts to achieve their objective of gradual abolition.

The view expressed by K. N. Llewellyn seems true, when he stated that the function of courts is to give prominence to life in action i.e., any theory or concept can gain acceptance only when it serves men's needs at a particular point of time.[330] Hence at times the absolute adherence to the concept of the sanctity of life in a society where the rate of crimes is higher can serve as a detriment to the common good. So here deterrence is the only solution. The enforcement of criminal penalty prescribing death requires consideration of various social factors.

The abolitionist countries have abolished death not only based on the idea of the sanctity of life in the sense of absolute inviolability to life but rather on the basis of myriad factors such as possible abuse, miscarriage and arbitrariness in its

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[328] 1/A Court H.R., Restrictions to the Death Penalty (Art 4 (2) and Art 4 (4) American Convention of Human Rights). Advisory Opinion on -3/83 of 8-9-1983, series A No 3, para37 as cited in a document published by the Inter American Commission on Human Rights, 'The Death Penalty in the Inter American Human Rights' Document 68 dt 31.12.2011, available at http://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf (visited on 29.10.2012).

[329] Sergio Garcia Ramirez, "The Inter American Court of Human Rights and the Death Penalty",3 *Mexican Law Review* 106 (2010).

[330] K. N. Llewellyn, "On Philosophy in American Law," 82 (3) *University of Pennsylvania Law Review and American Law Register* 205 (1934), reprinted in Francis J Mootz III (Ed.), *On Philosophy in* American Law, Cambridge University Press,UK (2009), p.3.

imposition, based on the crime rate etc. In India, death penalty has been prescribed for capital crimes[331] as defined in the Indian Penal Code but also in legislations dealing with drug trafficking,[332] terrorism[333] etc. Several legislations also mandate the imposition of this penalty.[334] Section 53 of the Code provides for death sentence or life imprisonment as alternative punishments. Section 354 (3) of Criminal Procedure Code provides that when the conviction is for an offence punishable with death or, in the alternative, with the imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of the sentence of death, the special reasons therein. Thus, any sentence of death should state the cogent reasons for arriving at the decision. The Indian Constitution apart from this, under Article 21 guarantees right to life but recognises the state power to deprive subject to the procedure established by law.

In Jagmohan Singh v State of UP[335] the Supreme Court upheld the constitutionality of Section 302 IPC as not violating Article 21 and Article 14 of the Constitution. The Court observed that:

> "*Deprivation of life is constitutionally permissible provided it is done according to the procedure established by Law. The death sentence per se is not unreasonable or not against public interest. The policy of the Law in giving a very wide discretion in the matter of punishment to the judges has its origin in the impossibility of laying down standards. Any attempt to lay down standards as to why in one case there should be more punishment and in the other less punishment would be an impossible task. What is true with regard to punishment imposed for other offences of the Code is equally true*

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[331] The Code provides death penalty for the offences of Murder (Section 302), Waging war against Government of India (Section 121) , Abetting mutiny actually committed (Section 132), Fabricating or giving false evidence upon which an innocent suffers death (Section 194), Dacoity accompanied by murder (Section 396).

[332] Section 31 A of the Narcotic Drugs and Psychotropic Substances Act 1985.

[333] Unlawful Activities (Prevention) Amendment Act , 2014

[334] The Army Act1950, the Navy Act 1956, the Air Force Act 1950, the Commission of Sati (Prevention) Act 1987, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

[335] A.I.R 1973 S.C 947

with regard to punishment imposed for other offences of the Code is equally true in the case of murder punishable under Section 302 IPC. No formula is possible that would provide a reasonable criterion for infinite variety of circumstances that may affect the gravity of the crime of murder. The impossibility of laying down standards is at the very core of the Criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment."[336]

It is found that this decision has been rendered taking into consideration the social conditions [337] and general intellectual levels persisting during that time and had rejected the transplanting of abolitionist thinking with regard to capital punishment into India.

In Rajendra Prasad v State of UP[338] Justice Krishna Iyer held that it is constitutionally permissible to swing a criminal out of corporal existence only if the security of the state and society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6). However he pointed the serious lacunae in the judicial decision making in this area when he said that:

".....the humanistic imperative of the Indian Constitution, as paramount to the punitive strategy of the Penal Code, has hardly been explored by the Courts in this field of 'life or death' at the hands of the Law. The main focus of our judgment is on this poignant gap in human rights Jurisprudence within the limits of the Penal Code, impregnated by the Constitution,.... in the Post- Constitutional period, Section 302 IPC and Section 354(3) of the Code of Criminal Procedure have to be read in the human rights of Part III and IV, further illuminated by the Preamble of the Constitution."[339]

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[336] *Ibid* at pp.956-59.

[337] The Court referred to the 25th Report of the Law Commission of India, which stated that India cannot afford to take a risk by experimenting abolition of this penalty.

[338] A.I.R 1979 S.C 916

[339] Para98

However this decision was overruled in Bachan Singh v State of Punjab[340] and the court held that Section 302 IPC does not violate Article 21. The court reminded that India has made specific reservations to the International Covenant on Civil and Political Rights on the aspect of abolition of death penalty but observed that:

> *"Judges should not be blood thirsty. A real and abiding concern for the dignity of human life postulates resistance to taking a life through laws instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed"*

Interpreting Section 354 (3) the Supreme Court observed that the phrase "*special reasons*" in the provision means exceptional reason founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. The court went on to observe that

> *".... in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302 of the penal code, the court should not confine its consideration principally or merely to the circumstances connected with the crime but also give due consideration to the circumstances of the criminal."*

The circumstances which the court held were the mindset of the criminal including social factors i.e., whether the criminal was under the grip of caste bias. Thus through reasoning in Bachan Singh's case [341]it is found that the policy to interpret Section 354 (3) was that life imprisonment was the rule and death sentence was the exception.

The Court in T V Vatheeswaran v State of Tamil Nadu[342] held that prolonged delay i.e., for two years in execution of death sentence is unjust, unfair, unreasonable and inhuman, which deprives the convict of the basic rights of a human being guaranteed under Article 21. Every moment in which the convict has

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[340] A.I.R 1980 S.C 898

[341] *supra* n.340.

[342] (1983) 2S.C.C68

to wait for the execution of death sentence basically terrorises him and it is the violation of the right to speedy trial which is constitutionally guaranteed. In Ediga Anamma v State of Andhra Pradesh[343] the Court substituted capital punishment for life imprisonment due to 12 years delay in carrying out the execution and also in taking into consideration certain personal grounds of the convict like age, mental imbalance, sex etc. Later the court laid down principles to be followed on judging whether there was delay.[344] The Court consistently held that delay in execution is tormenting since the convict was dying in the cell, each moment he waits for execution to be carried into effect.[345] In Mithu v State of Punjab[346] the court found that Section 303 IPC which provided that an individual who committed murder while serving a life sentence would be automatically sentenced to death to be arbitrary and unjust. The Court pointed out that the inability of the sentencing judges to take into consideration individual circumstances while deciding that the sentence would cause injustice to the accused.[347]

Chandrachud J observed thus:

> *"a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death , without regard to the circumstances in which the offence was committed and ,therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair."*[348]

This lenient attitude of the Courts, towards death penalty is not found to be uniform. The Courts have also taken the view that this mode of deterrence is essential in order to ensure the faith of the society in the legal system. The court in

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[343] A.I.R 1974S.C799

[344] In Sher Singh v State of Punjab(1983)2 S.C.C344 the court overruled the decision in Vatheeswaran that two years delay makes it obligatory for substitution to imprisonment for life. In judging whether there is delay the courts should find out whether it is wilful or procedural. In Madhu Mehta v Union of India A.I.R 1989 S.C 299the court ordered commutation to life imprisonment since there was no reasons to justify prolonged delay.

[345] *See* Sriharan v Union of India (2014)4 S.C.C242, Navneet Kaur v State(NCT of Delhi)(2014)7 S.C.C264

[346] A.I.R1983 S.C473

[347] Para707.

[348] Para 704 (D-F).

Mahesh v State of Madhya Pradesh[349] cautioned about this aspect. The courts also have pointed out that this penalty is a social necessity[350] though it admitted that the greater deterrent value of death penalty has not been empirically verified.[351] Judges have also pointed out that this penalty has a social purpose behind it and that it was risky to abolish death penalty due to the social conditions prevalent in India.[352] However, some sort of consistency in cases pertaining to bride burning and dowry deaths exists with regard to imposing death penalty[353] except the case of Ravindra Trimbak Chouthmal v State of Maharashtra [354]wherein the court held that though the murder was foul owing to malicious motive of dowry, it did not fit into the category of 'the rarest of rare' since dowry deaths are common.

The Court in Macchi Singh v State of Punjab[355] held that while one is killed by another, society may not feel bound by the principle of 'the rarest of the rare.' It has to be realised that every person must live life safely. Hence the rarest of the rare doctrine has to be determined based on certain factors such as:

1) Manner of Commission of murder: If the murder is committed in an extremely brutal, revolting, grotesque, diabolical or dastardly manner to the intense indignation of the community.
2) If Motive for the Commission of Murder shows depravity and meanness.
3) Anti-social or socially abhorrent nature of the Crime.
4) Magnitude of the Crime.

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[349] A.I.R 1987 S.C 1346 the Court observed that, "To give lesser punishment for the appellants would be to render the justice system of this country suspect. The Common man will lose faith in courts. In such cases, he understands and approves the language of deterrence more than reformative jargon."

[350] Asharfi Lal v State of UP (1987) 3 S.C.C 224 the court observed that, "As a measure of social necessity and also as a means of deterring other potential offenders the sentence of death is confirmed."

[351] Triveniben v State of Gujarat A.I.R 1989 S.C 1335 at para 11, p. 1343-1344.

[352] Sashi Nayar v Union of India A.I.R1992 S.C395

[353] Kailash Kaur v State of Punjab (1987) 2 S.C.C 631 ,Allaudin Mian v State of Bihar (1989) 3 S.C.C5

[354] A.I.R 1996 S.C787

[355] A.I.R 1983 S.C 957

5) Personality of the victim of the murder, that is, Child, helpless woman, public figure and so forth.

However, the Court in Sevaka Perumal v State of Tamil Nadu[356] the court pointed out that the sentencing system should be based on the factual matrix of each case and that the sentencing process should be stern where it should be and be tempered with mercy where it warrants being so. Hence the court pointed out that the facts and 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 and all other attending circumstances are relevant facts which would enter into the area of consideration in deciding on the imposition of death penalty.

The stance of the Supreme Court underwent a slight change with regard to treating of the factors germane for imposing death penalty. In Ravji Ram Chandra v State of Rajasthan[357] the two judge bench of the Supreme Court held that "it is the nature of the crime but not the criminal which are germane for consideration of appropriate punishment in a criminal trial." The court pointed out that for heinous crimes, the impact which it makes on the society has to be taken into consideration, and hence circumstances relating to the criminal are not pertinent in such cases. Thereafter, the Ravji precedent[358] was followed in a variety of cases until 2009 .In Santhosh Kumar Bariyar v State of Maharashtra[359] the two judge bench of the Supreme Court held that in all cases the circumstances pertaining to the criminal should be given full weight while deciding on death penalty. In this case, the court was concerned with the question as to whether the appellant who had killed his victim, a young boy, whom he kidnapped for ransom, should be awarded death penalty. Applying the rarest of the rare principle as laid down in Bachan Singh's case,[360] the court observed that it was the duty of the prosecution in such cases to prove that, reform or rehabilitation of the criminal was not possible. The court pinpointed that though the socio-economic backwardness of

[356] A.I.R 1991 S.C. 1463 at p. 1467

[357] A.I.R1996 S.C. 787

[358] *Ibid*.

[359] (2009) 6 S.C.C. 498

[360] *supra* n.340.

the convict might not dilute guilt, it was a mitigating circumstance and held that there was a potential for reform of the said criminal.

The relevance of this case lies on the fact that the court listed about six cases decided per in curium by the court based on the wrongful decision of the court in Ravji's decision.[361] The court observed that in none of these cases the sentencing deliberation had made an effort to look into the background of the criminal. The court also went on to observe that the decision of the court in Saibanna v State of Karnataka[362] was inconsistent with the dictum in Mithu's case[363] and Bachan Singh's case,[364] hence per in curium. In the case of Saibanna[365] the Supreme Court was confronted with the question of whether a life convict who was sent on parole killing his wife and daughter could be made liable under Section 303 IPC. The Court affirmed his death sentence when already in Mithu's decision [366]Section 303 IPC was struck down.

Thus it is found that there has been a certain amount of slip offs in cases awarding of death penalty. It is not the same of guided discretion as in US since though the Bachan Singh's case[367] is still the yardstick it had not been properly understood and applied.

Confusions regarding the "rarest of rare" principle in Bachan Singh's case[368] are not by a proper analysis of the principle in Section 354 (3) Cr PC, 1973. In British India, there was a Criminal Procedure Code of 1898, which contained a similar provision as that of Section 354 (3). It was Section 367 (5). Section 367 (5) mandated that in a case where the death penalty was prescribed, the court while granting any penalty other than death penalty had to record reasons. Therefore, prior to the Constitution 1950, death penalty was the rule and

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[361] *supra* ,n. 357

[362] (2005)4 S.C.C165

[363] *supra* ,n.346

[364] Ibid

[365] *Ibid.*

[366] *Ibid*

[367] *Ibid*

[368] *Ibid.*

life imprisonment the exception but after 1973 the new code under Section 354 (3) provides that where death penalty is to be given the court has to state the special reasons. Hence presently, death penalty is an exception. Moreover, the presence of Section 235 (2) requires for hearing the accused on the question of sentence. It is found that Bachan Singh's case[369] just clarified the position. In fact the court under Justice VR Krishna Iyer has articulated this in Ediga Anamma's[370] case itself.

The judiciary itself had admitted on several occasions that there has been faulty decision making and miscarriage of justice consequently. In Bachan Singh's case [371]the court under Justice Bhagwati held that death sentence is discriminatory in the sense that it has certain class bias in as much it is largely the poor and the downtrodden who are victims of this penalty.[372] In fact Justice Krishna Iyer had made an observation in Rajendra Prasad's case[373] that it is discriminatory in the sense that it is reserved for the poor , as for the white collar crimes which were more damaging to the public, will get exempted. For instance, financial scams, adulteration, environmental degradation etc. This seems true when one finds inconsistency in the sentencing policy and thereby , gross miscarriage of justice.

Sanctity of life principle postulates not only respect for life but also non discrimination as its basic element. Lack of consistency and gross miscarriage in criminal sentencing has deprived lives. Since death penalty is irreversible in nature, it has to be exercised with great circumspection and care. In Bariyar's decision [374]the court acknowledged that the *"Equal Protection clause ingrained*

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[369] *supra* n.340.

[370] *supra* n.343

[371] *Ibid*

[372] He quotes Justice Douglas in death penalty case, Justice J Krishna Iyer in Rajendra Prasad's case, Warden Duffy, Pamsey Clark and Governor Disalle of Ohio to substantiate his reasoning.

[373] Justice Iyer observed thus, "But with the development of the complex industrial society there has come into existence a class of murderers who indulge in nefarious activity solely for personal, monetary or corporate gain. These white collar criminals in appropriate cases do deserve capital punishment as the law now stands as deterrent and as putting an end to active mind indulging in incurably nefarious activities. It is such characteristics that determine more or less the gravity and character of the offence and the offender."

[374] *supra* n.359

under Article 14 applies to the judicial process at the sentencing stage." It continued to hold that "...a capital sentencing system which results in differential treatment of similarly situated capital convicts effectively classifies similar convicts differently with respect to their right to life under Article 21... In the ultimate analysis, it serves as an alarm bell because if capital sentences cannot be rationally distinguished from a significant number of cases where the result was a life sentence, it is more than an imperfect acknowledgement of an imperfect sentencing system. In a capital sentencing system if this happens with some frequency there is a lurking conclusion as regards the capital sentencing system becomes constitutionally arbitrary."

The very same discontentment can be seen in an dissenting opinion of Justice Blackmun, in an American Case i.e., in Collins v Collins[375] wherein he observed that,

> *"From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavoured - indeed, I have struggled- along with a majority of this court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavour. Rather than continue to coddle the court's decision that the desired level of fairness has been achieved...I feel morally and intellectually obligated to concede that the death penalty experiment has failed. It is virtually self evident to me that no combination of procedural rules or substantive regulations can ever save the death penalty from its inherent constitutional deficiencies."*

The Steiker Report of 2008 also admitted that guided discretion is unsuccessful; hence in 2009 the American Law Institute withdrew the death penalty provision from the Model Penal Code under Section 210.6. However, it continues in other state laws and the courts are still guided by the principle as laid

[375] 510 U.S 1141(1994)

down in Gregg v Georgia[376] and other cases based on '*guided discretion'* and *the multi layered appeal structure*.

The call for abolition of this penalty is not based on the moral norm that life needs to be respected. But due to the arbitrary manner of its imposition which results in the deprivation of life arbitrary by the state. The need is to look into the current crime rate, and the social and cultural factors to decide on the question whether it is to be abolished. It has been often reported that the rate of execution based on is very less.[377] The rate of heinous crimes including murder has not decreased despite this. Hence, the malady today is the judicial error in the application of sentencing criteria. Revamping of the sentencing procedure is needed, criteria should be structurally articulated, and the penalty is to be restricted as intended under section 354(3) as laid down in Bachan Singh's case.[378] The delay due to procedural requirements such as commutation etc is plaguing the deterrent objective behind the penalty. Moreover, no serious effort has been made to conduct a study on the requirement of this penalty as argued before the Supreme Court.[379]

4.4 The Sanctity of Life as the Basis of Civil Law and Justice

Legal principles on civil liability mainly developed due to development of common law principles. Common law principles have developed due to the profound impact of the Christian conception of the sanctity of human life. Blackstone began his conception on the nature of laws generally, based on the statements in Genesis on account of creation.[380] According to Blackstone, law in its most general and comprehensive way signifies a rule of action and it is indiscriminately applied to all kinds of action. Thus, when the Supreme Being formed the universe and created matter out of nothing, god applied certain principles upon the matter, both animate and inanimate. He established certain

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[376] 428U.S153(1976)

[377] Annual Survey, Crime in India 1992-2011 points that murder rate has declined at the rate of 0.09percent.

[378] *supra* n.340

[379] Shashi Nayar v Union of India A.I.R1992 S.C395

[380] *supra* n.28 at p. 38.

laws of motion to which moveable bodies must conform. This view came to be followed by Jesse Root who in the American history adopted the Christian assumption of the sanctity of life as the basis of common law.[381] As for the laws of civil order, Blackstone claimed that such laws were wholly dependent on the law of nature and the Divine law and that no human laws could contradict them. However, Blackstone tried to distinguish the civil law from natural and law of revelation when he stressed that there are a great number of circumstances when both the divine law and the natural law leave a man at his own liberty; which are found necessary for the benefit of society and this is where civil law comes into existence.[382] Thus he proceeded to define civil or municipal law as "a rule of civil conduct prescribed by the supreme power of the state, commanding what is right and what is wrong." He finds that under civil law, man as a citizen with duties towards his neighbour for the subsistence and peace of society.[383] He unlike the positivists regarded that no human legislature has the power to abridge or destroy the rights bestowed on man by nature and god alike. Thus Common law contained two sets of rules:

1) Rules that were rules commanded by god and required of all nations and at all times.
2) Secondly, there were rules adopted by the community because they were felicitous to the societal order. These were known as customs. These customs could not proscribe what god has commanded or command or prohibit what god has prohibited.[384]

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[381] "What is Common law?...Common law is the perfection of reason, arising from the nature of God, of man and of his things, from their relations, dependencies and connections; It is Universal…It is in itself perfect…it is immutable,..it is superior to all other laws and regulations. .It is immemorial. .it is coexistent with nature of man, … It is most energetic and coercive." Jesse Root, "The Origin of Government and Laws in Connecticut-1789" , in Perry Miller (Ed.),*The Legal Mind in America: From Independence to the Civil War*, Anchor Books, New York (1st edn., 1962), p.31.

[382] *supra* n.90.

[383] *supra* n. 374, at p. 45.

[384] Herbert W. Titus, "God's Revelations: Foundations for the Common Law", in H. Wayne House (Ed.), *The Christian and American Law – Christianity's Impact on America's Founding Documents and Future Direction,* Kregel Publications, USA (1998), p.23.

This classical view based on the Christian assumption of the sanctity of life prevailed in the Common law countries till the end of 19th century when Oliver Wendell Holmes and his colleague John Chipman Gray attacked it. Holmes found the basis of law in social experience when he pointed out that, "The life of law has not been logic: it has been experience.[385] The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy... even the prejudices which judges share with their fellowmen have a good deal more to do than the syllogism in determining the rules by which men should be governed." Gray criticised the view of Blackstone that judges should discover law by stressing that the judges were in fact creators of law.[386] This change of view has been attributed by some thinkers[387] as an offshoot of the findings of Charles Darwin in his, *Origin of Species.*

A similar view existed with regard to the concept of "property" in law. The Biblical Conception of the sanctity of life and dominion over the property as the divine mandate can be found in the views of both Blackstone and Locke which have paved way for recognition by the legal systems in (England and America) property rights as basic rights. We find that they built their conception of private property on the basis of the Genesis creation story to support their theories. However, Locke improvised his version on private property by holding that whatever a man by his labour removes out of the state of nature has provided by mixing by his labour with the thing he labours and thereby made the thing his property.[388]

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[385] Oliver Wendell Holmes, *The Common Law* (1881), available at http://www.gutenberg.org/files/2449/2449-h/2449-h.htm

[386] John Gray, "The Nature and Sources of Law" (1909), available at https://archive.org/details/natureandsource00graygoog

[387] Charles William Eliot and Henry Steele Commager commented on this aspect.

[388] John Locke, "An Essay Concerning the True Original Extent of Civil Government", in Robert Maynard Hutchins (Ed.), *Great Books of the Western World,* Encyclopaedia Britannica , USA (1971) ,p. 32. He stresses that man has a property in his own person. Thus, he stresses that the labour of his body and the work of his hands are his.

The theory of Blackstone is essentially biblical.[389] His conception of sacredness of human life can be regarded as the basis on which the liability of trespass developed. The acceptance of the protection of individual which not only has the body but property and chattel was recognised by Blackstone. Later thinking also accepted this. There are three types of torts based on this namely, torts of trespass to person which includes assault, battery, false imprisonment etc., trespass to land and trespass to chattels. Later courts began to accept the sanctity of human life as the basis of the law of trespass. The inviolable nature of human life was accepted by the English Courts.[390] Again it is being accepted that the concept of strict liability, negligence etc. are biblical based on God's laws given to Moses in the Old Testament.[391]

Views exist that the concept of freedom of contract originated from the Christian view that a promise created an obligation to God and that for the salvation of souls God instituted the ecclesiastical and secular courts with the task, in part, of enforcing contractual obligations to the extent that such obligations are just.[392] This is more or less similar to the conception of property also.[393] However, this view brushed aside the conception of western contract law that every individual has a moral right to enter into contractual obligations.

Thus it is found that the fundamental principles creating liability had a profound influence on the concept of the sanctity of human life.

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[389] "The earth … and all things therein, are the general property of mankind, exclusive of other beings, from the immediate gift of the creator." *supra* n.28 at p. 3.

[390] Collins v Wilcock (1984) 3 All.E.R 374.

[391] Thomas J. Methvin, 'The trial lawyers and the biblical basis for what we do.' Available at https://www.beasleyallen.com/webfiles/Trial%20Lawyers%20and%20the%20Biblical%20Basis%20For%20What%20We%20Do.pdf

[392] Harold J. Berman, " The Christian Sources of General Contract Law", in John Witte Jr & Frank S. Alexander (Eds.), *Christianity and Law: An Introduction*, Cambridge University Press, UK (2008), pp.125-139.

[393] Blackstone, basing his argument on the Christian view as in Genesis 1: 28 established that God has given the right to man to exercise his dominion over all the earth and everything in the earth. See, Book II at pp.3-4.

Conclusion

The sanctity of human life has been accepted by most of the democratic legal systems as their foundational principle. The principle seeks to establish the fact that the interest or right which the individual seeks to establish is exercised not in a vacuum but in society or in a legal system where similar interest is sought to be exercised by others. Thereby, it seeks to establish a just equilibrium wherein competing interests are balanced and exercised in a fair manner so that individual and collective interest is taken care of based on socio-economic and cultural background in which rights are established.

There is always a mistaken notion that the sanctity of human life means absolute inviolability. Though it purports to establish the notion that a human being has got the right to bodily integrity and physical existence and self determination, it also recognises situations in which the existence of a human being may not only be detrimental to himself but also to the society. Therefore, law recognises certain situations wherein the right to life may be restricted based on collective social interest and based on the particular individual interest. Most of the legal systems recognises human worth and dignity as the basis of its laws but also recognises situations wherein it cannot be exercised absolutely. Hence law devices certain situations in which complete adherence to this concept may not be possible based on collective interest and for the sustenance of the legal system. At times the state power allows termination of life based on compliance of certain conditions but ultimately the sustenance of this principle is essential for the individual and the society alike. Human life has to be valued and respected at all times but there might arise situations in which the interest of others collides, and here law has to take an active role so that least harm is caused to the individual and the society alike. The choice which law has to make depends on myriad factors such as the situation in hand, the socio-economic and cultural backgrounds, considerations of the individual, social and future interest etc. This is the reason we do not find uniformity in the application of legal principles to the same set of facts or issues pertaining to questions of life and death. A moderate position is the best solution adopted in most of the legal systems.

Accordingly, it can be concluded that:

1) Life is a basic good but it is not an absolute good.
2) There is an in eliminable equality in dignity among all human beings. The prohibition of intentional killing emphasises that each human life deserves protection alike.
3) Uniformity and consistency in the application of the fundamental values underlying the concept of the sanctity of human life are not possible. The application of the concept can be influenced by many factors for example social, economic, cultural etc. However, a common standard is to be followed by legal systems in their law making.
4) It cannot be related to a specific value but it covers a spectrum of values including equality or non discrimination, respect for a person's privacy or confidentiality, liberty, personal autonomy, body integrity etc. These rights may not be considered absolute. However, the concept should be considered inviolable for the sustenance of any legal system.
5) It is the basis of a legal system and acts as fundamental test to the validity and sustenance of the legal system.

Chapter 5

The Sanctity of Human Life as Reflected in International Human Rights Instruments

Modern democratic states and the legal institutions functioning under it have always given prominence to the concept of the sanctity to human life which expresses the notion that man has an innate right to be valued and to receive proper treatment based on this value. The human species as such and not the individual alone became the central focus of this concept.[1]The term *the sanctity of human life* was replaced with the term *human dignity* in international discourses on human rights due to certain just and varied reasons. However, the ultimate faith of the world in the concept came to light when the preamble of the UN Charter expressed its belief in "*the dignity and worth of the human person,*"[2] and thereafter the adoption of dignity based rights. Established legally through the foundational UN documents, human dignity began to play a central role not only in the national level but also became a seminal factor in the international realm.

5.1 Recognition of the Sanctity of Human Life by International Institutional Mechanisms

The concept of the sanctity of human life takes its form in different senses in different contexts. Yet it is deemed to be the universal and fundamental norm of civilised human existence. This concept came to be globally recognised after the establishment of the United Nations. The dignity and worth of human life was recognised as the foundation of the global human rights regime. This was declared not only by the International Bill of Human Rights and bills and covenants like

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1 George Kateb, *Human Dignity,* Belknap Press, USA (2011), p. 211.

2 Preamble of the UN Charter reads:

"We the People of the United Nations Determined.....

To reaffirm faith in the fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and nations large and small...."

Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights but also by other instruments.[3]

5.1.1 Contribution of the UN and its Institutional Mechanisms in Recognition of the Concept

It was not only the Nazi genocide of Jews, roma (gypsies) and other groups which spurred the drafting of human rights instruments but certain other reasons also existed for such a course of action. The inclusion of *crimes against humanity* in the Charter of International Military Tribunal, which paved the way for the subsequent Nuremberg trials, also created a feeling that for human atrocities there should be international accountability, especially when domestic law is silent or contrary.[4]Chapter 1 of the United Nations Charter pinpoints that the principal aim of the body is not only confined in ensuring collective peace and security. The fundamental purpose of its establishment is to ensure human rights for all and facilitate circumstances favourable for their realisation.[5] The preamble pronounces the commitment of the new world order towards the concept of the sanctity of human life.[6] By the usage of the term *'reaffirm'* in the preamble it is meant that faith in human worth or dignity is an existing reality which is sought to be re-

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[3] Vienna Declaration of 1993. The Preamble reads: "…Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms..", available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx (visited on 5-10-2013).

[4] Available at http://www.britannica.com/EBchecked/topic/618067/Universal-Declaration-of-Human-Rights-UDHR (visited on 2. 1. 2013).

[5] Chapter I , Art1(3) reads "To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms of all without distinction as to race, sex, language or religion; and

Art1 (4) reads "To be a centre for harmonizing the actions of nations in the attainment of that common ends."

[6] Preamble of the UN Charter reads:

"WE THE PEOPLE OF THE UNITED NATIONS DETERMINED……..

To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and nations large and small……..."

established through the Charter.[7] The concept of *human dignity or inherent worth* is the most important and innovative element introduced by the UN charter. Jan Christian Smuts,[8] a prominent South African and British Commonwealth Statesman, setting forth a preamble for the UN Charter created a different objective for the world body, i.e., respect for human life which was not among the objectives of the League of Nations of which he, himself was the architect.[9] The Charter contains numerous provisions ensuring protection and preservation of human rights.[10]

At the time of drafting the Charter of the United Nations two prominent discourses on respect for human life gained attention. The first conception stressed that certain exceptional positions exist for the human person which is the inherent human worth as distinguished from other living creatures. This concept holds that man was made in the image of god and hence inviolable by nature. This is more based on the Jewish-Christian philosophy. The other conception is based on the natural law concept which holds that all human beings are endowed by nature with reason and, therefore, are to be recognized as equals. Thus, by using the term *dignity* in the Charter instead of *the sanctity of human life* and worth dispelled the theological basis of the term and made it more secular which enables the application of the concept in different socio-cultural contexts. However, it is often criticised that the Charter's reference to human rights are vague and scattered.

The notable feature of the UN Charter is that though it promises protection and promotion of human rights it does not define the term human rights. However, in order to carry out the intent behind the promise it seeks to ensure, the

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7 Klause Dicke, "The Founding Function *of* Human Dignity in the Universal Declaration of Human Rights", in David Kretzmer & Eckart Kleine (Ed.), *The Concept of Human Dignity in Human Rights Discourse*, Kluwer Law International, Hague (2002),p.114.

8 Christof Heyns, "The Preamble of the UN Charter: The Contribution of Jan Smuts", 7 *African Journal of International and Comparative Law* 329 (1995).

9 It is contested that Smuts adopted the terminology "the sanctity of the human being" and it was Gildersleeve who edited it. Charles R Beitz, "Human Dignity of Human Rights: Nothing but a Phrase", 41(3) P*hilosophy and Public Affairs* 193 (2013), available at http://onlinelibrary.wiley.com/doi/10.1111/papa.12017/pdf (visited on 5-10-2014).

10 See Art 13 (1) (b) of chapter IV, Art 55 (c) of chapter IX, Art 62(2) of Chapter X, Art 68 of Chapter X, Art 76 (c) of chapter XII.

Economic and Social Council (ECOSOC) was established[11] under Article 7[12] of the UN Charter and is permitted to make recommendations for that purpose and to draft conventions as per Article 68.[13] The deliberations in the United Nations Conference on International Organisation held in 1945 at San Francisco, which established the UN, reveal that initially the chapters setting out the purpose and principles of the proposed organisation had made no reference to either human rights or fundamental freedoms. The NewZealand Delegation led by Prime Minister Peter Fraser, had in the Conference sought for the inclusion of an undertaking by nations to protect and promote Human Rights in the Chapter 1 of the UN Charter.[14] Though the amendment as such was not incorporated since it involved an undertaking by nations, yet references made to human rights can be found not only in the preamble but under many provisions[15]

Article 68 of the Charter requires the Economic and Social Council to establish commissions in socio-economic field as well as for the promotion of human rights. Article 62 vests the power in the Economic and Social Council for making recommendations for the effective implementation and enforcement of human rights. By virtue of Article 68 the Commission of Human Rights was anchored directly by the UN Charter itself and thus draws power directly from the Charter. The UN Charter established for the first time an institutional mechanism for the protection and enforcement of human rights. The pre-existing character of the inherent worth of human life is sought to be reaffirmed through the words in the charter. In the first session of the General Assembly of the United Nations the Foreign Minister of China stressed that the dignity of man needs to be respected if

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[11] David Feldman, *Civil Liberties and Human Rights in England and Wales*, Clarendon Press, Oxford (1993), p. 41.

[12] Article 7 established the main organs of the UN.

[13] Article 68 reads, "The Economic and Social Council shall set up in economic and social fields and for promotion of human rights and such other commissions as may be required for the performance of its functions."

[14] The New Zealand proposal reads: "All members of the Organization undertake to preserve, protect and promote Human Rights and Fundamental Freedoms, and in particular, the rights of freedom from want, freedom from fear, freedom of speech and freedom of worship."

[15] UNCIO 25 April-26 June 1945 , available at www.voxo.webs.com (visited on 5-1-2013).

peace is to be achieved.[16] Thus human rights are the rights to be fully human, and thus one can be fully human only through our common humanity.[17] This gets reflected in the human rights law.

5.1.2 Recognition of Human Dignity as a Term with Universal Appeal by International Human Rights Instruments

The International declarations or Conventions pertaining to human rights are unclear as to the exact meaning of human dignity or as to how it gives rise to grounds on human rights. No explicit definition of the expression is found in the human rights instruments. This concept is however the universal authoritative standard with the establishment of the UN and the International Bill of Rights. It may be found that the term was incorporated into the International Human Rights regime as a term which is applicable to entire human beings and was an attempt to reconcile ideological and political differences on respect to humanity.

The drafting of the Universal Declaration of Human Rights, 1948 (UDHR) can be considered as the first important international initiative to put the fine principles embedded within the concept of the sanctity of human life into pragmatic application. The conceptual framework of the Universal Declaration echoes the commitment of the International community to enable man to understand his worth and to recognise and respect that his fellowmen also have such similar worth. The drafting of the International Bill of Rights was a process which reflected the effort taken at international level for recognition of basic rights of man which stressed that this was essential for peaceful coexistence.

The discussions in the Nuclear Commission of the Economic and Social Council, 1946 did not however harp on the sanctity of human life or human dignity. But it stressed that there was an urgent need to draft a Bill of Human Rights so that

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[16] Wellington Koo , the then China's Foreign Minister asserted, "If the world is to enjoy lasting peace , the dignity of man must be respected as the first principle of the new order; and the implementation of this principle will not only strengthen the basis of our civilization but remove suspicion between nations and thus contribute to the cause of peace." First General Assembly Session 8th plenary meeting 15th January 1946 as quoted in Moses Moskowitz, *The Politics and Dynamics of Human Rights,* Oceana Publications , New York (1968), p.82.

[17] Daniel Fischlin & Martha Nandorfy (Ed.), *The Concise Guide to Global Human Rights*, Oxford University Press, India (2007), Prologue.

human beings are respected and not discriminated beyond their national frontiers thereby preventing frictions and enabling conditions for peaceful coexistence.[18] The Economic and Social Council by a resolution established the Commission of Human Rights in 1946,[19]charging it with the responsibility to create an International Bill of Rights and monitoring the enforcement of the same. Well known members of the Commission who contributed significantly to the drafting of the Charter are Eleanor Roosevelt, who was the Chairman,[20] Jacques Maritain and Rene Cassin[21]of France, Charles Malik[22]of Lebanon, Pen Chung Chang of China, and John Humphrey, Director of the UN's Human Rights division.

The two key ethical considerations that underscored the main tenets of the International Bill of Rights are a commitment to the inherent dignity of every human being and a commitment to non discrimination. The drafting process of the committee under John Humphrey's chairmanship debated on a range of issues including the concept of inherent worth or dignity, the importance of contextual factors (especially cultural) in the determination of the content and range of rights, the relationship of the individual and societal welfare.[23]

The first draft outline of the Universal declaration set out the primary objective of it as peacemaking formula so as to ensure peace and for sustaining human dignity. It did not state anything about the inherent worth of human life.[24] In the discussions that followed it was pointed out that this was a great anomaly.[25]. Moreover, the distinction between human life and animal life need to

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[18] Eleanor Roosevelt, *The Promise of Human Rights,* available at http://www.gwu.edu/~erpapers/documents/articles/promiseofhumanrights.cfm (visited on 23-1-2013).

[19] Available at http://research.un.org/en/undhr/ecosoc/2 (visited on 15-2-2015)

[20] She was the widow of American President Franklin Roosevelt and chaired successfully the drafting committee.

[21] He composed the first draft of the declaration.

[22] Committee's Rapporteur.

[23] *supra* n.4.

[24] Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/3 visited on 10-1-2013).

[25] See discussion of item 2 of the Agenda of the International Bill of Rights E/CN.4/SR dt 31-1-1947 available at daccess-dd-ny.un.org/doc/UNDOC/GEN/GL9/902/37/PDF/GL990237.pdf/Open Element (visited on 12-1-2013).

be stressed in the preamble itself.[26]However, certain other representatives stressed the need to reflect the philosophy of man as a community and man as an individual in the preamble of the International Bill of Rights.[27] Majority of the members felt that the preamble should reflect the philosophy behind human life and qualities common to all mankind rather than universal rights of the states. Discussions focussed on the aspect that for an individual to realise fully his dignity needs protection against the tyranny of the state and hence the international instruments should aim at that.[28] The members in the committee had different ideological and religious outlooks on life, yet they put them aside and wanted to create a common standard and shared understanding where human life is respected.

The Preamble to Universal Declaration echoes the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family. The words in the preamble take their inspiration from the words of the French Declaration of the Rights of Man and Citizen. The opening words of the UDHR exposes a revival of natural law theory and this thinking makes clear that human beings posses certain moral rights and these rights exist prior to the rights recognised by positive law. Thus the origin of human rights lies in the very nature of man himself. Terms like *'inherent, 'inalienable,' 'born free and equal'* make reference to the idea of natural rights. The opening words of the declaration remind that disregard and contempt of human rights had made man commit barbarous acts against his fellowmen and hence the practical need to recognise human rights.

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[26] It was in a reply to a question from the representative of Australia regarding the nature of the standard envisaged for the application of human rights that Mr Chang went on to stress that human rights should be given a universal application regardless of different human levels. He reflected on the aspect of minimum standard as a means of increasing the stature of man as opposed to that of animals. For this, he reminded the Commission of the human values of the 16thcentury thinkers and proposed that this philosophy should be included in the preamble.

[27] The French representative Mr. Cassin stressed this. He was also of the view that the permanency of qualities common to mankind should be given stress.

[28] Meeting held by the Human Rights Commission on 1-2-1947, available at E/CN-4/SR.9

available at http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/SR.9

(visited on 13-1-2013)

Article1of UDHR is viewed as a bit Anglo Saxon and to a larger part American since as in the American Declaration the drafters of UDHR initially used the terminology "*all men are born free and equal*." Protest from various quarters ended with the terminology in Article:[29]"*All human beings.....*"[30] The words in the Preamble and Article 1 of the Declaration were subject to much debate and deliberation in the Third Committee on Social, Humanitarian and Cultural Affairs since the Geneva Draft,1947 and the Lake Success Draft,1948 declared that, '*Al lmen by nature are born free and equal.*'[31]The use of the term *'nature*' sparked the discussion regarding the philosophical underpinnings of the concept of human rights and that resulted in the abandoning of the term. Brazilian Amendment to Article1, sought to include the statement, "*all human beings are created in the image and likeness of God"* which was based on the Christian assumption of the sanctity of human life.

Discussions stressed that the great cleavage on the line of philosophy between the east and the Christian west should be understood and that terms which spark ideological conflicts be avoided since the charter is applicable to every person irrespective of their religion, class, race, sex, birth, colour etc. should avoid metaphysical problems. Deliberations also acknowledged the fact that Article1 of UDHR can be found in the philosophies of the 18th century which centred on the idea of the goodness in man's essential nature and the idea of soul given to man by God. During the course of the discussions there was a wide range of clashes of viewpoints when there was a western attempt to bring in the Christian conception of human life but the eastern block tried to resist it. Similarly, the clash of the socialist thoughts and the capitalist viewpoints was visible during the discussions. The holistic views on the concept of human rights and the nature of the universality of rights were a worry for not only the drafters

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[29] Article 1 of UDHR reads: "All human beings are born free and equal in dignity. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

[30] Eleanor Roosevelt, *Making Human Rights Come Alive* (1949), available at www.udhr.org/ history/Biographies/bioer.htm (visited on 14-1-2013).

[31] Hanna Mari Kivisto, "The Concept of 'Human Dignity' in the Post War Human Rights Debates", 27 *Res Publica: Revista de Filosofia Politica* 101(2012), available at http://www.saavedrafajardo.org/Archivos/respublica/numeros/27/08.pdf (visited on 15-1-2013).

but even for the UN when the International Bill of Rights was initially mooted. The Philosophers' Committee 1946, appointed by UNESCO to study on the question of how inconsistencies in the foundational philosophy can be reconciled discussed the different philosophical outlooks on the life of man. A prominent member of the Committee was Jacques Maritian, a catholic philosopher, who took the view that lack of consensus on the foundation was not fatal. He wrote that the fact that if an agreement could be achieved across the cultures on practical concepts, it was enough to enable a great task to be undertaken.[32] It is found that such an approach was not only political but a practical application of human rights designed for peaceful coexistence.[33]

As to the question of bringing the sanctity in religious sense as the basis of human dignity, there was a general feeling that placing the divine in the political plan by introducing it in the declaration should not be permitted.[34] Thus, the transcendental source of human rights was sought to be carefully avoided since the application of human rights principles applies to people belonging to different cultures, races, religions, births etc.[35]

The term '*human dignity'* was used in the Human Rights debates to point out the status of man in the ontological sense, relational sense as well as the state claims.[36] This means that instead of the use of the term *the sanctity of human life* which is popularly misconstrued as divine or as of theological origin, the word *dignity* was used to convey three values or precepts which defined the status of human life. The first conception, the ontological status of human beings, conveys

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[32] Mary Ann Glendon & Elliot Abrams, "Reflection on the UDHR" (1998), available at http://www.firstthings.com/article/1998/04/002-reflections-on-the-udhr (visited on 20-1-2013).

[33] Jeffrey Flynn, "Rethinking Human Rights: Multiple Foundations and Intercultural Dialogue", available at www.irmgard-coinx-stiftung.de (visited on 21-1-2013).

[34] Jorge Carera Andrade was the representative of Ecuador objecting the Brazilian amendment stressed that the declaration was meant for people of all faiths and affirmed that Article1 was a doctrinal statement rather than a statement of rights. *Ibid.*

[35] Rene Cassin admitted that the first Article did not contain divine origin of man though many members wanted its inclusion which was to achieve unanimity. Rene Cassin, "From the Ten Commandments to the Rights of Man*",* available at http://renecassin.over-blog.com/article-from-the-ten-commandments-to-the-rights-of-man-72080499.html (visited on 27-5-2015).

[36] Christopher M.C. Crud den, "Human Dignity and Judicial Interpretation of Human Rights", 19 (4) *Eur.J.Int.L.* 655 (2008).

the meaning that every human being has got an intrinsic worth by virtue of being a human being (this worth may be of divine origin or by nature). The second relational claim conveys the meaning that this intrinsic worth needs to be recognised and respected by others and the third aspect, the state claim, the recognition of intrinsic worth, requires that the state exists for individual well being. The third dimension has emerged in the debates regarding the drafting of Human Rights Instruments i.e., limited state claim.[37]

The draft of the International Bill of Rights submitted by the drafting committee to the Commission of Human Rights in 1947 stresses that human dignity can be meaningful only if one respects his neighbour as one's own self and respect his dignity and worth.[38] The individual as a part of collective good and the responsibility cast on him in this regard, though stressed in Article 29,[39] find expression in the UN emblem.[40] The International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) in 1966 which together with the Universal Declaration established a strong International Bill of Rights that stressed on upholding human dignity and worth in letter and spirit. The ICCPR stated in its preamble that all the human rights accrue as a result of the dignity of the person.[41] The Covenant sought to establish a legal obligation in which states would be

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[37] *Ibid.*

[38] Preamble of the Draft International Bill of Rights presented by the drafting commission to the Commission of Human Rights, 1 July 1947, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/21 (visited on 24-1-2013).

[39] Article 29 of the UDHR reads: "1 everyone has duties to the community in which alone the free and full development of his personality is possible. 2 In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. 3 These rights and freedoms may in no case be exercised contrary to the purpose and principles of the United Nations."

[40] The olive branch and the blue colour symbolize peace and the world map represents the human fraternity.

[41] Preamble of ICCPR reads "State parties to the present Covenant, considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the freedom, justice and peace in the world.

Recognizing that these rights derive from the inherent dignity of the human person…"

accountable in case human rights are not upheld by the state.[42] The Preamble stressed that human rights can be meaningful when civil and political rights can be enjoyed in a just socio-economic environment. This was provided under the International Covenant on Economic, Social and Cultural Rights, 1966. Thus, the term "human rights" covers a broad spectrum of rights which involve all elementary preconditions not only for human survival but for dignified existence. The Optional Protocol to Covenant on Civil and Political Rights 1976 established the right of the individual to appeal to the international community in case of violation of covenanted rights and freedom.[43]

Generally, human rights instruments are classified as civil and political rights are known as the first generation rights since they were articulated due to the influence of tyrannical and oppressive state trampling human rights during the seventeenth and eighteenth centuries. Similarly, the economic and social rights were termed second generation rights due to industrialisation and the rise of working class wherein new meanings came to be attributed to life with dignity. The third generation human rights embraced the collective rights of mankind to face the challenges of advancement of science. Thus, if first and second generation rights were meant to satisfy the essential needs of man, the third generation rights strived to create conditions which enable flourishing of human life which is the fundamental basis of the concept of sanctity.

The term *'dignity'* has long been associated in Declarations and Conventions with terms like 'inherent,' 'intrinsic,' 'person' etc. These terms though said to be vague, however give precise guidance to our understanding on the term, *dignity.* The term *inherent* means involved in the essential character of something and *intrinsic* means the permanent characteristic attribute of something and when this is associated with *human*, the term *dignity* becomes inseparable from human conditions. Thus, dignity is understood as not attaching to any specific feature but a worth which is unconditional by virtue of being a human

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[42] John P Humphrey, "The International Bill of Rights*:* Scope and Implementation*",* 17 *William and Mary Law Review* 529 *(*1976).

[43] Moses Moskowitz, *The Politics and Dynamics of Human Rights*, Oceana Pub., New York, (1968), p.103.

being.[44] The term *person* is prescriptive and not generic, having an independent value and may not be deemed instrumental. The term *respect* used in the Universal Declaration and other covenants is understood as esteem, deference or recognition. It is found that these terms have subjective (as to how one feels and thinks about another) and objective (how one treats another) aspects.[45] Thus human dignity has found place in most of the international instruments on human rights as the foundational objective in the preamble itself in this sense.[46]

The classification of human rights in the human rights instruments reveals two distinct facets of the concept of dignity namely the assertion of individual self and the assertion of individual as a part of the community. A classic illustration of it is Article 2(1) of the Declaration of the Right to Development 1986, which stressed on the right to development wherein it places the individual and the collective aspect of this right in a mutual relationship and thereby seeks to link the conditions of life with the welfare and well being of the people.[47]

It is found that if the main frame of reference of UDHR and sister Conventions emphasised human dignity and worth, thereby focussing on every individual person equally, the later conventions were eager on stressing expressly the dual nature of the concept. For instance, the UN Declaration on the Rights of Indigenous Peoples, 2007, recognises individual right to non discrimination and as a part of indigenous population, the collectivist rights which are essential for the integral development of peoples. This notion of individual as a part of humanity has been extended not only to this generation but to the future also.[48]

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[44] Roberto Andorno, "Human Dignity and Human Rights as a Common Ground for a Global Bioethics", 34 *Journal of Medicine and Philosophy* 223 (2009).

[45] Henry Steiner & Philip Alston (Eds.), *International Human Rights in Context- Law, Politics, Morals,* Clarendon Press, Oxford (2009), pp.139-145

[46] See Convention on Rights of Child 1989, Convention on the Protection of the Rights of the Migrant Workers and Members of their Families 1990, Convention on the Rights of the Persons with Disabilities 2006 etc.

[47] Article 2 (1) reads: "the human person is the central subject of development and should be the active participant and beneficiary of the right to development."

[48] Convention for the protection of the World Cultural and Natural Heritage 1972, Convention on Biological Diversity 1990, Rio Declaration of Environment and Development 1992, Vienna Declaration and Programme of Action 1993, Declaration on the Responsibilities of the Present Generation towards future generation 1997 etc.

5.1.3 Regional Human Rights Arrangements and Respect for the Worth of Human Life

Efforts to bring respect to human dignity took their expression not only under the auspices of the United Nations but also regional arrangements protecting the same have received international recognitions such as the European Convention on Human Rights signed in Rome in November, 1950,[49] Charter of Fundamental Rights of European Union 2000, the American Declaration of the Rights and Duties of Man 1948, preceding six months before UDHR, and the African Charter on Human and Peoples Rights 1986.

The Opening statement of the Ninth International Conference of American States [50] and the preamble[51] of the declaration establish the ultimate faith on human rights. It can be considered as the world's first International Instrument on Human Rights. The treaty establishing Organisation of American States (OAS) treated dignity as the basis for legislation.[52] The use of words like dignity or inherent worth of human life gave the human rights concept a concrete shape. At the European level, the ratification of European Convention on Human Rights(ECHR) is a condition precedent for membership to the Council of Europe. [53] Thus, respect for human rights remains the condition precedent for international

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[49] Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (visited on 26-1-2013).

[50] The Opening statement of the Declaration adopted at the Ninth Conference of American States, 1948 reads:

"The American peoples have acknowledged the dignity of the individual and their national Constitutions recognize that judicial and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness. The American states have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is the national of a certain state, but are based upon attributes of his human personality. The International Protection of the rights of man should be the principal guide of an evolving American Law…'

[51] Preamble of the American Declaration of the Rights and Duties of Man reads: "All men are born free and equal , in dignity and rights and being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another. The fulfilment of duty by each individual is a prerequisite to the rights of all .Rights and Duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty....."

[52] Chapter VIII of the treaty establishing Organization of American States.

[53] Oliver De Schutter, *International Human Rights Law- Cases, Materials, Commentary,* Cambridge University Press, New York (1st edn.,2010), p. 21.

political arrangements. Though the European Convention on Human Rights1950 did not define dignity, the European Charter of Fundamental Rights 2000, under Article 1 declares that human dignity is inviolable and hence needs to be respected and protected. In Queen v East Sussex County Council[54]Justice Munby while asserted that though the term dignity is not used in the Convention it still permeates the entire provisions of the Convention, and held that dignity is one of the core values of European Society and it is nothing new since it reflects the Biblical call.[55] Thus, the interpretation of dignity was based on the Christian conception of the sanctity of human life at the European level. This is quite contrary to the Preambular words of the African Charter on Human and Peoples Rights 1986 or Banjul Charter which stresses on the unique attributes of humans and that from this stems the human rights.[56]

5.1.4 Human Dignity as Encompassing a Spectrum of Rights

Human dignity under human rights instruments have been recognised as a right by itself [57] and also as the basis of all rights. Thus it had been equated as the foundational concept on which ideals of liberty or autonomy and equality has been based. Ideals of self determination, bodily integrity and privacy are associated with dignity. The belief that everybody should be treated equally and with dignity also means nobody should be tortured or treated in an inhuman way. It also means that nobody has the right to own another person. Respect for life led to the recognition of the right to life. It encompasses individual freedom as well as collective interest. At times it is power conferring and power limiting as such. Recognition of civil, political, economic and social rights of man makes dignified existence possible since dignity means human subsistence and the flourishing of human life. Since human dignity is a unity of both objective and subjective

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54 R (A, B, X and Y) v East Sussex County Council, [2005] ADR.L.R. 04/25

55 Justice Munby while discussing Article 8 of the ECHR pointed out its relation to the concept of human dignity and quoted Mathews Chapter 7 verse 12 to hold that human dignity has emerged from the Bible.

56 Preamble reads: "Recognizing on the one hand, that the fundamental human right stems from the attributes of the human being which justify their national and international protection and on the other hand that the reality and respect of people's rights should necessarily guarantee human rights."

57 Article1 of EU charter of Fundamental Rights stresses this.

features, the human rights law recognises the need to give special protection to vulnerable groups in society and also the right not to be discriminated and their privacy be not violated. It respects and includes not only the rights of the present generation but of posterity as well. Thus it also casts certain duties or obligations towards fellowmen. It casts the obligation on states also to secure these rights for man based on dignity, for instance, the obligation of the states in securing the right to food.[58] Thus it is a unity of rights and duties. It protects man at different stages of life be it children or aged, and different states of human life disabled, the migrant etc. Thus it is the epitome of rights and a self evident right by itself.

Most of the human rights instruments employ the term *dignity* without taking an effort to define it. However, the role of the concept as right empowering and at the same time right constraint had added to the confusion regarding its content. Hence it is pertinent to look into the judicial interpretation of the different connotations to the term 'dignity.'

5.2 Judicial Interpretation of the Concept of Human Dignity in the Human Rights Law

The Courts have been consistently concerned with the question of the content and scope of the application of the concept in human rights violations. This phenomenon is visible throughout the national and international jurisdictions. However the content and role with regard to its application has not been consistent. Since none of the international declarations or covenants have attempted to define this term, it has been left to the judges to make it context specific.

5.2.1 Interpretations on Inviolability of Human Life and Body

The right to be and remain human is an immunity against loss of dignity by use of physical or psychological force.[59] The inviolability is often treated as a part of the sanctity of human life. This inviolability principle is often misconstrued in

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[58] See General Comment 12 Committee of ESCR in 1999 and Report of the Special Rapporteur on Right to Food Jean Ziegler, A/HRC/7/5, para17, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/7session/A-HRC-7-5.doc (visited on 5-10-2014).

[59] Upendra Baxi, "From Human Rights to the Right to be Human : Some Heresies", in Upendra Baxi et al. (Ed.), *The Right to be Human*, Lancer International, Delhi (1st edn,1987), p.184.

human rights discourse as the sole dominion of one over his body as that of a private property.[60] Inviolability of the human person is the subject of protection under human rights law. The *'person'* here refers not only to his subjective experience (the pain which one experiences when one is attacked) but an objective experience (he as a member of the human community). Hence dignity or human rights comes to protect both the experiences. The inviolability in human person denotes not only the control of the human being on his body but it denotes a social viewpoint as to how the body of a particular individual who is a part of the society should be respected. This is the reason why organ transplantation and blood donation are permissible but all these are subject to legal restrictions.Thus, the requirement that even after death, human bodies should be treated with dignity.[61] It is often argued that once a person is dead his attributes of personhood ceases and he is no longer a person. But then the question is why the dead are recognised as possessing certain rights.[62] This is because the treatment meted out to the dead would have an immediate impact on the interests of the living and so needs protection.[63] The individualised approach of treating man as the sole owner of his body and so has bodily integrity perpetuates treating body as a property thereby justifying commodification and commercialisation of the body. Certain writers[64] identify the concept of bodily integrity in asserting their moral claims of the sanctity of human life.[65]

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[60] Gowri Ramachandran, "Against the Right to Bodily Integrity: of Cyborgs and Human Rights*,"* *Denver University Law Review* 1(2009). In this article, the writer does not approve the dignity based approach but rather says that certain rights follow from this concept which can be taken to define the contractual obligations.

[61] Available at https://www.inter-disciplinary.net/ptb/mso/dd/dd6/glahn%20paper.pdf (visited on 30-1-2013).

[62] Indecent keeping and handling and exposing corpse in order to create an impression that the deceased is still alive, neglecting to bury or cremating the body after reasonable time , attempt to dispose of the body for gain or profit are some of the common law offences.

[63] Kristen Rabe Smolensky, "Rights of the Dead", 37 *Hofstra Law Review* 763 (2009).

[64] Daniel Callahan while taking the concept of the sanctity of life beyond the religious plane and attempting to give it a secular foundation on his findings on abortion states that the concept of bodily integrity as one among the basis of the sanctity of human life. Daniel Callahan, *Abortion: Law, Choice and Mortality*, Macmillan, New York (1970), pp. 305-335.

[65] H. Tristram Engel Harddant Jr., "Resources in Critical Care," in Kurt Bayertz (Ed.), *The Sanctity of Human Life and Human Dignity*, Kluwer Academic Publisher, Netherlands (1996) p. 205.

Totally disregarding the physical and psychological integrity of a human person is a violation of his human dignity and the human rights law protects the same. Due to the universal potential for violence among human beings, human rights are charged with protecting their body, a prerequisite condition for human dignity.[66] Responsibility extends to all societies and those belonging to different cultures without distinction to protect the same. The simple piece of evidence to prove this aspect is that all legal systems criminalise offence against life and limb. Most of the human rights instruments treat the right to life, security, protection against torture, inhuman and degrading punishment as non derogable. This protection extends not on the premise that man is the sole owner of his body but on the fact that man is a part of the society which treats such intrusions as creating an impact on the (personal and psychological trauma) on the lives of his fellowmen. This is the reason why cruel, inhuman and degrading acts are said to be against human dignity.[67] In this context it is worthwhile to note that the Convention for the Protection of Human Rights and Dignity of the Human Being in the Application of Biology and Medicine, 1997 by the Council of Europe stresses the need to respect a person as an individual and as a member of the human species and thereby respect his dignity.[68]Thus human rights law stresses this dimension in its mandate to respect the human rights.

It is found that an individualised notion that man is the master of his body turns futile at certain circumstances wherein courts are confronted with questions of life and death and the principle of bodily integrity. In a Court of Appeal decision in Re A (Children) (Conjoined Twins: Surgical Separation)[69] we find different arguments raised by judges regarding the conduct of surgery on

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66 Sibylle Kalupner, "The Human Right of Bodily Integrity and the Challenge of Intercultural Dialogue", available online at http://www.docstoc.com/docs/159565044/Sibylle-Kalupner-The-human-right-of-bodily-integrity (visited on 2-2-2013). In this article the writer had attempted to argue that the western conception of bodily integrity precipitates intercultural dialogues.

67 In Tyrer v United Kingdom (1978) ECHR2the European Court of Human Rights held that the institutionalized use of force through judicially imposed birching was an assault upon the dignity of the human person and upon his physical integrity.

68 The Preamble of the Convention on Human Rights and Biomedicine 1997, by the Council of Europe stresses this aspect.

69 (2000)EWCA.Civ.254

conjoined twins which might eventually result in the death of one.[70] The reasoning of the court was based on the concept of the sanctity of human life and dignity. Justice Johnson conceived that the very existence of a lesser developed twin on the support of a comparatively well developed twin is itself a violation of the autonomy of the less developed twin. Justice Ward on the other hand stressed that the very existence of the lesser developed twin is an act of violence on the bodily integrity of the developed twin since eventually it may be a threat to the very existence of the competent. Dignity here is conceived with autonomy and independence in one's body. Justice Brook reasoned according to the doctrine of necessity and not self defence. By giving a central role to dignity, he asserted that, "the doctrine of the sanctity of human life respects the integrity of the human person. The proposed operation would give these children both the integrity nature denied to them." However it is found that Justice Walker's reasoning is more convincing when he opined thus:

> *"every human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy-the right to have one's own body whole and intact and (on reaching age and understanding) to take decision about one's own body."*[71]

Since both the twins have been deprived of their bodily integrity and autonomy which is their natural right, according to Justice Walker, separation would be in the best interest of both twins though death of the weak one would be the inevitable consequence .The operation according to him would give the weak one even in her death, bodily integrity as a human being. Thus it is found that on

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[70] Jodie and Mary were conjoined twins. They each have their own brain, heart and lungs and other vital organs and they have arms and legs. They were joined at the lower abdomen. While not underplaying their surgical complexities, they can be successfully separated. But the operation will kill the weaker twin, Mary. This was because her lungs and heart were too deficient to oxygenate and pump blood through their body. She was alive only because a common artery enabled her sister, to circulate life sustaining oxygenated blood from both of them. Separation would require clamping and then the severing of the common artery. Within minutes of doing so the doctors advised that Mary would die. If the operation did not take place both would die within two to six months. The parents were unable to consent for the operation. Both their twins were equal in their eyes and cannot agree to kill one. As devout Roman Catholics they believed it is god's will. So the doctors sought a declaration that the operation may be lawfully carried out. J Johnson allowed the application.

[71] *Ibid.*

the basis of dignity, the best interest test was conceived and a pragmatic solution was found out. The conception of Kant that body is a bounded entity over which a single individual has ultimate control would necessitate a revisit in certain circumstances.[72] The individualised approach on respect for bodily integrity and dignity cannot satisfactorily solve questions of life and death.

Some of the rights in human rights instruments have not been either defined or their content specified which are left for the courts to define based on the circumstances at hand and on the basis of socio-cultural contexts. This is more commonly found in European Convention on Human Rights.[73] However, certain rights are held to be absolute or non derogable. From time to time courts are left with the option to decide when individual interest conflicts with public interest. It is found that while interpreting conflicting human rights interest and with different socio cultural ethos, the courts have evolved certain principles, for example, the principle of the margin of appreciation, proportionality etc were developed by the European Court of Human Rights.[74]

5.2.2 Interpretations on Life and Death

It is found that the European Court of Human Rights is often confronted with questions of life and death with the concept of privacy and self autonomy. The court, while deciding on whether the state or a third party could take a decision on the question of the death of a patient it is found that the court takes a cautious approach. In Diane pretty v United Kingdom[75] the court held that the refusal by national authorities for the conduct of euthanasia on the applicant by her husband or third party is not violative of the right to life under Article2, ECHR. The court found that the right to die or right to secure death through third

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[72] Daniel Sharp, "Bodies with (out) Boundaries, Kant, Conjoined Twinnings, and Rethinking Bodily Integrity", available at https://www.academia.edu/954037/Bodies_ with_out_Boundaries _Kant_Conjoined_Twinning_and_the_Rethinking_of_Bodily_Integrity (visited on 6-2-2013).

[73] Aileen Mc Harg, "Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the Decisions of the European Court of Human Rights", 62(5) *The Modern Law Review* 672 (1999).

[74] Jean Paul Costa, "The European Court of Human Rights and its Recent Case Laws", 38 *Texas International Law Journal* 456 (2003).

[75] (2002) ECHR 427

party or with the assistance of public authority cannot be derived from Article 2 of the convention.[76] Thus it is found that the Strasburg court interpreted like the Indian Courts that the right to life does not include the right to die. Here again the court's observation on the interpretation of Article 2[77] ECHR was that the objective behind Section 2 of the Suicide Act was the protection of the weak and vulnerable persons. As the condition of the terminally ill may vary, many persons are at the risk of abuse and it is the vulnerability of the class which provides the basis of the law. The cardinal point to be looked here is that the court was attempting to balance the individual right with collective interest. Dignity understood in terms of individual quality of life and expression of the identity of self was given a subsidiary position to dignity found in general terms with wider dimension of sustaining life in terms of a large collective group. This trend can be found in most cases of euthanasia. However, though courts in most number of cases have adopted this stand it is often subjected to ridicule and criticism.[78] Some writers pinpoint that although law and society must pay serious attention to the sanctity of life, the individual wields ultimate power[79]when autonomy enters the equation. However, it is to be understood that many legal systems have legalised assisted suicide while others have strictly forbidden it. Hence in most cases it is found that the human rights decision making institutions have to make the decision based on the legal and socio-cultural contexts. In Hass v Switzerland[80] the Court was confronted with the question of denial by state authorities to prescribe lethal drugs in a country like Switzerland where assisted suicide is legally permitted. It should be noted that Switzerland[81] does not give a special

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[76] Para 40.

[77] Article 2 ECHR Section1 reads as 1. "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of sentence of a court following his conviction of a crime for which this penalty is provided by law…."

[78] Susan Millns,"Death, Dignity and Discrimination: The Case of Pretty v United Kingdom", available at http://www.germanlawjournal.com/print.php?id=197 visited on 8-2-2013.

[79] Sheila A. M. Mclean, *Assisted Dying: Reflections on the Need for Law Reform*, Routledge-Cavendish, New York (1st edn., 2007), p.192.

[80] (2011)53 EHRR 33

[81] Active euthanasia is illegal in Switzerland. Section 114 and Section 115 of the Swiss Code makes punishable assisted suicide with selfish motive. However the recipient need not be a Swiss national.

status to physicians for assisted suicide but requires a prescription for the drug. In the case in question the applicant was a psychiatric patient with bipolar affective disorder and since he was conscious of the fact that his treatment was impossible and his illness would deprive him the right to live with dignity, he approached the physicians to prescribe a lethal drug since he had already registered himself with 'dignitas,' an association which provides free service in cases of assisted suicide. Aggrieved by the inaction of the public authorities he approached the European Court of Human Rights. Rejecting the argument of the applicant that he had been denied the right to choose the time and manner of his death and that the state had an obligation under exceptional situations to procure necessary products for suicide, the court held that there was no obligation under Article 8 to assist in the commission of the suicide. In fact, the court accepted that in countries which accepted assisted suicide such restrictions are necessary for preventing abuse. Reiterating that the states have no obligation to assist citizens seeking to commit suicide, in Koch v Germany[82] the court said that the decision to grant a right to suicide is largely up to the member states. Refusal to grant it does not amount to an infringement of the European Convention of Human Rights. Thus it is found that the court, while interpreting on questions of life and death, decided with adequate foresight so as to uphold human dignity and worth.

There are situations in which the patient would desire that the decision regarding his death may not be decided by a third party including the doctor who treats him since such a decision would violate his dignity and autonomy. This is the reason courts are prompted to take a cautious approach. In Burke v United Kingdom[83] the European Court of Human Rights was confronted with such a question, wherein the applicant complained that the British General Medical Council guidelines permitted a doctor to remove ANH (artificial, nutrition and hydration) from a patient, who is incompetent to communicate by way of terminal illness. Invoking Article 2, Article 3 and Article 8 of the ECHR, the applicant

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[82] (2013) 56 EHRR 6

[83] (Unreported)Application no 19807/06 decided on 11-7- 2006 European Court of Human Rights, Fourth Session. See http://caselaw.echr.globe24h.com/0/0/united-kingdom/2006/07/11/burke-v-the-united-kingdom-76785-19807-06.shtml

argued that there is insufficient protection in that a doctor might reach a decision to withdraw ANH without being under an obligation to obtain the approval of the court, thereby precipitating a painful death by thirst and starvation.[84] Rejecting the application, the court held that the domestic law, the GMC, is strongly in favour of prolonging life which accords with the spirit of the Convention and the court emphasised that in case of incompetent patients or those who anticipate that with the passage of time their physical and mental condition would deteriorate, they would be unable to communicate their wish owing to illness can make a living will or advance treatment directive.

Human rights protection is extended not only to those who seek it but it is often found extended to probable vulnerable class or the vulnerable themselves. A classic illustration of this is the decision of European Court of Human Rights in the case of Keenan v United Kingdom[85] wherein the court held that the notion of inhuman or degrading treatment may be extended to those who cannot perceive that such treatment is meted out to them especially the mentally disabled when they are unconscious. Thus it is found that when certain autonomy based rights cannot be exercised by the vulnerable, the court comes forward to protect by conceiving tests like the best interest. Yet the application of these tests largely depends on the judge's chosen perspective. This is evident in Burke v United Kingdom.

The next question which confronts us is what is the importance of the' *self*' or *'person'* since it is fragmented into social conditions and context. An individual's personality is not developed autonomously but it is developed by his relationship between others and the outside world. The importance of social conditions and

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[84] The applicant was diagnosed from congenital degenerative brain condition in 1982.He gradually lost his legs and so dependent on wheel chair. This is a progressive disease and in time, he will lose the ability to swallow and he will require artificial nutrition and hydration (ANH). The medical evidence indicates that the applicant is likely to retain full cognitive faculties even during the end stage of disease and would be aware of pain, discomfort and distress resulting from dehydration and malnutrition. During the final days it is expected that he would lose the ability to communicate. The applicant wishes to be fed and is provided with appropriate hydration until he dies of natural causes. He does not want ANH to be withdrawn or die of thirst. He does not want a decision to be taken by the doctors that his life is no longer worth living.

[85] (2001) ECHR 242

relationships between human beings in creating and developing one's actions and one's personality – a social context is not only necessary but is also a need for this personality to thrive and form.[86] This is the important function which human rights do in practice. A classic example of this can be found in Article 8[87]of the ECHR since it throws light on the individual self and his relationship with others. Respect under this Article can be discerned as respecting not only the individual but his value systems based on his socio-cultural relations. Respect for the individual's private life gives stress on the individual as supreme in certain areas of his personal life which means personal autonomy is given prominence like bodily integrity. Again it gives prominence to personal identity including personal information.[88] However it is found that these rights guaranteed are not absolute which is evident from Article 8(2). In R.R v Poland[89]while deciding on the question of whether consistent refusal on the part of hospital authorities in refusing to give access to prenatal genetic tests to determine genetic information to find out congenital defect and conduct abortion in a timely manner are violations of Article 8 ECHR, the court pondered on different dimensions of Article 8. The court observed that access to genetic information is a part of right to access to health services and observing that a timely intervention protects not only the reproductive choice of the women but prevents malformation of the child. The court was of the view that though the right to access to such information falls within the notion of private life, it is in fact a right to obtain information about one's condition. The court observed that during pregnancy the foetus condition is vital for women's reproductive health condition.[90] The effective exercise of this right is often decisive for the possibility of exercising

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[86] Jill Marshall, "Personal Freedom Through Human Rights Law?: Autonomy, Identity and Integrity Under the European Convention on Human Rights *", International Studies in Human Rights*, Martinus Nijhoff Publishers, Netherlands (2008), p. 3.

[87] Article 8 reads: "1 Everyone has the right to respect for his private and family life, his home and his correspondence. 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well- being of the country, for the prevention of disorder or crime, for the protection of health or morals, as for the protection of the rights and freedoms of others."

[88] Available at http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr_article_8.pdf (visited on 18-2-2013.)

[89] (2011) ECHR 828

[90] Para197

personal autonomy covered by Article 8, by deciding, on the basis of such information, on the future course of events relevant for the individual's quality of life. It is found that though Poland allowed legal abortion, it created long procedural formalities within its legal frame work which made legal abortion virtually impossible. This case shows how the deep rooted Christian assumption on the theological base of the sanctity of life had prompted the civil authorities to deny abortion which was legally permissible in the name of procedural formalities. This had prompted the European Human Rights Court in this case to reaffirm the decision in Tysaic v Poland [91] which held that once the state acting within the limits of the margin of appreciation adopts statutory regulation allowing abortion in some cases, it must not structure its legal framework in a way which would limit real possibility to obtain it. It is found that cultural and religious sensitivity to the issue of abortion had prevented the European Court of Human Rights from deciding on right to access to abortion and female reproductive choice. Moreover, there are differing views among the member states on the question whether an unborn foetus has right to life under Article 2, ECHR.

In Rose Marie Bruggemann & Adelheid Scheuten v Federal Republic of Germany[92] while holding that provoked pregnancy may be permissible in countries permitting it within certain time limit, the court pointed out that pregnancy cannot be said to pertain to the sphere of private life. The court held that whenever a woman is pregnant her life is connected to the developing foetus. But we find that in this decision also the court did not attempt to answer the question whether the unborn foetus had absolute right to life. InVo v France[93] the court stated that there is no European consensus on the question when life begins on both the scientific and legal definition of the beginning of life, hence there is a need to balance the legal, medical, philosophical, ethical or religious dimension of defining the human being.[94] So the institutions under the convention exercise the margin of appreciation, thereby interpreting so as to balance the interest of both

[91] (2007) ECHR 219

[92] (1981) 3 EHHR 244

[93] (2005) 40 EHHR 12

[94] See para. 82.

the mother and the child. The lack of European Consensus on the matter and the difficulty of the European Court of human rights[95] in dealing with the issue are visible while going through the case laws on the subject.

In AB and C v Ireland [96]the court held that Article 8 of the ECHR does not confer a right to abortion but states have a broad margin of appreciation on the legality of abortion based on their socio-cultural ethos. However, the court pointed out that though Ireland had the right to decide on what law it should adopt, it held that the Irish law was unclear and uncertain as to under what circumstances and what procedure are to be contemplated when abortion may be permissible to a pregnant woman whose life is at peril. To that extent, the Court observed that the law of Ireland violates Article 8 of the Convention. Interestingly, it is found that the Irish law recognises the right to life of the foetus with due regard to the equal right of the mother. This commitment of the Irish law due to its strong commitment to the concept of the Christian assumption of the sanctity of human life was sought to be respected in this case. But the court showed its practical wisdom wherein it stressed that when the mother's life is at peril, such a strict adherence to the concept of the right to life of the unborn foetus is not permissible. Thus, the Court demonstrated that right to life is not an absolute one but a qualified one. However, state practices including that of Ireland are often found to be contrary wherein blind adherence to Christian faith of sanctity had negated the mother's right.[97] By utilising the margin of appreciation, the court had on numerous occasions attempted to balance the interest of both the mother and the foetus since the court had on previous occasions also acknowledged that there is lack of European Consensus. Thus it is found that in the practical application of human rights principles, the lack of consensus between the theological and secular notions on human life is visible. This had affected the structuring of legal systems and thus the application of the fundamental principle of respect to human dignity at times becomes context specific at one end, extending the ambit of a human

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[95] Emma Williamson, "The Right to Life of the Foetus under the European Court of Human Rights", l2(1) *Warwick Student Law Review* 33 (2012).

[96] (2010) ECHR 2032

[97] *supra* n.89.

right and at the other end restricting it. This is because in human rights adjudication it is found that the process of balancing the individual interest with the public interest takes into consideration the socio economic and cultural ethos of the member states. This is visible in case of imposition of death penalty.

Right to life is not absolutely inviolable as it may at first sight appear to be. There are a number of occasions wherein states may deprive individuals their life but human rights instruments do not raise any objections. Article 3of the Universal Declaration[98] echoes the commitment of the world towards protection of the right to life, liberty and security of a person. The Covenant on Civil and Political also contains provisions with regard to the general human right guarantee of the right to life and circumstances in which this rule may be deviated. Arbitrary deprivation of life is always treated as against human dignity. ICCPR contains provisions which streamline the procedures states may have to comply when death penalty is imposed. The Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of Death Penalty 1989 necessitates the states to abolish death penalty as such. In 1982, a Special Rapporteur was appointed by the Commission for Human Rights whose task was to examine the Extrajudicial, Summary and Arbitrary Executions taking place worldwide. The UN had formulated different guidelines and principles[99] which need to be adopted by member states in case they are carrying out executions. It had also stipulated guidelines for the treatment of death convicts so that their dignity is guaranteed to them till their last breath. The Rome Statute of International Criminal Court, 1998 also contains guidelines when death penalty may be imposed and the numerous restrictions associated with it. These are the same at the regional level also.[100] It is

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[98] Article 3reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[99] Sircusa Principles on the Limitation and Derogation of Provisions in the ICCPR 1984 developed by the UN Sub Commission on the Prevention and discrimination of Minorities 1984, Safeguards Guaranteeing the Protection of the Rights of those facing Death Penalty 1984, Principles on the Effective Prevention and Investigation of Extra legal, Arbitrary and Summary Executions 1989.

[100] Convention for the Protection of Human Rights and Fundamental Freedoms 1949 (ECHR), (Article 2 & 15), Protocol 6 to the ECHR, the African Charter on the Rights and Welfare of the Child (Article4), the American Convention on Human Rights 1978, (Article4), Protocol to the American Convention on Human Rights to Abolish Death Penalty 1990.

interesting to note that though Article 2 of the ECHR affirms right to life, the very same provision approves death penalty. Though Protocol 6 of ECHR restricts the use of death penalty, Protocol 13 abolished the same. While the EU Charter of Fundamental Rights under Article 2 assured the right to life under its first clause, it abolished death penalty in its second clause[101]. It is inspired by Article 2(1) of Protocol 6 of ECHR.[102]The fundamental distinction between Protocol 6 and Protocol 13 of ECHR, is that Protocol 6 was applicable during peace time and hence allowed execution for war crimes[103] but Protocol 13 applied in all circumstances.[104] Thus it is found that European level, the abolition of death penalty was in an incremental manner and was not an absolute manner which is evident from Protocol 6.

The European Court of Human Rights has related the legality of death penalty not in relation to the right to life alone but with the right against inhuman treatment and degrading punishment under Article 3 of ECHR. There is a close connection between Article 2 and Article 3 of ECHR.[105] The European Courts have been consistently holding that the ECHR not only guarantees physical integrity but psychological protection of humans since it is part of human dignity. This aspect came out more elaborately in the discussions by the courts onthe imposition of death penalty. The trend of the court seems to be that "be it a death convict he enjoys the right to physical and emotional security to his last breath since he belongs to the family of Homosapiens." In Soering v United Kingdom[106] the Court happened to discuss the phenomenon called "*death row"*[107]wherein the convict has to wait for the execution for a long period under which he would be put to extreme

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[101] Article 2 reads:

"1 Everyone has the right to life

2 No one, shall be condemned to the death penalty, or executed."

[102] Steve Peers et al., *The EU Charter of Fundamental Rights: A Commentary*, Heart Publishing, Oxford (2014), pp. 35-36.

[103] See Article 2 of Protocol 6, ECHR

[104] Available at http://www.echr.coe.int/LibraryDocs/HR%20handbooks/handbook08_en.pdf

[105] Jacobs Francis G, *The European Convention on Human Rights,* Clarendon Press, Oxford, (1975), p. 23.

[106] (1989) 11EHRR 439

[107] See para100-107

physical and psychological trauma which would be against human dignity and thus would fall under Article 3.

The observation made by the European Court of Human Rights in Ocalan v Turkey [108]is worth mentioning wherein the court was concerned with the question of what would be the impact on a convict who has been put to death penalty as a result of unfair trial. The court observed thus:

> "*to impose a death sentence after an unfair trial was to subject that person wrongfully to the fear that he would be executed. The fear and uncertainty as to the future generated by the sentence of death, in circumstances where there existed a possibility that the sentence would be enforced, inevitably gave rise to a significant degree of human anguish. Such anguish cannot be disassociated with the fairness of the proceedings underlying the sentence which, given the human life was at stake, became unlawful under the Convention."*

Both the cases reveal the attitude of the European Human Rights Court for a liberal approach wherein the death penalty is viewed as a cruel and degrading punishment. In the landmark decision of the European Court of Human Rights in Al-Saadoon Mufdhi v the United Kingdom,[109] the court held that death penalty involved a deliberate and premeditated destruction of a human being by the state authorities, causing physical pain and intense psychological suffering as a result of foreknowledge of death, and could be therefore considered as inhuman and degrading and as contrary to Article 3 of the ECHR.[110] The court held that by virtue of law and practice over sixty years after the ECHR had entered into force, the law providing death penalty under Article 2(2) seems to have been virtually amended especially after Protocol 6 in 1983 and Protocol 13 in 2002 came into force.

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[108] (2005) ECHR 282

[109] (2010) ECHR 282

[110] The case relates to the complaint by the applicants, accused of murder of two British soldiers shortly after the invasion of Iraq in 2003that their transfer by the British authorities into Iraqi custody put them at real risk, by executing by hanging. Hence allege violation of Article 2 (2) and Article 3 ECHR.

It is found that the court did not ponder in this case on the question of whether the crime rate in member states have increased or lowered since the protocol. The court was more interested in holding that the legal procedural tangles before the execution actually comes into effect as a source of psychological torture for the convict which is inhuman and degrading for a human being. In this context it is interesting to note that the Indian legal system while making reservations to the provision on death penalty abolition fails to look into the very same aspect i.e., long procedural delays, lack of clear cut criteria as to what are the factors to be taken into consideration while determining "rarest of rare prepositions." It is found that the notion of the sanctity of human life is concerned with the physical and mental integrity of a human being. The psychological element here is protected not only based on an individualised approach but also based on the objective side of human experience i.e., where the society feels that it is cruel, degrading and inhuman to treat a fellow human being who is a death convict to be executed after a long wait for execution. Thus, emotional and psychological protection is an important facet of the concept of dignity. In this context one can find that law can abridge the liberty of an individual only when it does harm to others as found in the conception of the harm principle of John Stuart Mill or when there is an unconsented harm to the individual concerned.[111]

5.2.3 Interpretations regarding Third Party Interest in Human Body

With the advancement of science the question of control of man over his own body and mind has assumed new dimensions. Questions are often raised as to what extent man has control over his body parts. Whether the legal system should permit an unrestricted control over his body parts or there needs a social or legal control to this in public interest came under debate. This had happened especially with regard to blood donation, organ donation or transplantation.

Most of the liberal democracies of today permit organ donation, transplantation etc. This is because such benevolent acts need to be always respected. But this freedom is circumscribed by legal control. What is the need for

[111] *supra* n.30, Chapter 3.

legal control? Does man have no control over his body? This is the same question which triggers in cases of reproductive choice of women. The concern is when such an act is made for financial incentives or in such equivalent terms since this perpetuates exploitation by one against the other. It is a fact that most of the liberal societies of today allow individuals total decision making power over their bodies but that right is circumscribed to the extent this does not interfere with the lives of other people. The right to decide on oneself is self determination. Courts and legislatures have addressed these questions on a property perspective especially in case of organ donation or transplantation. This approach of the American courts can be seen as earlier in cases relating to abolition of slavery.[112] This is often found as a result of incorporation of Lockean conception that every man has a 'property' in his own 'person,' that is, we own ourselves.[113]

As discussed earlier[114] the views of Blackstone and Locke on which the Anglo American Jurisprudence developed are influenced by the Christian conception of the sanctity of life and dominion which god has given power to man to have control off. Based upon this civil law on trespass, assault etc developed. The improvised version of the Biblical connotation of the dominion of property by Locke said that private property as that whatever a man by his labour removes from the state of nature and by mixing his labour with the thing by his labour makes the thing his property. This connotation to private property is used by various courts to answer questions of property in human body.[115] The first instance of this is visible in 1908 in Doodeward v Spence[116]in which the Australian High Court while deciding on the question of right over the bodies of two stillborn Siamese twins which were preserved by the doctor and after his death sold to Doodeward who claimed ownership right over the bodies. Following the Lockean prophecy, the court observed thus:

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[112] See Dred Scott case and other related cases.

[113] John Locke, *Second Treatise on Civil Government,* Chapter V, Section XXVII, available at http://www.constitution.org/jl/2ndtreat.htm (visited on 27-2-2013)

[114] See Chapter 2 relating to the sanctity of law as the basis of civil law.

[115] *supra* Chapters 2&3.

[116] (1908) 6 CLR 406. Observation is from the judgment of Griffith J. Other judges were Barton J and Higgins J.

> *"When a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it."*[117]

In R v Kelly and Rv Lindsay[118] the question was whether human body parts taken from the Royal College of surgeons by the both the appellants were property that was capable of being stolen under the Theft Act 1968. The court held that there was no property in a human body at common law and that in this case there was no property in body parts because they had not been altered by the labour of someone who would become the owner therefore.

With the advancement in science the patent system has found to be giving a practical application of the Lockean conception. After the advancement in science, patent system is largely in practice. Though patenting of discoveries, mental process or information is not legally permissible, a person can obtain patent over a novel useful invention i.e., a thing over which a person applies his effort or skill. There are a number of restrictions to patenting and the most prominent is human beings are not patentable. However, we find that it has come to be accepted that property rights in the form of patents can exist in living things provided it embodies a degree of human effort and skill. In Diamonds v Chakrabarty[119] the United States Supreme Court allowed a patent over a living matter. However in Moore v Regents of University of California[120] the Californian Court though rejected the right to property in the human

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[117] *Id., n.116.*

[118] Anthony-Noel Kelly ,Niel Lindsay, R v (1998) EWCA Crim 1578 .

[119] Diamonds, Commissioner of Patents and Trademarks v Chakrabarty.447U.S 303 (1980) Respondent Chakrabarty, a microbiologist, filed a patent application for a human made bacterium which is capable of breaking down multiple components of crude oil, which was believed to have significant value for the treatment of oil spills. The patent examiner rejected his claim for the bacteria. The US Supreme Court observed that while laws of nature, physical phenomena and abstract ideas are not patentable but this invention is not a naturally occurring manufacture or composition of matter- a product of human ingenuity having a distinct name, character and use, hence patentable.

[120] 51 Cal.3d.120 (1990) John Moore the plaintiff, underwent treatment for hairy cell leukemia at the Medical Centre of the University of California, Los Angeles. After hospitalizing Moore extensive blood, bone marrow aspirate and other bodily substances were withdrawn. Dr David Golde conducted a splenectomy operation on oct20, 1970 and his spleen was removed. Before the operation the doctor formed the intent to obtain portions of Moore's spleen following its removal to be taken to a separate research unit for which he gave written instructions. These

body held that those who had applied effort and skill to Moore's body parts were held to be entitled to the property that resulted from their exertions. Thus, the derivatives from the human body parts were held patentable. This case depicted the conceptual dilemma[121] since the decision denied bodily property to the inhabitant of the body while allowing other people to derive property rights in that body. Infact we find that the courts have feared to answer to the question whether or not we have property rights in the human body.

The US District Court for Southern District of Florida in Greenberg v Miami Children's Hospital Research Institute[122]went a step further ahead and held that the blood, tissues and other body parts supplied by Greenberg were not his property and also went on to hold that the gene responsible for the disease belonged to the scientist who isolated it and the hospital who patented it. Hence it cannot be considered as the property of those in whom it remained. It might be noted that unlike Moore's decision here the petitioner had consented to the research but wanted the research findings freely available for all. The William Catalona et al v Washington University [123] decision goes a bit further than the decision in Moore and Greenberg. The case relates to William C.Catalona who was a prostrate cancer surgeon and researcher formerly employed by Washington University. Over the course of decades he amassed more than 3500tissue samples with the permission of his patients. Thus he developed prostrate specific antigen test and held clinicaltrials to improve testing for prostrate cancer. When he left the

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research activities were not intended to have any relation to Moore's medical care. Neither the doctor nor the hospital informed nor got consent from him for this. In 1979, Golde found out a cell line from Moore's T-lymphocytes and got a patent in 1984.Moore challenged against the respondent's on the ground of tort of conversion, ownership over body, breach of judicial relationship, lack of informed consent etc. The majority held that there exist no ownership interest in excised cells for the plea of conversion to be extended in this case(Panelli j with Lucasj, Eagleson J and KennardJJ)but found that there was breach of judicial duty and lack of informed consent.

[121] The majority opined that this dilemma needs to be resolved by the legislature. Mosk J in his dissent noted that the majority had avoided answering the issue directly. It is found that throughout the judgment the lack of clarity on the issue of whether treating human body parts as property would offend human dignity of the individual from whom the part is taken and patented.

[122] 208 F.Supp.2d.918 (2002)

[123] 79 USLW 3226 On 22 -1-2008 the US Supreme Court denied certiorari to the US District Court of Appeal decision. It was a summary disposition in which Certiorari was denied.

University he asked his patient donors to write to Washington University requesting that their tissue samples be sent to the new place. The Washington University refused to send them and a dispute arose about the patient's right to gain control over the tissue. Holding that the Washington University was currently in possession of the biological materials and had continuously asserted its possession and had ownership interest in it , the court found that not just intellectual property in the body but also tangible physical parts of the body i.e., blood, tissue,DNA, were owned by the University. The reasoning was that the University owns it and stored the same and so has ownership than the patients from whom it is derived.[124]

In Relaxin/ Howard Florey Institute[125] case the European Patent Office was concerned with the question of patenting of DNA encoding human H2-Relaxin, a DNA fragment and amino acid sequence which is not found in human genome but the gene can be extracted from certain human tissue in pregnant women. Stressing that the patenting of this DNA does not confer on their proprietors any rights whatever on the human beings, the Opposition Division found that patenting one gene is different from patenting human life and that if clones of all genes in the human body were combined , it would not be possible for a scientist to reconstitute human life. This was upheld in appeal. Thus, again it allowed the ownership of parts of another person's body or derivatives while preventing ownership of one's own body appears to be a morally wrong preposition. In Hecht v Superior Court (Kane)[126]the court conceded that sperm is a unique type of property over which probate court had jurisdiction. The case is that William Kane had stored specimens of his sperm with a sperm bank. When he committed suicide, he left a will that bequeathed the sperm to his girlfriend. The court observed thus:

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[124] Discussion of the case can be found in the decision of the Court of Appeals Eighth circuit decision in Washington University v William J Catalona, available at http://media.ca8.uscourts.gov/ opndir/07/06/062286P.pdf

[125] EPO – T 0272/95, patentee: Howard Florey Institute of Experimental Physiology and Medicine Opponent: Aglietta, Amendola et al by Technical Board of Appeal.

[126] 20 Cal Rptr 2d 275 (1993)

> *"...at the time of his death, decedent had an interest , in the nature of ownership, to the extent that he had decision- making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute 'property' within the Probate Code Section 62..."*[127]

It is found that the question of personal autonomy here is linked with the concept of property. It is alleged that the conception of property in body had led to commercialisation and commodification of human body.[128] It is found from the discourse on case laws that the conception of property by this means perpetuates and justifies commercialisation of human genes. It is found that such a conception is totally concerned about private property and not public domain. There are views that such conception of property in human body vitiates the concept of dignity which incorporates within itself both the subjective and objective experiences of human life and creates democratic deficit in social relationships.[129]The Cartesian view that mind and body are two facets which constitute the uniqueness to human being has also gained acceptance. The advancement of science and consequent legal entitlements like patents necessitates a careful examination of questions on human dignity and scientific research.

Conclusion

Human Rights Instruments have placed the concept of the sanctity of human life as the foundational concept of human rights. For the practical application of the concept a pragmatic consensus was arrived at in the drafting of UDHR and sister covenants which proposed to include a neutral term which does not have ideological and religious undertones. Thus it can be summed up that:

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[127] The Court differed from the decision in Moore and even asserted that the decision in Moore could not satisfactorily answer the question what is the nature of property derived from human body. The case also depicted the legality of posthumous conception of children through the artificial reproductive techniques.

[128] Available at https://www.researchgate.net/profile/Bryn_Williams-Jones2/publication/253008254_Concepts_of_Personhood_and_the_Commodification_of_the_Body/links/0deec52738dce3800f000000.pdf (visited on 28-5-2015).

[129] Carole Pateman, "Self-Ownership and property in the Person: Democratization and a Tale of Two Concepts", 10 *The Journal of Political Philosophy* 34 (2002).

1) The term *human dignity* replaced the term *the sanctity of human life* in International Human Rights Instruments which was due to a pragmatic consensus wilfully arrived at.
2) The Concept of human dignity has been left undefined and open ended by international instruments for creative interpretations which would uphold the worth of humanity with the passage of time and changing circumstances.
3) The term 'dignity' encompasses two dimensions of human life such as assertion of individual self and assertion of individual as a part of humanity. Thus human rights represent both individual and collective interest of humanity.
4) Human dignity is the foundational concept of human rights law and instruments. It is the foundation on which the entire structure of human rights rests. Thus it is the basis of several rights found in international documents. It is both power conferring and power limiting. Regional arrangements also stress on inviolability of human dignity.
5) Judicial Interpretations on human dignity revealed that the lack of definition of this concept had enabled the courts to decide based on prevailing socio economic conditions. Judicial discussions on the concept had lead to coining of new principles and ideals for maximum realisation and recognition of humanity. With the passage of time , the advancement in science and innovation had made the task of interpretation difficult and opened up new questions on human life and body.

Chapter 6
Certain Advances in Human Genetic Research and its Implications

Genomic sciences have widened the vistas of human biological research. Application of this science in human beings has contributed to the development of biomedicine and has widened our understanding on diseases. Thus this era is often termed as the genomic era.[1] Molecular genetics is useful in medicine since it helps in knowing the functioning of cells and thereby provides insight into the reasons behind diseases, tools to be applied for diagnosis, and cure and preventive steps to be taken to ward off the occurrence of diseases. Human genomic sciences not only contribute to the development of biomedicine but also enable one to know about the evolutionary process as well as the details of our progeny. However, of late, certain advances in this field have led to suspicion and apprehension in the minds of the common man. Hence there is a need for a detailed analysis in this direction.

6.1 Human Genetic Research as the Basis for the Advancement of Bio-Medical Sciences

Human Genetic Research involves the study of inherited human traits.[2] Much of the research of this nature is principally concerned with genetic or DNA mutations of humans that can cause specific diseases. Genetics, which involves the study of genes through their variations, has brought a revolutionary change in the biomedical field and health care systems. Insights about the structure function and control of genes and how they influence an individual's health has produced an expansive knowledge of the causes of diseases, the sort of therapy to be applied and how the disease can be prevented.

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1 Francis S. Collins et al., "A Vision for the Future of Genomics Research", 422 *Natur*e 835 (2003), available at http://www.nature.com/nature/journal/v422/n6934/full/nature01626.html visited on 18-2-2015).

2 Available at http://www.hhs.gov/ohrp/archive/irb/irb_chapter5ii.htm visited 6-10-2012).

However, it should be understood that human genetics need not be essentially related with medical aspects but can be used for purposes other than medical in nature.[3] Many of the techniques of modern biotechnology utilise the cellular functions of molecules of deoxyribonucleic acid (DNA). Biotechnology or the exploitation of biological processes for industrial and other purposes is not a new phenomenon but recent developments in human molecular biology have led to the burgeoning of new biotech industries.[4]

Thus, as observed by Jay Katz, "When science takes man as its subject, tensions arise between two basic values, freedom of scientific inquiry and protection of the individual's inviolability. In this context, the term human being is understood in two ways:(a) narrowly as the whole organism, (b) broadly to encompass human biological material."[5]

Thus when human beings become the subject of research, questions of the sanctity of life or dignity takes a central place based on the risks involved. This leads to the classification of research based on the risk involved as:

1) *Clinical Research:* done at the bed side. This implies that there is a direct contact between the research subject and the investigator.
2) *Epidemiological Research* which is based on the medical data derived or collected for purposes other than the research itself, and
3) *Research on Human Biological Material.*[6]

It is found that in all these types of research problems of privacy or confidentiality, informed consent, protection of data and the information, patenting etc have been a matter of risk which affects human dignity, autonomy

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3 Crime investigation and detection is one of the classic examples. It helps in forensic investigation, autopsies and helps in knowing the causes of the death.

4 Alexandra Mac Bean, "The Patentability of Human Beings*:* The Effect of a Proposed Exclusion in the Patents Act 1953", 33 *Victoria University of Wellington Law Review* 379 (2002).

5 *Ibid.*

6 Bartha Maria Knoppers & Dominique Sprumont, "Human Subjects Research, Ethics and International Codes on Genetic Research," in Thomas H. Murray, Maxwell J. Mehlman (Eds.), *Encyclopedia of Ethical, Legal and Policy Issues* in *Biotechnology,* vol II, John Wiley & Sons, USA (2000), p. 566.

and integrity. It is in the third category of research that the application of molecular genetics is applied to a greater degree and different techniques of research involving human genes happen. There are multiple and varied use of the biological material[7] collected such as for diagnostic and therapeutic interventions in which tissue samples, blood, urine, sputum, saliva, hair follicle, bone marrow etc are taken. They may be taken to diagnose primary diseases, predict prognosis, direct treatment, monitor remission or progression, and even to screen at risk by identifying abnormalities in cells or the DNA of the cells. Biopsies taken after therapeutic surgical intervention are also used.

In clinical research, a biological sample of this nature is used for evidence of inherited traits or diseases by examining the DNA or the number, characteristics or arrangements of chromosomes.[8] Basic research principally aims to answer more general questions about specific cellular and molecular changes in the development of the disease thereby helping the clinical researchers to find rational and systematic ways to approach the treatment of the disease.

The DNA in the biological tissue or sample gives information about human origin and anthropology which gives insights as to the cause and progress of the disease. Thus genetic technology's importance rests with the expectation that new therapies will be developed as our understanding of the genetic contribution to disease continues to expand. Genetic technology is thus expected to reshape the existing clinical practices, thereby enabling us to manage and control our genetic constraints.[9] It has already provided benefits to mankind in the form of vaccines, diagnostics and other knowledge for management of health and diseases.[10] With the availability of biotechnological tools and techniques new vistas of molecular medicine make available new cures.

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7 Human biological materials have been categorized into unidentified specimens, identified specimens, unidentified samples, unlinked samples, coded samples and identified samples. *Ethical Policies on the Human Genome, Genetic Research and Services*, January 2002, Department of Biotechnology, Ministry of Science and Technology, India.

8 *First Report of the Irish Council of Bioethics,* available at http://health.gov.ie/wp-content/uploads/2014/07/Human_Biological_Material1.pdf (visited on 1-10-2012).

9 Benjamin Goodman, "Genetics and the Law", 26 *U.N.S.W. Law Journal* 741 (2003).

10 *Ibid.*

Sometimes it involves the application of foreign material to individuals and the analysis of resultant effects. Hence greater extent of risk is involved since it has the potential of creating adverse impact (physical and mental) not only the research participant but others which might include his family and future descendants or the society or the group to which he is related. Thus ethical rules are mandatory in the area with the concept of sanctity of human life as its basis.

Human genetic research involves risk and at the same time it promises benefits to human kind. The risk involved may produce harm or benefit. The techniques used in the research has both these aspects, hence there is a need for an understanding of the techniques involved, the risk involved in each, the benefits involved and the harm which may or may not accrue. The task of law is to balance the relative weightage between benefit and harm and choose the technique which furthers the interest of the research participants and the society alike.

Gene Technology as commonly understood covers a range of activities concerned with the understanding of the expression of genes by, taking advantage of natural genetic variation, modifying genes and transferring genes to the new host. Thus it includes not only the discovery of genes or genomics but also how it functions and interacts. Genes exist in all living things and they are coded instruction that determine what an organism will look like and how it will function.

Each cell contains DNA which is the blue print of that organism. DNA and RNA are the two basic kinds of molecules that carry the genetic code, a series of chemical "*letters"* that, in sequences called genes, and provide cells with instructions for building proteins.[11]

Proteins are a major structural component of cells and are major players in the assembly and maintenance of cells, tissues, organs etc.[12]An alteration in the genetic material by intervention in genetic processes to produce new traits in organisms is a practice in biotechnology called genetic engineering which is used not only in plants and animals but also in human constitution.

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[11] John M Golden, "Biotechnology, Technology Policy, and Patentability: Natural Products and Invention in the American System*"*, 50 *Emory L.J* 114 (2001).

[12] Mark S. Ellinger, "DNA Diagnostic Technology: Probing the Problem of Causation in Toxic Torts", 3 *Harv. J. Law Technol.*35 (1990).

Since 1970's biologists have been bringing about radical changes by employing recombinant DNA techniques. That is done by isolating and combining the genetic materials of different organisms, frequently across the boundaries of natural biological species.[13] This technology has been useful in the diagnosis and treatment of hereditary diseases.

Moreover, this technology makes possible powerful diagnostic tools such as genetic tests or DNA tests which allow doctors to scan patients for variations in sequences of bases that prefigure the onset of disease. This involves the screening of the genetic data or information within the constitution of the human being. The Genetic information or data which is available is of immense utility in predictive and diagnostic and therapeutic medicine since it not only reveals the genetic predisposition of the individual concerned but also of his close relatives, offspring etc. Hence this technology is also known by the term sibling technology. Thus, manipulation of genes done through genetic technology, affects not only the individual concerned but his family, siblings and offspring. Questions with regard to the risk involved in the protection of the data which affects not only the individual but others related to him has raised wider concerns with regard to the conflict of different values involved in the application of this technology. Thus, the concept of respect to human dignity comes in.

There are a variety of technical applications of applied genetics in human medicine such as genetic testing which may involve not only individuals but human embryos for early diagnosis of genetic defects, somatic cell gene therapy which aims at curing individuals of genetic defects by transferring normal genes to their somatic cells, germ line intervention involving genetic transformation of human eggs, sperm or embryo cells through transplanting alien genes in their germline cells so that their transformed genetic endowment will be passed on to their offspring; and cloning which includes production of genetically identified copies of individuals or parts by embryo splitting or genome transfer.[14]

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[13] S. K. Ghosh (Ed.), *Encyclopedic Dictionary of Bioethics,* vol II, Global Vision Publishing House, India (2003), p.399.

[14] Peter Koller, "Human Genome Technology from the View point of Efficiency and Justice," *in* Casino Marco Mazzoni (Ed.), *Ethics and Law in Biological Research*, Martinus Nijhoff Publishers and Kluwer Law International (2002), p.15.

Apart from this, the Monoclonal antibody technology is another technique which helps the production of pure antibodies which do not enable therapeutically to protect against illness but help to diagnose[15]a wide variety of diseases. It had also provided towards the growth of biotech industries especially the pharmaceuticals.[16] Due to the application of genetic engineering a new technology called birth technology has emerged which embraces not only methods for scientifically assisting human conception such as artificial insemination, in vitro fertilization, embryo transfer etc. but also the diagnostic and testing techniques enabling physicians to determine, even prior to conception, the genetic, environmental or other risks of establishing a pregnancy, and following conception, the well-being of the embryo, or later the foetus, at every stage of its prenatal life.[17] Though the application of biotechnology has been hailed as a great hope to the millions of childless couples, grave concerns have also been raised.[18] Hence an appraisal of the newer technologies and its implications if any, require analysis which may throw light on our primary concern of whether genetic research impinges the sanctity of human life.

6.2 Certain Advances in Genetic Research and its Impact on Human Dignity

Different types of techniques are applied in genetic research involving humans. Some of the common are prenatal screening, carrier screening, pharmacogenetics etc. But the practice of certain types of research had laid to despair and apprehensions that it would dehumanise human life. Hence there is a need to look into these areas of research.

6.2.1 Genetic Mapping of the Human Genome

The Human Genome is understood as a complete set of human genetic information stored as DNA sequences within 23 chromosomes pairs of the cell

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[15] Available at http://www.accessexcellence.org/RC/AB/IE/Monoclonal_Antibody.php (visited on 8-10-2012).

[16] Janice M. Reichert et al., "Monoclonal Antibody Successes in the Clinic", 23 *Nature Biotechnology* 1073 (2005).

[17] Bartha Maria Knoppers, "Modern Birth Technology and Human Rights", 33 The American Journal of Comparative Law 1 (1985).

[18] John A Robertson, "Pre Commitment Strategies for Disposition of Frozen Embryos", 50 *Emory L. .J* 989 (2001).

nucleus and in a small DNA molecule.[19] Since genes hold all our heredity information and it provides the genetic code that allows our body to grow, develop and function, they play a great role in our risk to develop certain disorders.

A detail genetic map helps to locate the risk genes for a variety of genetic diseases. It thereby allows investigating the root cause of the disease so as to avoid the environmental conditions that trigger the disease, formulate customized drugs and techniques for gene therapy.[20] It enables genetic screening and timely application of the therapy and the drugs necessary for it. Thus it helps development of predictive medicine and preventive medicine. Moreover, it helps to trace the disease by prenatal genetic diagnostics and thereby helps to rectify birth defects.

It increases the reproductive choice of the women thereby avoiding birth of children with genetic defects. Improved diagnostic techniques such as presymptomatic testing, carrier screening and prenatal screening can provide information that poses significant ethical problems for individuals, employers and insurance companies.[21]

Genetic mapping leads to manipulation which at first has been justified as for therapeutic purpose but later shifted to self improvement which raises ethical concerns. The Human Genome Project (HGP) is one such international project undertaken with the funding of the United States with the objective to understand the genetic makeup of the human species. In the Report of the Office of the Health and Environmental Research of the US administration on Human Genome Initiative 1987, it is stated that human chromosomes contain unknown number of genes ranging from 20,000 to 200,000 in number.[22] The attempt of the project is to study and map 20,000-25000 genes since it can make dramatic changes in

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19 Available at http://en.wikipedia.org/wiki/Human_genome (visited on 25-5-2013).

20 Available at http://geneticmap.net/benefits.php (visited on 25-5-2013).

21 Thomas H Murray& Efrat Livny, "The Human Genome Project: Ethical and Social Implications", 83 (1) *Bull. Med. Libr. Assc.* 15 (1995).

22 Available at www.ornl.gov/sci/techresources/Human-Genome/project/herac2.shtml#report (visited on 9-10-2012).

medical and biotechnological field.[23] The project initially began in 1986 and was declared completed in April 2003.The object of the project was to understand and study and eventually treat more than 4000 genetic diseases that afflict mankind and to study diseases in which genetic predisposition is important.[24]However, further analysis and details continue to occur even thereafter.

The project claims that donor identity was protected and moreover the genetic information is also protected. The major criticism is that the technology used by the HGP would be transferred to private players. Thus, though the project was for fixing scientific standards, the commercial goals it mooted cannot be overlooked since it was primarily for raising the US economy.

A major controversy erupted when the private players started patenting partial gene sequencing in order to protect their investments. This led to a huge outcry against how big corporate could own property rights over the human body. Moreover, patenting by US companies of the sequences of the Human genome project was considered as unlawful by several countries since HGP is an international collaboration.[25] However the mapping of genes has raised both social and ethical implications since it is apprehended that it may perpetuate discrimination. It is alleged that the genomic library created through mapping may provide genetic information to the employers prior to employing them which may lead to discriminating employees who may be susceptible to certain genetic disorders and thereby labelling as unsuitable to certain types of works.

The confidentiality of the data secured, the protection of the interest of the donors, and questions of privacy are again a matter of concern. It is apprehended that this may have an impact on the health insurance companies who may be reluctant to give coverage to those having genetic disorders. This prompted the US Congress to pass a legislation banning discrimination based on genetic knowledge especially in the context of the data derived from HGP. This

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[23] Available at http://www.osti.gov/accomplishments/documents/fullText/ACC0486.pdf (visited on 9-10-2012).

[24] Michael Kirby, "Human Genome Project-Legal Issues", 42 (1*) J.I.LI.* 20 (2000).

[25] Melissa T. Sturges, "Who Should Hold Property Rights to the Human Genome? An Application of the Common Heritage of Humankind*"*, 13 *Am U.Int'l. L. Rev.* 222 (1997).

enactment came to be known as Genetic Information and Non Discrimination Act 2008. It should be remembered that this is just with regard to HGP but this can be extended to all sorts of genetic mapping.

The question of potential discrimination due to genetic mapping came under public scrutiny when the Human Genome Diversity Project (HGDP) ,an US funded project was mooted in 1991. The project aimed to collect biological materials from different sets of population across the world and thereby built up a representative database which gives insight to the evolution and migration of human population, and to study the variations in genes which confer resistance and vulnerability to diseases so as to develop medicine.

Different observers mooted that this project would lead to 'scientific racism.'[26] It was feared that indigenous population would be exploited if this project is allowed.[27]It is said that it would lead to bio piracy and the ownership of the knowledge and patenting of biological materials of the indigenous population. Moreover, it was alleged that it leads to patenting of the cell lines of the indigenous population leading to their commercial exploitation.[28] In 1995, the International Declaration of the Indigenous Peoples of the Western Hemisphere opposed patenting of genetic material from indigenous persons[29] and communities by any scientific project or individual researcher and declared that the Human Genome Diversity Project in particular as violating the concept of the sanctity of life. The wording found in the Declaration sounds an affirmation of the concept of the sanctity of life in its opening remarks:

> "We *are the original peoples of the Western hemisphere of the continents of North, Central and South America. Our Principles are based upon our profound belief in the sacredness of all Creations, both animate*

[26] Lisa Gannet, "Racism and Human Genome Diversity Research: The Ethical Limits of "Population Thinking", 68(3) Philosophy of Science (2001). Supplement Proceedings of the Biennial of the Philosophy of Science Association. Part I Contributed Papers 479.

[27] L. Luca Cavalli–Sforza, "The Human Genome Diversity Project: Past, Present, Future", *6* (16) *Nature Reviews- Genetics* 333 (2006).

[28] Available at www.hgalert.org/topics/personalInfo/hgdp.htm (visited on 9-10-2012).

[29] "We oppose the patenting of all natural genetic materials. We hold that life cannot be bought, owned, sold, discovered or patented, even in its smallest form."

and inanimate. We live in reciprocal relationship with all life in this divine and natural order."[30]

The Convention reveals the commitment of the indigenous people to the concept of the sacredness of life and how they recognise the intrinsic value of life. This view is more or less similar to the eastern conception of human life, especially that of Hinduism.

It is found that their ardent emphasis on the sanctity of life was not based on religion but on their faith in the natural order and natural process. Hence to say that human life is sacred we don't need to assert the same based on divinity (nor refute it absolutely) but by our ardent faith in nature. This is sought to be proved by the wordings in the Convention.

It is worthwhile to mention, the relevance of the1993 Mataatua Declaration[31]which called for the halting of the genetic research till its implications are studied and understood by the indigenous people and can be regulated based on their interest. They felt until then that they would be exploited by the researchers with commercial motives. The patenting of the cell line of Hagahai tribe of Papua New Guinea proved this true and hence the commercialisation of human genes through these types of projects has raised questions about the sanctity or dignity of human life. This has raised international concerns.[32]Such types of research have been considered by the indigenous communities as a threat to their existence.[33] Thus, these types of projects are looked upon as a threat[34] rather than a cause to give a better health and life to all.

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30 Available at http://www.tebtebba.org/index.php/all-resources/category/34-indigenous-peoples-declaration-statements-and-interventions?download=173:declaration-of-indigenous-peoples-of-the-western-hemisphere-regarding-the-hgdp (visited on 9-10-2012).

31 Kimberly Tallbear, "The Tribal Specific Approach to Genetic Research and Technology" presented at the R&D Management Conference, University of Victoria, Wellington, New Zealand, 9 February 2001,p. 4.

32 Ukupseni Declaration, Kuna Yala on Human Genome Diversity Project 1997, the North American Indigenous Peoples Summit on Biological Diversity and Biological Ethics 1997; Beijing Declaration of indigenous Women also stresses on this aspect.

33 Jonathan Mark, "Human Genome Diversity Project: Impact on Indigenous Communities," in *Encyclopedia of Human Genome,* Macmillan Publishers Ltd., London (2004), p. 4.

34 The North American Graves Protection and Repatriation Act 1990.

However countries where there is absence of a regulatory framework with regard to genetic research are bound to face this social problem due to genetic mapping. Genetic therapy is bound to create genetic manipulations which can lead to '*designer babies.'* Moreover, it can bring about a negative impact on individual and familial relationships. The personal, psychological and familial consequence of predictive genetic information raises larger concerns. It can have great impact on a person's self perception and happiness.[35]

Genetic mapping is a way towards better health and medicine. Hence it has got a significant impact on human life. The dearth of a regulatory framework to control the ethical, social and moral implications raised creates apprehension in our minds. International attention to this aspect can be first seen in the Declaration of Inuyama on Human Genome Mapping, Genetic Screening and Gene therapy 1990, adopted in the XXIV Round Table Conference of the Council for International Organisations of Medical Sciences.[36] While appreciating the positive impact on the advancement in health and improvement in human conditions due to genomic mapping, the Declaration cautioned that research in this area should be based on sound ethical standards and that the knowledge gained should be used appropriately, especially in genetic screening and therapy.

Thereafter, UNESCO took initiatives to set up the International Bioethics Committee which drafted the Universal Declaration on Human Genome and Human Rights in 1997.This declaration can be said to put to rest the apprehension as to potential discrimination as a result of genetic mapping. Article 2[37] and Article 6[38]explicitly prevent discrimination based on genetic characteristics. The

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[35] Henry T. Greely, "Ethical and Social Issues in Human Genome Research", 27*Annual Review* 479 (1998).

[36] Council for International Organizations of Medical Sciences(CIOMS),The Declaration of Inuyama on Human Genome Mapping, Genetic Screening and Gene Therapy (1990), reprinted in *Source Book in Bioethics: A Documentary History*, Albert R. Jonsen et al. (Eds.), (1998), available at https://www1.umn.edu/humanrts/instree/inuyama.html (visited on 10-10-2012).

[37] Article 2 reads: a. "Everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics. b. That dignity makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity."

[38] Article 6 reads: "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."

provision makes it clear that respect for human life springs not from the genetic characteristics of man but from its uniqueness.

The Universal Declaration on Bioethics and Human Rights adopted in 2005 also set out ethical standards which prohibited discrimination based on genetic makeup.[39] The Declaration, as in the1997 Declaration on Human Genome and Human Rights, stated that there are benefits and harm as to the conduct of this type of research. Hence all efforts are needed to maximise the benefits and reduce the harm.[40] States are required to follow these international guidelines for effectively creating a regulatory framework.

6.2.2 Recombinant DNA Technology and its Application in Human Subject Research

Genetic engineering or genetic manipulation involves numerous techniques and the most common technique used for it is the recombinant DNA technology which is applied not only in medicine but industry, agriculture and various other fields. This technology involves joining together of DNA molecules from two different species and inserting them into a host organism to produce new genetic combinations.[41] The application of this technology seeks to achieve improved resistance to disease, prevents genetic diseases, improved drugs, treatment for pre-existing conditions etc.[42]

If one looks into the background of the development of this technology and its application in research, it can be found that once this research was primarily initiated by public sector institutions and universities. But now it has shifted to private sector, especially to huge companies either investing in public universities

[39] Article 11 reads: "No individual or group should be discriminated against or stigmatized on any grounds in violation of human dignity, human rights and fundamental freedoms."

[40] Article 4.

[41] Available at www.britannica.com/EBchecked/topic/493667/recombinant-DNA-technology (visited on 11-10-2012).

[42] Available at www.rpi.edu/dept/chem-eng/Biotech-Environ/Projects00/rdna/rdnaimpact.html (visited on 11-10-2012).

to carry out research for them or the private players themselves investing in research and development with commercial motives due to its great potential.[43]

It contributes not only to the diagnosis of disease but also provides treatment for the disease through gene therapy by replacing a mutated or faulty gene with a healthy one.[44] However, even before the therapy is decided the first stage in the application of this technology is genetic testing. Detecting whether an individual has the capacity to develop a specific disease during his life, and being able to link the disease to the specific chromosome and ultimately the gene responsible, are done by this testing.[45] Thus this testing is done by cutting a piece of DNA with restriction enzymes and inserting them into a plasmid and finally analysing the gene.

Gene therapy[46]is applied to two types of cells namely somatic cells and germ line cells.[47] Gene therapy using germ line cells results in permanent changes to these genes which are passed down to subsequent generations. If done early in embryologic development, through processes such as pre implantation diagnosis and in vitro fertilization, the gene transfer could also occur in all the cells of the embryo which is developing. This therapy therefore offers permanent therapeutic effect for those who inherit the target gene.[48]However, the application of this therapy is often viewed with circumspection because it involves a larger risk since the genetic change propagated by this therapy may be harmful with the potential

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43 Susan Wright, "Recombinant DNA Technology and Its Social Transformation,1972-1982", 2 *Osiris* 303(1986).

44 Available at http://www.preservearticles.com/2011120818251/some-of-the-applications-of-recombinant-dna-technology-are-as-follows.html (visited on 11-10-2012).

45 Emile R Bergeson, "The Ethics of Gene Therapy", (1997), available at http://www.ndsu.edu/pubweb/~mcclean/plsc431/students/bergeson.htm (visited on 11-19-2012).

46 There are three important steps in doing this: firstly partial removal of the patient's cells, secondly introduction of normal, functional copies of the gene via vectors to replace the defective cells in the patient and finally the reintroduction of the modified cells into the patient once the genes have been fixed in their vectors.

47 Available at http://www.medindia.net/articles/genetherapy.htm (visited on 29-11-2012).

48 Available at http://www.genetherapynet.com/types-of-gene-therapy.html (visited on 29-11-2012).

for unforeseen negative effects on future generations.[49] Moreover, such a change from '*nature'* 'to '*nurture*' is viewed as "*playing god."*[50]

Somatic gene therapy [51]is much in vogue since it is characterised as safer and it only targets the defective cells of the patient and they are non reproductive cells.[52] Hence they are not transferred to future generations. Its therapeutic effect affects only the patient concerned[53] but however often it is accused that the effect of such a therapy is short lived. The most common concern of this therapy is that despite elaborate "built in safety measures," there is a finite risk that the vectors could recombine with undetected viruses or endogenous DNA sequences in the cell and so become infectious. This risk of *'viral escape'* as well as other potential risks questions the capability of this therapy.[54]

Respect for human life is the central epitome of science. It is often accused that changing the genetic material of the human organism is deprivation of the inviolability of human life. The value of the science depends on how far it contributes to human life and happiness, not only of the individual concerned but the entire humanity of which he is a part. It should be remembered that all treatments including surgery involve an interference with life which has either naturally occurred, or divinely ordained or scientifically evolved. However the value of any therapy depends on its impact on the total humanity concerned based on the cure it promises and the gravity of the risk involved in its application.

The terminology *'Playing god'* through application of this technology is usually applied to connote that man is entering into the domain exclusively

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[49] Barry R. Furrow, "Governing Science: Public Risks and Private Remedies", 131*University of Pennsylvania Law Review* 1407 (1983).

[50] Sonia Y. Hunt, "Controversies in Treatment Approaches: Gene Therapy, IVF, Stem Cells and Pharmacogenomics", 1 (1) *Nature Education* 222 (2008).

[51] Somatic gene therapy is done in two ways: ex vivo (exterior) and in vivo (interior). In ex vivo mode cells are modified outside the body and then transplanted back in again whereas in the in vivo mode genes are changed in cells still in the body.

[52] Inder M. Verma & Nikunj Somia*,"*Gene Therapy-Promises, Problems and Prospect*s",* 389 *Nature* 239 (1997).

[53] John H. Fletcher, "Moral Problems and Ethical Issues in Prospective Gene Therapy", 69, *Virginia Law Review* 515 (1983).

[54] Sherman Elias & George J. Annas, "Somatic and Germline Gene Therapy". Available at https://www.franklincollege.edu/science_courses/bioethics/somatic%20and%20germline%20gene%20therapy.pdf (visited on 29-11-2012).

undertaken by divinity. Western philosophers used this term based on the Christian assumption of the‘ *image of god'* which stresses the role of god in creating man.[55] However this type of reasoning is found unsuitable since if it's accepted, the application of medicine on man itself becomes questionable. Medical science or genetic science exists for man which is in itself the product of human creation. Hence any alteration in the physical constitution of man cannot by itself be detrimental to the interest of humanity. But those technologies which might offer a cure but may have far reaching consequences in its application both on the patient and his family or a given set of population should be applied with care and caution since this may offend human dignity.

Concerns have been raised as to the application of germ line therapy since it would ultimately lead to genetic enhancement of characteristics such as physical and mental abilities, thus a new form of eugenics.[56] Even if this therapy is limited for therapeutic purpose yet this therapy is found to be unjustifiable for all types of genetic disease. Moreover the frequency of the disease gene in a given population would be an important factor in determining the application of this therapy. The larger area of unrest in the application of this therapy is that we might be able to design the genetic makeup of our offspring i.e., designer babies.[57] This may have moral, social and legal implications.[58] The lack of consent of future generations to alterations in genetic inheritance and the extent of parental autonomy in determining the genetic makeup of their offspring are one among its implications.[59]

Ecological argument put forth against this therapy is that human gene pool, a product of thousands and millions of years of carefully balanced evolution will

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[55] Available at https://www.faraday.st-edmunds.cam.ac.uk/CIS/st-edmunds/jones/pdf/jones_lecture.pdf (visited on 30-11-2012).

[56] Mark C. Johnson, "Germline Gene Therapy: Hubris, Playing God or a Future Panacea?", 73 *B.I.O.S.* 16 (2002).

[57] Reinhard Renneberg, *Biotechnology for Beginners,* Arnold J. Denmain (Ed.), Academic Press, (2008), p.287.

[58] E. Marden & D. Nelkin, "Displaced Agendas: Current Regulatory Strategies for Germline Gene Therapy," 45 Mc *Gill Law J.* 463 (2000).

[59] Morris Fiddler & Eugene Pergament, "Germline Gene Therapy: Its Time is Near," 2 (2) *Molecular Human Reproduction* 76 (1996).

be disturbed and weakened by the application of this therapy with unforeseen consequences.[60] However, some writers express the view that the therapeutic option of this therapy need not be overlooked while raising concerns of ethics.[61] It is found that the therapy is found to create issues which affect certain primary concerns on how far it is ethical to change human traits and questions on how far parents can be given control over their children's lives and on exacerbation of discrimination and social inequality.[62]

The sanctity of human life postulates respect for human life and is antithetical to discrimination. It embodies both subjective and objective experiences of human life. The authenticity and the safety of the application of the germ line therapy have been questioned by the medical and scientific world equally. Scientists themselves while doing their medical research concede that the integrity of genetic information depends on the fidelity of DNA replication and on the efficiency of several different DNA repair processes.[63] Since the application of germ line therapy cannot be said as a total and safe panacea to genetic diseases, the nature of unforeseen risk is often understood as wide and of far reaching consequences.

Thus it is found that not only potential clinical concerns (such as by this process functional gene is disrupted or a proto-oncogene is activated by the newly inserted gene or regulatory signals of non functional gene affecting the new exogenous gene)but social dangers persist by the application of this therapy. The reason for condemning this seems to be that though the term *'playing god'* is used the underlying concern is basically that of crossing a symbolic barrier beyond which medicine and mankind become involved not in treating the disease but in recreating ourselves. Such a step may involve adding an extra gene to enhance a specific characteristic, e.g. an attempt to make one's child tall. Selectively altering

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[60] Torsten O. Neilson, "Human Germline Gene Therapy- Crossroads: Where Medicine and Humanities Meet," *3 M.J.M.* 127 (1997).

[61] W. French Anderson, "Human Gene Therapy: Scientific and Ethical Considerations," 10 *The Journal of Medicine and Philosophy* 290 (1985).

[62] David B. Resnik, "Bioethics of Gene Therapy*"44444444* (2012), available at http://www.els.net/WileyCDA/ElsArticle/refId-a0003480.html (visited 5-12-2012).

[63] Anju Bansal et al., "Implication of DNA Repair Genes in Prostate Tumourigenesis in Indian Males", 136 *Indian Journal of Medical Research* 623 (2012).

a characteristic might endanger the overall metabolic balance of the individual cells or the body as a whole.[64]Moreover, such alterations, if permitted, may lead to social discrimination in future.

This therapy has the capacity to make changes to the entire gene pool of a family. It evokes a controversy as to the right of future generations to be free of genetic alterations made without their consent. Another haunting question is can a presumed consent of future generation to the application of this therapy has any legal basis. The answer inevitably is negative. In addition to this the Germ line therapy raises the issue whether the genome itself has an intrinsic right to diversity which has hardly been probed.[65] Thus it is found that it is the "*enhancement purpose*"[66] which the germ line therapy serves is the primary concern of law makers. This had prompted the international community to feel that it offends human dignity.

At the international level, the UNESCO Universal Declaration on the Human Genome and Human Rights, 1997 provides that germ line interventions could be contrary to human dignity.[67] Similarly the European Convention on Human Rights and Biomedicine 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."[68]

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[65] Maha F. Munayyer, "Genetic Testing and Germ–Line Manipulation: Constructing a New Language for International Human Rights", 12 *American University International Law Review* 698 (1997).

[66] Roberto Andorno, "Biomedicine and International Human Rights Law: in Search of a Global Consensus", 80 (12) *Bulletin of the World Health Organization* 961 (2002).

[67] Article 24 reads: "The International Bioethics Committee of UNESCO should contribute to the dissemination of the principles set out in this Declaration and to the further examination of issues raised by their applications and by the evolution of the technologies in question. It should organize appropriate consultations with parties concerned, such as vulnerable groups. It should make recommendations, in accordance with UNESCO's statutory procedures, addressed to the General Conference and give advice concerning the follow – up of this Declaration, in particular regarding the identification of practices that could be contrary to human dignity, such as germ-line interventions."

[68] Article 13 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine also known as Convention on Human Rights and Biomedicine, 1997 Oviedo.

At the national level, most of the countries, though to certain extent accept the therapeutic promise which the therapy offers it bans the non therapeutic use of the therapy. However countries like Australia,[69]Canada,[70]Germany,[71] Israel,[72]and Netherlands[73]had completely banned the application of this therapy. As for India, there is no specific law currently banning germ line therapy. However it is found that certain regulations[74] which relate to clinical trials are made applicable in relation to germ line therapy.[75] Both the national and international law view the application of the therapy as offending human dignity. It affects not only the concerned research subject but all those related to him i.e., the family to which he belongs to or his offspring. Moreover, the authenticity of the technology is itself viewed with suspicion. The sanctity of life embodies within itself the concept of respect for the life of fellowmen and therefore, it negates discrimination. Since this technology if applied, would deny privacy and perpetuate social discrimination hence it negates dignity. The enhancement purpose this therapy offers is viewed with circumspection and this is so, with regard to human cloning.

6.2.3 Human Cloning

Cloning in biotechnology usually refers to processes used to produce genetically identical copies of biological entity.[76]The copied material has the same

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69 Section 18 and Section 22 (4) of the Prohibition of Human Cloning Act 2002 bans the use of this therapy.

70 Act Respecting Assisted Human Reproduction and Related Research 2004.

71 Embryo Protection Act 1990, Section5 (1).

72 Prohibition of Genetic Interventions (Human Cloning and Genetic Modification of Reproductive Cells) Act 2004 has banned it under Section3 (1).

73 The Embryos Act 2002 under Section24 and Section 28(1).

74 The Drugs and Cosmetics Act 1940 as amended in 2003, the Ethical Guidelines for Biomedical Research on Human Subjects 2000 (adopted by the Indian Council of Medical Research) and the Good Clinical Practices 2001 (adopted by the Ministry of Health)In the Statement on Specific Principles on Human Genetics Research 2000 the ICMR specifically bans germ line therapy .The Guidelines for Stem Cell Research and Therapy 2006 of the ICMR and the Department of Biotechnology specifically states that under these guidelines, any research either related to germ line genetic engineering or involving implantation of a human embryo into a uterus after in vitro manipulation at any stage of development is prohibited.

75 National Regulatory Frameworks Regarding Human Genetic Modification Technologies (Somatic and Germ line Modification) A Report for the Genetics and Public Policy Center www.dnapolicy.org/pdf/geneticModification.pdf.

76 Available at www.genome.gov/25020028 (visited on 2-12-2012).

genetic makeup as the original which is called the clone.[77] The term clone comes from the ancient Greek word *klon* or twig which refers to the process whereby a plant can be created from a twig.[78]Usually human cloning takes place in three forms namely, DNA cloning or molecular cloning[79] which refers to the process in which DNA fragments of interest are transferred to a self replicating genetic element such as the bacterial plasmid. The DNA of interest can then be propagated in a foreign host cell.

The second form is reproductive cloning is used to generate an organism that has the same nuclear DNA as another currently or previously existing organism. This is also called as somatic cell nuclear transfer.[80]The third type is the therapeutic cloning or embryo cloning. It is the process by which stem cells are harvested so that they can be used for study of human development and to treat disease. Stem cells are important because they can be used to generate virtually any type of specialized cells in the human body.[81] While discovering the double-helical structure of DNA, James D. Watson and Francis Crick in 1971 predicted that human cloning would be possible one day.[82] However, it is a fact that no human being has ever been cloned till date. There are allegations that several

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77 Researchers use cloning techniques to make copies of genes using the procedure consisting of inserting a gene from an organism, often referred to as "foreign DNA", into the genetic material of a carrier called a vector. Examples of vectors include bacteria, viruses, plasmids which are small DNA circles carried by bacteria. After the gene is inserted, the vector is placed in laboratory conditions that prompt it to multiply, resulting in the gene being copied many times.

78 Available at http://www.encyclopedia.com/article-1G2-3402500107/cloning-scientific-background.html (2-12-2012).

79 DNA Cloning can be done by two techniques namely cell based and polymerase chain reaction. Under the cell based cloning, the DNA fragment is cut off from the chromosomal DNA by using restriction enzymes and it is attached to a plasmid that has been cut using the same restriction enzymes (this allows for the easy attachment of the foreign gene).Once the gene of interest is joined with its vector (vector is an agent that can carry a DNA fragment into a host cell) it is called a recombinant DNA molecule. Polymerase chain reaction technique wherein when all cells divide, enzymes called polymerases make a copy of the entire DNA in each chromosome.

80 Dolly, the birth of the scientifically cloned sheep by an Englishmen named Ian Wilmut was the first technological breakthrough in the creation process undertaken by man using this technology.

81 Available at www.cbc-network.org/issues/faking-life/human-cloning (visited on 6-12-2012).

82 Sachdev Yadav, "Human Cloning: Perspectives, Ethical Issues and Legal Implications", 8 *International Journal of Pharma and Bio Sciences* 28 (2011), available online at http://ijpbs.net/volume2/issue1/biological/_3.pdf (visited 2-3-2012).

researchers have actually attempted human cloning, alluding heavy scrutiny by using terms such as somatic cell nuclear transfer and therapeutic cloning.[83]

Cloning for research and therapy should be distinguished from reproductive cloning though the very same technique, that is, somatic cell nuclear transfer (SCNT) is applied. In this therapy instead of transferring the cloned embryo to the uterus in order to generate pregnancy, it is used to generate pluripotent stem cells which are a powerful tool for developing therapies for incurable diseases and conditions for important biomedical research and for drug discovery and toxicity testing.[84] Thus it is understood that killing of a clone for its stem cells is therapeutic cloning and letting the clone to live is reproductive cloning. If therapeutic cloning using embryos are found successful, then replacement organs could become freely available to the patients who would presumably be of no danger of rejection because the organ's DNA would match the patient's DNA exactly. Moreover, it promises permanent cure for many diseases which were found to be incurable. It has wide applications in regenerative medicine and has got high rejuvenating potential for the cells.[85]

There is also criticism that the experimentation of this type of cloning involves a huge rate of destruction of embryos for deriving stem cells and the destruction of embryos involves the destruction of lives. It is alleged that therapeutic cloning makes human life a commodity to be created, manipulated and destroyed merely for the purpose of experimentation.[86] The use of the stem cells are also subject to criticism since it affects the immune system of the body and if applied, can lead to the risk of tumours.[87]

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[83] Available http://www.bibliotecapleyades.net/ciencia/ciencia_genetica08.htm (visited on 27-5-2015).

[84] Available at http://plato.stanford.edu/entries/cloning/ (visited on 2-3-2012).

[85] Charlotte Kfoury, "Therapeutic Cloning: Promises and Issues", 10 (2) *McGill Journal of Medicine* 112 (2007).

[86] Available at http://www.mccl.org/reproductive-vs-therapeutic-cloning.html (visited on 10-12-2012)

[87] Amna Adnan, "Risks and Disadvantages of Therapeutic Cloning", *a*vailable at http://www.biotecharticles.com/Stem-Cells-Article/Risks-and-Disadvantages-of-Therapeutic-Cloning-490.html (visited on 8-12-2012).

Reproductive cloning on the other hand is done not only by virtue of Somatic cell nuclear transfer but also by embryo splitting.[88] It offers an effective treatment to infertile couples that would be genetically identical to the donor. It gives an opportunity to the gay and lesbians to have children. People who need to transplant to treat their own or their children's diseases can avail this this form of cloning.[89]Thus it is found that it has two uses namely, procreative use and deliberate replicative use. It may also be applied to serve the eugenic purpose. Moreover, it can be used by individuals who want to revive or replace a dead child or make a tissue donor for a child.[90] However, huge apprehensions are raised about this type of cloning on the grounds of human dignity, worth etc. and on the line of thought that it would replace natural sexual reproduction thereby creating designer babies.

Moreover, it is feared that this type of cloning destroys the parent-child relationship and affects the social fabric which leads to identity crisis,[91] discrimination and breakdown of social relationships and bonds. It is alleged that basic social institutions like marriage, family etc would be destroyed if this form of cloning is accepted. It is apprehended that it would affect not only the clone but the women who would be bearing these babies. On a report during the discussions in the UN on banning cloning of this form, the representative of Honduras cautioned that banning is a need since it can lead to "*exploitation of women*."

Delegates from the developing countries during the discussion pointed out that women from poor countries would be targeted as a source as a large number of women's eggs would be needed to support "*egg farm.*"[92] It is feared that it is

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88 Embryo splitting begins with invitro fertilisation i.e., the union outside the woman's body of a sperm and an egg to generate a zygote. The zygote or embryo splits into two and then four identical cells. At this stage the cell can be separated and allowed to develop into separate but identical blastocyst which can then be implanted in the uterus.

89 *Scientific and Medical Aspects of Human Reproductive Cloning,* National Research Council*,* D C National Academy Press (2002), p.25.

90 Amir Afshar, "The Ethics of Cloning", available at http://cosmos.ucdavis.edu/archives/2007/cluster7/afshar_amir.pdf (visited on 10-12-2012).

91 M. Chandrasekharan, Human Rights and Bio Technology in the Twenty First Century*, C.U.L.R.* 76 (2000).

92 Available at https://www.lifesitenews.com/news/un-approves-declaration-banning-all-human-cloning (visited on 18-7-2013).

not safe as they may result in the birth of children with severe developmental abnormalities.[93] Nicholas Agar, in his work *Perfect copy*[94] had predicted that reproductive cloners would have to overcome many obstacles since society at large may not be ready to welcome human clones. All these have sparked off bioethical debates and the law seems to take a cautious approach in the application of this scientific process.

As for the legality of therapeutic cloning, the moral status of the embryo has been a matter of ethical discourse. The main question posed is whether an embryo can be treated as a person or a potential person. And whether the destruction of embryos could be treated to be murder, or if it is morally justifiable to destroy an embryo. Different ethical arguments exist with regard to this. The church treats therapeutic cloning as unethical since on conception the embryo is treated as a moral subject. Hence the question of the sanctity of human life and the ethics of destruction of human embryos comes into play. Thus, the question here is when does life begin or can an embryo be considered a living entity. This is so, with regard to arguments on the legality and ethics of abortion. However, it is found that with the change of time the social and cultural ethos have responded to these questions differently. The concept of family itself has changed and this is so due to the change in the conception or our outlook on this institution primarily after the industrial revolution of the 19th century.[95] Determination of the legal status of the human embryo has been a subject of judicial scrutiny in many advanced countries. Moreover it has been a point of discussion and concern in the international arena.

The ethics on human cloning has been a subject of raging controversy since the cloning of Dolly, the sheep. The pros and cons of cloning has been a subject of effective discourse on priority of moral values. However, in some bioethical arguments there are arguments that such apprehensions and doubts

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93 M. Mameli, "Reproductive Cloning, Genetic Engineering and the Autonomy of the Child: the Moral Agent and the Open Future", 33 *Journal of Medical Ethics* 87 (2007).

94 Nicholas Agar, *Perfect Copy-Unraveling the Cloning Debate*, Icon Books Ltd., (2002), p.171.

95 Janet L. Dolgin, "Embryonic Discourse: Abortion, Stem Cells and Cloning", 31 *Florida State University Law Review* 103 (2003).

raised are totally misconstrued due to our lack of understanding of humanity and mere reduction of humanity to its physical nature as a body consisting of a collection of cells.[96] Moreover, some writers point out that the argument that cloning affects an individual's personal identity is unfounded since genetically identical twins are obviously different people.[97]

However it is found that the objection in case of cloning is not identity but perhaps the genetic exclusivity or uniqueness. The primary objection towards it is that it offends human dignity. It is found that dignity is associated to uniqueness and autonomy. We find that a clone would not be able to enjoy this since it is compromised in this process and having identical genome snatches away its uniqueness. The Bioethical arguments point out that if cloning is pursued, it will lead to dehumanization of man. This idea was put forward by Leon Kass, the famous bioethist who believed that if reproductive cloning is not banned it may lead to a situation in which procreation becomes dehumanized into manufacture, which would be further degraded by commodification which is virtually the inescapable result of allowing baby making to proceed under the banner of commerce.[98] The danger of commodification of life by the application of this technology can said to be a reason for the view that it impinges human dignity. The commercial rise in the market for embryos would be the inevitable result which again is a matter of concern.

The act of cloning itself can be implicated as an intention to violate the rights of the clone in the future since the creation of the clone itself is for not its own benefit but for someone else and is thus an instrumental means. This is the reason why Kant is seen quoted in bioethical arguments.The predetermination of the genetic makeup of a human clone is per se violating the fundamental tenets of dignity since he loses his privacy and autonomy.[99] It is found that the process of

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[96] Roman Alshuler, "Human Cloning Revisited: Ethical Debate in the Technological Worldview", 3 (2) *Biomedical Law & Ethics* 180 (2009).

[97] Raanan Gillon, "Human Reproductive Cloning: A Look at the Arguments against it and Rejection of Most of them", 92 (1) *Journal of the Royal Society of Medicine* 6 (1999).

[98] Leon R. Kass, "The Wisdom of Repugnance", 2 *The New Republic* 20 (1997), available at http://web.stanford.edu/~mvr2j/sfsu09/extra/Kass2.pdf (visited on 11-5-2015).

[99] Ashish Kumar et al., "Multifaceted Aspects of Human Cloning*",* 8 *JK SCIENCE* 125 (2006).

cloning has an impact on the individual and that the life of fellowmen alike, and hence impinges respect for life. Due to the advantages of the application of this technology the legal and regulatory regime seems not uniform among the countries. It can be inferred that the moral status of the embryo is intertwined with the social and cultural perceptions of each country on the concept of the sanctity of human life and this has an impact on the regulatory framework as such. This is because the western world, predominantly dominated by the Christian conception of the sanctity of life, has a very rigid outlook on the moral status of embryos and on the question of the morality in the intervention by man on the creation process.[100] This is evident from the papal views on the subject.[101]

The Islamic view also treats reproductive cloning as not favourable.[102] This reveals that a single regulatory framework would be an arduous task. But with regard to the banning of reproductive cloning most of the countries seem to take a stringent approach towards its banning. In India, we find no legislations on the subject but only guidelines issued by regulatory bodies exist. The Indian Council of Medical Research in 2000 issued Ethical guidelines for biomedical research on Human Subjects which bans cloning. Consistent with this the Department of Biotechnology, Government of India has laid down the policy stand of India with regard to cloning" *as a matter of principle cloning shall not be permitted."*[103]

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[100] "This evaluation of the morality of abortion is to be applied also to the recent forms of intervention on human embryos which although carried out for purposes legitimate in themselves, inevitably involve the killing of those embryos. This is the case with experimentation on embryos, which is becoming increasingly widespread in the field of biomedical research and is legally permitted in some countries. Although one must hold as licit procedures carried out on the human embryos which respect the life and integrity of the embryo and do not involve disproportionate risks for it but rather are directed to its healing, the improvement of its condition of health, or its individual survival , it must nonetheless be stated that the uses of human embryos or foetuses as an object of experimentation constitute a crime against their dignity as human beings who have a right to same respect owed to a child once born, just as to every person," Ioannes Paulus PP.II, Evangelium Vitae, available at http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html (visited in 17-2-2014).

[101] Document of the Holy See on Human Cloning, From the Vatican, September27, 2004, available at http://www.vatican.va/roman_curia/secretariat_state/2004/documents/rc_seg-st_20040927_ cloning_en.html (visited in 17-2-2014).

[102] Larijani and F. Zahedi, "Islamic Perspective on Human Cloning and Stem Cell Research", 36 (10) *Transplantation Proceedings* 3188 (2004).

[103] Ethical Policies on Human Genome, Genetic Research and Services, Jan 2002.

The United Nation's struggle to articulate a cloning treaty exemplifies both the variations in approaches and the challenges associated with seeking consensus in this morally contested area.[104] However, the international legal framework regulating cloning seems to throw light on the concept of dignity in relation to the conduct of biological research. We can find that consensus to a certain extent exists with regard to banning germ line interventions and reproductive human cloning, though there exists philosophical pluralism.

UNESCO has been an active body engaged in stressing the need to control human cloning. The International Bioethics Committee of the UNESCO[105] since 1992 was deliberating and drafting on the declaration on human genome which finally was adopted as the Universal Declaration on human genome and human rights, 1997. The International Bioethics Committee which consisted of fifty ad-hoc members' initially representing different fields had an in depth bioethical reflection representing divergent value systems based on their disparate cultural and religious and societal and economic standings. Hence it took four years for arriving at a consensus to draft this instrument. Moreover, since its drafting was undertaken under the auspices of UNESCO, it is non-binding on its members. However, one finds that human dignity and the conviction that it should not be compromised takes a pivotal place in the instrument. Article 11 of the instrument contains provision banning reproductive cloning as offending human dignity.[106] This was a late addition since originally several delegates of the International Bioethics committee were of the view of not rushing to condemn any particular technique as such, including cloning.[107]

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[104] Shaud D. Pattinson and Timothy Caulfield, "Variations and Voids: the Regulation of Human Cloning around the World", 5:9 *BMC Medical Ethics* (2004), available at Open Access www.biomedcentral.com/content/pdf/1472-6939-5-9.pdf (visited on 17-2-2014).

[105] The International Bioethics Committee was created in 1992 for making recommendations in this regard to UNESCO.

[106] Article 11 reads: "Practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted. States and competent international organisations are invited to cooperate in identifying practices and in taking national or international level, the measures necessary to ensure that the principles set out in this Declaration are respected."

[107] Shawn H. E. Harmon, "The Significance of UNESCO's Universal Declaration on Human Genome and Human Rights" 2:1 *SCRIPT-ed* 20 *(*2005), available at http://www2.law.ed.ac.uk/ahrc/script-ed/vol2-1/harmon.asp (visited on 15-12-2012).

Certain writers point out that the wordings of Article 11 was drafted callously since there is an arbitrary selection of reproductive cloning alone while it remains silent on other activities like germ line genetic therapy, research on human embryos etc.[108] Views exist that since the term 'dignity' itself lacks a precise definition it is meaningless to declare the ban on cloning.[109] However, it is found that the declaration was a novel initiative, the first of its kind and throughout the document it stressed the core value of respect for life and its diversity. Many international organisations also have contributed to the development of the regulation of biomedical research.[110]

The World Health Organisation through its organ the World Health Assembly[111] by a resolution declared that cloning for replication of individuals is unethical.[112] In 2002, though the World Health Organisation repeated its urge to ban reproductive cloning, we can find that the very same organisation cautioned against banning certain techniques of cloning for medical purposes.[113] During the very same period, the concern for human cloning found its expression in the regional level with the Council of Europe bringing forth a regional human right instrument known as the European Convention on Human Rights and Biomedicine, 1997 spawning a similar prohibition.[114] The Additional Protocol on the Prohibition of Cloning of Human Beings, 1998, bans cloning of either the

[108] Dean Bell, "Human Cloning and International Human Rights Law", 21, *Sydney Law Review* 223 (1999).

[109] Timothy Caulfield, "Human Cloning Laws, Human Dignity and the Poverty of Policy Making Dialogue", 4:3 *BMC Medical Ethics* (2003), available at http://www.biomedcentral.com/1472-6939/4/3 (visited on 15-12-2012).

[110] The World Medical Association was instrumental in drafting the Helsinki Declaration on Biomedical Research 1964, the Council of International Organisation for Medical Sciences (CIOMS) prepared and revised the International Guidelines for Biomedical Research Involving Human Subjects 1992 etc.

[111] Roberto Andorno, "Biomedicine and International Human Rights Law: in Search of Global Consensus," 80 (12) *Bulletin of the WHO* 959 (2002).

[112] Resolution WHA 50. 370 of 1997 and resolution WHA 51. 10 of 1998 declared cloning as unethical and unacceptable.

[113] Available at http://scienceprogress.org/2008/11/an-emerging-consensus/#notes (visited on 23-5-2015)

[114] Carmel Shalev, "Human Cloning and Human Rights: A Commentary", 6(1) *Health and Human Rights* 137 (2002).

living or dead.[115] Moreover, the preamble[116]of the Convention states that the instrumentalisation of humans through deliberate creation of identical individuals violates human dignity.[117] It seeks to protect man at three levels namely, as an individual, as a part of the community and as the part of present and future human species which is elicited in the preamble itself.[118]Thus the sanctity of human life plays a central position with regard to the banning of human cloning.

The Additional Protocol did not however take a specific stand on cloning of cells for research purpose.[119] But this protocol can be treated as the first international instrument which has been made legally binding. The European Union Charter of Fundamental Rights, 2000 bans reproductive cloning under its guarantee of physical integrity.[120] The Organisation of African Unity also takes a similar stance against reproductive cloning.[121] We find that the initiative for legally controlling cloning was as a result of the commitment of different legal systems at the national and regional level to the concept of the sanctity of human life. The intent to respect human beings is the foundation of every legal system and for an effective sustenance of any regulatory framework respect for human life should be the central theme. It is found that this is the reason human dignity has been often cited as a parameter to control cloning technology by different countries.

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[115] Article1 (1) reads: "Any intervention seeking to create a human being 'genetically identical' to another human being whether living or dead is prohibited."

[116] Preamble reads-"…Considering however that the instrumentalisation of human beings through the deliberate creation of human beings through the deliberate creation of genetically identifiable human beings is contrary to human dignity and thus constitutes a misuse of biology and medicine…."

[117] Robert Andorno, "The Oviedo Convention: a European Legal Framework at the Intersection of Human Rights and Health Law", 2 *J.I.B.L.*133 (2005).

[118] Preamble of the Ovideo Convention.

[119] Article 18 of the Convention however is explicitly banning creation of embryos for research purpose.

[120] Article 3 (2) reads-"In the field of medicine and biology, the following must be respected in particular:

-the free and informed consent of the person concerned, according to the procedure laid by law,

-the prohibition of eugenic practices, in particular those aiming at the selection of persons

-the prohibition on making of human body and its parts as such a source of financial gain

-the prohibition of the reproductive cloning of human beings."

[121] The OAU had passed resolutions against cloning. In the Addis Ababa Summit South Africa introduced an item seeking an international consensus on banning reproductive cloning.

It was due to the initiative of France and Germany in 2001 that a ban on reproductive cloning was given serious consideration in the United Nations. Their concern was that those threatening to clone humans would engage themselves in the activity in countries which had not legally banned reproductive cloning.[122]Hence an international consensus was sought for. In 2001 an ad-hoc Committee on International Convention against Reproductive Cloning supported by UNESCO was established by the General Assembly which was entrusted the task of drafting of a convention on cloning. However we find that no consensus could be reached regarding the questions of whether there should be a total ban on reproductive cloning only or therapeutic cloning should also be included within the prohibition.[123]

In February 2005 a working group finalised the draft on UN Declaration on Human Cloning though there was a clear cleavage of thinking on the question of whether to ban all forms of cloning or restrict it to absolute prohibition of reproductive cloning while permitting therapeutic cloning by creating a strict regulatory regime. Thus the Declaration came into being. It specifically states that if any type of cloning i.e., reproductive, therapeutic or experimental cloning violates human dignity or human life it may be prohibited. It is also feared that the non binding nature of the declaration makes it possible for the scientist to develop stem cell therapies which will facilitate the birth of human clones and once born these clones will enjoy all the rights guaranteed by the International Bill of Rights and thereby the declaration would be just a paper tiger.[124] However it is found that even after the declaration was adopted countries are not uniform in their approach on banning therapeutic cloning. There has been stress on revisiting the declaration in 2008.[125]

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[122] Cameron N., & Henderson A., "Brave New World at the General Assembly: The United Nations Declaration on Human Cloning", 9 *Minnesota Journal of Law, Science & Technology* 157 (2008).

[123] *Ibid.*

[124] Kerry MacIntosh, "Human Clones and International Human Rights", 4 *Santa Clara Journal of International Law* 134 (2006).

[125] The ethics panel of the international bioethics committee is again looking into the appropriateness of banning of therapeutic cloning.

The countries have stressed on developing an international consensus as to therapeutic cloning due to the increasing potential of stem cells and its impact on public health. They felt that a blatant prohibition on the cloning of embryos for research would have an adverse impact and that is the reason for lack of international consensus.[126] Thus the declaration as such had not settled the issue of research on human embryos. The reason is that the cloning is closely associated with stem cell research which is claimed by some scientist as a promise for cure while others looking upon it with suspicion. Hence it is worthwhile to look on stem cell research and its impact.

6.2.4 Stem Cell Research

Stem cell research is closely linked to human cloning. Stem cells are generally understood as generic cells that can make exact copies of themselves indefinitely. It has the ability to produce specialized cells for various tissues in the body such as heart muscle, brain tissue and liver tissue. Stem cells can be found in the embryos five days after the embryos have been formed through the union of sperm and egg. Stem cells are of such a nature that they can be saved and used on a later period to produce specialized cells when needed. Basically these cells are of two types namely, the embryonic stem cells which are taken from aborted foetuses or fertilized eggs that are left over from in vitro fertilisation (IVF) or cloned embryos or existing stem lines and they are of great use since they can produce cells for almost every tissue in the body. The other type is Somatic or Adult stem cells which are not much in use for research purposes since they are specific to certain cell types such as blood, intestines, skin and muscle.[127]

Thus, stem cells can be taken from a variety of sources like bone marrow, cardiac cells, liver, skin, umbilical cord blood, muscle, peripheral blood, the inner cell mass of blastocysts etc. Stem cells can be extracted from human embryos through the technique of somatic nuclear transfer or therapeutic cloning.[128] It is

[126] Available at http://www.un.org/press/en/2005/gal3271.doc.htm (visited on 15-12-2012).

[127] Available at www.umm.edu/edu/ency/article/007120.htm (visited on 16-12-2012).

[128] "A Guide to the Benefits, Responsibilities and Opportunities of Embryonic Stem Cell Research' British North American Committee, available at http://www.acus.org/docs/0406-

highlighted by scientists that the potential benefit of this type of research is that it would revolutionize medicine and is a promise not only for cure of the debilitating diseases but also is helpful to understand the cause for such diseases by way of understanding it through the study of the development of these cells.[129]

In regenerative or reparative medicine, the use of these cells is therapeutically valuable for regeneration of diseased tissues and organs. Moreover, scientists are already using the stem cells to screen new drugs and to develop model systems to study normal growth and identify the causes of birth defects.[130]

The status of human embryo in this type of research has evoked controversies and ethical concerns. The derivation of pluripotent stem cell lines from oocytes and embryos is fraught with disputes regarding the onset of human personhood and human reproduction. However, we find that in all cases of human stem cell research there are difficult questions with regard to the consent to donate biological materials for the conduct of research, clinical trials of stem cell therapy and oversight of the process of research. Still, compared to the adult stem cell research, the embryonic stem cell research is controversy ridden. The reason is that it involves the destruction of embryos. It involves destruction of 7-8 day old embryos. It is a fact that embryos have the potential to become live foetus if implanted into a women's uterus at the appropriate time. Hence some view that removing the inner cell mass for stem cells and its destruction thereafter is similar to destruction of human beings or murder. But views also exist that embryos are mere clump of cells which can be used for research purposes.

Hence there is nothing unethical with regard to conduct of research. Many hold a middle view that the early embryos need special respect as they are potential human beings but that it is acceptable to use it for certain types of research provided there is sound scientific justification, proper oversight and

Guide_Benefits_Resposibilities_Opportunities_Embroyonic_Stem_Cell_Research.pdf (visited on 16-12-2012).

[129] Ramachandran R. P. & Yelledahili L. U., "Exploring the Recent Advances in Stem Cell Research", 1 (3) *Journal of Stem Cell Research & Therapy* (2011), available at http//dx.doi.org/10.4172/2157-7633.1000113 (visited on 16-12-2012).

[130] Available at http://stemcells.nih.gov/info/basics/Pages/Default.aspx (visited 17-12-2012).

informed consent.[131] There exist views that donation of fresh embryos from infertile couples at IVF clinics lead to hard coercion on women and consent is obtained either not understanding the later use of the embryos or on the pretext that these unused embryos are a waste. Thus, quite often the relevant interest of women is overlooked.[132] Moreover, it is often accused that if embryos are donated for research while a woman has been actively pursuing her infertility treatment she might need to undergo further ovarian stimulation to produce more embryos for future treatments. Thus it affects female reproductive health.[133]

Again there are allegations that if research in this field is permitted it may lead to exploitation of the vulnerable sections of society. Different legal systems choose these views based on their socio-cultural ethos. Objections also exist against somatic cell nuclear transfer (SCNT) to derive stem cells since they involve creating embryos for research purpose and destruction in that process involves violation of the respect for nascent human life. This is the objection to therapeutic cloning.

Other practical risks apprehended are as the stem cells injected into a patient is permanent, its long term side effect is unknown.[134] Thus stem cell therapies and their possible effects have not been studied and understood properly in order to decide what its side effects are. Moreover certain studies reveal that it can lead to development of tumours. Hence in some countries medicinal products containing stem cells are put under strict vigil and subjected to great scrutiny.[135] Nowadays, stem cell banks are increasingly seen as an essential resource of

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[131] Bernard Lo and Lindsay Parham, "Ethical Issues in Stem Cell Research", 30 (3) *Endocrine Reviews* 204 (2009).

[132] Carolyn Mcleod & Francois Baylis, "Donate fresh or frozen embryos to stem cell research: in whose interest?", 21 *Bioethics* 465 (2007).

[133] Lori P. Knowles, "Primordial Stem Cell Regulation: Implications of Assisted Reproductive Technology Policies Among Nations", 1 *Journal of Women's Health* 31 (1999).

[134] Certain researchers themselves have raised the concern that its adverse side effects are unknown. In this article it is with regard to cells inserted for cardio vascular repair. Bodo E. Strauer and Ran Kornowski, "Stem Cell therapy in Perspective*"*, 107 *Circulation* 929 (2003).

[135] European Medicine Agency issued a public statement raising concerns over unregulated medicinal products and the need to be used only in controlled conditions, 16 April 2010, available at http://www.eurordis.org/sites/default/files/publications/55-3%20Revised%20public%20statement%20on%20stem-cell%20medicinal%20products.pdf (visited on 17-12-2012).

biological materials for both basic and translational research. Issues relating to the maintenance of genetic information, legitimacy, independence, transparency and governance of banking activities are also a matter of concern. Appropriate mechanisms and ethical and legal approaches to solve challenges related to informed consent, privacy and confidentiality, commercialization and the safety of human participants in research are yet to be defined in case of stem cell banking.[136] Issues relating to the access, that is, whether it should be kept open or controlled have not been legally answered.

With the invention of induced pluripotent stem cells(iPS), the opportunities for stem cell research has grown tremendously. Disease specific cell lines of pluripotent stem cells, increases our knowledge on the patho-physiology of complex diseases which helps in the development of personalised medicine and related therapies. This has resulted in higher rate of the involvement of pharmaceutical industries in investment and involvement in this research. This has led to the emergence of not only national stem cell banking but also international initiatives like international Stem Cell Registry, International Stem Cell Banking Initiative, European Human Stem cell Registry etc.[137] This facilitates transnational research and harmonization of regulatory framework which remain a stupendous task.

Different criteria exist for depositing and access of stem cells in different countries based on their socio ethical thinking and outlook and so harmonization of regulations is the need. However, it is at this juncture that many questions relating to tissue donation and the levels of protection to be afforded to it assumes significance. In the legal and ethical point of view, the main question which confronts us is whether the human tissue derived for the purpose of research should be treated as property or is it ethically right to take a person's tissue and obtain commercial rights such as patent and gain financial benefits out of it, as it is part of human body. Thus patenting of stem cell research has raised wider

[136] Bartha M. Knoppers and Rosario Isasi, "Stem Cell Banking: between Traceability and Identifiability", 2:73 *Genome Medicine* (2010), available http://genomemedicine.com/content/pdf/gm194.pdf (visited on 17-12-2012).

[137] Rosario Isasi and Bartha M. Knoppers, "From Banking to International Governance: Fostering Innovation in Stem Cell Research", 20 *Stem Cells International* 2 (2011), available at http://www.jourlib.org/paper/50544 (visited on 19-12-2012).

concerns. Again to what extent the donor's right should be recognised is a matter of concern. This raises a variety of regulatory questions such as, the extent of informed consent, its nature, the handling of old samples by stem cell banks, the data protection to be offered to research subjects. The doubts raised had led different countries to adopt different regulatory frameworks based on their socio-cultural and ethical outlook.

In America, Stem Cell research has turned into a hotly contested area in American political history[138]since the first human stem cell line was found by James Thompson and John Gearhart in 1998. Federal law in United States does not ban this research but certain restrictions have been imposed with regard to its funding and use under the guidelines issued by the National Institute of Health in 2000. The US Supreme Court in James L Sherley et al v Kathleen Sebilius, Secretary of Health and Human Services et al[139] declined to hear and strike down the decision of the District Court of Appeals[140] allowing the Executive order of the President on the 2009 guidelines expanding the funding for embryonic stem cell research issued by the National Institutes of Health. Thus we find that the environment for carrying out this type of research is very congenial.

Italy, on the other hand had deliberately stopped funding for this research since 2009. However it does not permit destruction of embryos for retrieval of stem cells but does not ban the import of it. As for Ireland, there is a legislative vacuum on the subject but the policy stands against research on embryonic stem cells. United Kingdom on the other hand, legalised the use of embryos and use of stem cell lines but under strict control by the Human Fertility and Embryology

[138] The most contested battleground for this research began since President George Bush banned federal funding for research that uses human embryonic stem cells. Barrack Obama, his successor reversed the ban, pending a law suit thus leaving the legality of the research in darkness. However, recently the court had allowed the NIH funding for stem cell research.

[139] Decided on 7-august 2013. See http://www.supremecourt.gov/Search.aspx?FileName=/ docketfiles/ 2-454.htm

[140] The decision did not ponder on the question of acceptability of this type of research but was on the procedural requirements with regard to the funding to be given by government on this type of research. To see the decision of the Court of Appeal of the District of Columbia. See http://www.cadc.uscourts.gov/internet/opinions.nsf/DF210F382F98EBAC852578810051B18C /$file/10-5287-1305585.pdf

Authority.[141] The Human Fertilisation and Embryology Act 1990 and the Human Fertilisation and Embryology (Research purpose) Regulations 2001 regulate the research in this field. As for Germany, scientists are allowed to use several approved cell lines but does not allow destruction of embryos for retrieving stem cells. The Embryo Protection Act,1991 and Stem Cell Act,2002 allow adult stem cell research but places restrictions on embryonic stem cell research. We find that in their approach both Italy and Germany follow the very same policy. Countries like Singapore, South Korea, Israel and Scandinavian countries already permit embryonic stem cell research.[142]As for France, the research is under strict control and creation of embryos for research is banned. However, research is permitted on satisfying four conditions such as-

(a) research is scientifically relevant

(b) research is likely to allow major medical advances

(c) it is expressly established that the research cannot be performed unless cells derived from embryos are used.

(d) The research project respects French ethical principles on embryos and embryonic stem cell lines[143]

The French Biomedicine Agency established by the Bioethics Law in 2004 licenses and monitors these research projects. The French National Consultative Committee of Ethics, 1983 renders ethical advice on policy making on this research.[144]

India has taken a liberal stance as to the conduct of human embryonic stem cell research. Government agencies and industry research organisations are engaged in this research.[145] It was in 2002, that the Indian Council of Medical Research and

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[141] Howard Wolinsky, "Stem Cell Battles: Stem Cell research in the USA is facing legal and Political challenges", 11(12) *EMBO Reports* 921 (2010), available at http://www.ncbi.nlm.nih.gov/ pmc/articles/PMC2999869/ (visited on 20-12-2012).

[142] Randy Schkeman & Marjorie Schultz, "Stem Cell Research: Opportunities and Challenges", *Bulletin of the American Academy* 19 (2006)

[143] Articles 40-44 of the Bioethics law, 2004.

[144] Available at www.eurostemcell.org/stem-cell-regulations (visited 20-12-2012).

[145] Alka Sharma, "Stem Cell Research in India*:* Emerging Scenario and Policy Concerns"*,* 8 *Asian Biotechnology and Development Review* 47 (2006).

the Department of Health permitted the conduct of therapeutic cloning and stem cell research. However, with the increase in unethical practices and the increase in applications for funding, a draft for guidelines was mooted. The Indian Council of Medical Research and the Department of Biotechnology issued guidelines in 2007with regard to the conduct of stem cell research. It permits conduct of research in adult stem cells, cord cells and embryonic stem cells. It declares that the research shall be conducted with great respect to human dignity and fundamental freedoms.[146] The guideline established the National Apex Committee for Stem Cell Research and Therapy which is the national body entrusted with the responsibility for reviewing the stem cell research proposals. Institutions which undertake this research are required under the guidelines to establish their own committees to review the research proposals. Scientists who are conducting this research need to be registered with the National Apex Committee for Stem Cell Research and the creation of the new stem cell lines needs the approval of both the local and national level committees. The National Apex Committee also has the responsibility of registering all the stem cell research centres and also monitoring the clinical trials related to stem cell research.[147]

The National Bioethics Committee (NBC) prepared the consent for tissue collection for research. The guidelines restrict the creation of embryos by way of IVF or SCNT for the purpose of deriving embryonic stem cells. However, if the researcher seeks to create it exclusively for research purpose, they must provide explicit justification for the procedure and establish that the creation of the embryo is for research purpose only. The guidelines also restrict clinical trials wherein cells have undergone major manipulations such as genetic alterations. It also restricts various forms of chimera research.[148] The Ethical Guidelines for Biomedical Research on Human Participants 2006 issued by ICMR has under Chapter VI permitted the conduct of research and therapy. But these guidelines are silent as to stem cell based research products.[149] India has acquired a

[146] In the General Principles of the Guidelines 3.2 this aspect is discussed.

[147] Clause4 of the guidelines enlist the functions and powers of the body.

[148] A Report of the Wither spoon council on Ethics and Integrity of Science, available at http://www.thenewatlantis.com/publications/number-34-winter-2012 (visited on 20-12-2012).

[149] Bobby George, "Regulations and Guidelines Governing Stem Cell Based Research Products: Clinical Considerations", 2(3) *Perspectives in Clinical Research* 94 (2011).

pioneering leadership role with regard to stem cell research. The reasons for this are the absence of religious opposition and the lack of strict regulatory regime and public-private partnership in this field.[150] However the lack of legislation and any sanctions in the guidelines for its violation are major sources of concern.

Lack of sanctions for violation of the guidelines is a major challenge as commercial exploitation occurs since the private hospitals, individual practitioners and the private commercial houses are in this field. Moreover unregulated experimental therapies and clinical trials are a threat to human dignity.[151] Lack of supervision of the clinical trials has resulted in the exploitation of patients. Commercial motives in this field have resulted in the vulnerable sections of society becoming the target groups of exploitation by clinicians and researchers alike. Thus we can find that such a state of affairs is a threat to the concept of the sanctity of life. However the ICMR, Department of Health Research and the Department of Biotechnology have brought about a draft guideline on stem cell research in 2012. The drawback of this guideline is the lack of any sanctions for its violation. Thus these guidelines remain as a mere paper tiger. Hence the need is for a legislative endeavour which can put to rest the ambiguities and apprehensions to rest.

The ethical violations[152] which had occurred around the world had prompted the strong need to control the stem cell research. We find that the United Nations in this regard has not been up to the expectation since it had not brought into effect any convention particularly with regard to stem cell research exclusively. However the United Nations Declaration on Human Cloning 2005 bans all forms of cloning.

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[150] Nibedita Lenka, "Advancements in Stem Cell Research-Indian Perspective*",* 16 (3) *Annals of Neurosciences* (2009), available at http://annalsofneurosciences.org/journal/index.php/annal/article/viewArticle/47/949 (visited on 2-3-2015)

[151] Prasanna Kumar Patra & Margaret Steelboom Faulkner, "Bionetworking: Between Guidelines and Practice in Stem Cell Therapy Enterprise in India", 7:2 *SCRIPTed* 295 (2010), available at www.law.ed.ac.uk/ahrc/script-ed/vol7-2/patra.asp (visited on 22-12-2012).

[152] One such violation is the controversies that followed the fake finding of the Korean researcher Hwang Woosuk that he had succeeded in creating human embryonic stem cells through cloning in 2006.

The International Bioethics Committee of UNESCO in 2001 had suggested that appropriate debates may be held at national regulatory level to derive public consensus though there might exist pluralistic viewpoints. It stressed the need for protection of the donor's interest. However, the decision which the IBC shall arrive should not offend human dignity.[153] The General Assembly of the UN is considering the opinion of the IBC on the need to relook on the question of banning all forms of cloning including therapeutic cloning.[154]

At the European level, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, 1997 does not explicitly say anything on embryonic stem cell research but leaves each country the discretion to legislate provided two conditions are satisfied such as:

1) the prohibition of producing human embryos for research purpose[155]and
2) adoption of relevant rules for the adequate protection of embryos.

The European Group on Ethics in Science and New Technologies of the European Commission adopted on 15th November 2000 that it is up to each member to decide on whether to conduct embryonic research but stated that it considers ethically unacceptable the creation of embryos with donated gametes for the purpose of deriving stem cells and "premature" the creation of embryos by somatic nuclear transfer.

The EU Tissue Directive[156]agreed on March 2004 sets standard of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.[157] To ensure that the rules are followed and that the premises are suitable for development of clinical-grade

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153 Available at unesdoc.unesco.org/images/0013/001322/132287e.pdf (visited on 23-12-2012).

154 Available at www.un.org/apps/news/story.asp??NEWSID=28544&CR=clo#Uabtn6JHJUTNBo (visited on 23-12-2012).

155 Article 18.

156 Available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:2004:102:0048:0058:en: PDF (visited on 23-12-2012).

157 Oonagh Corrigan et al., "Ethical Legal and Social Issues in Stem Cell Research and Therapy" Cambridge Genetics Knowledge Park, available at http://www.phgfoundation.org/file/16351/ (visited on 23-12-2012).

tissue therapies, each member state is responsible for seeing that establishments that handle relevant tissue are licensed and follow a quality assurance system. Moreover, strict rules of traceability of product development lead to achieve greater accountability. Member states are required to ensure that the import of human tissue intended for human application are accredited or licensed by competent authority.[158]

It is found that the European Law is more cautious with regard to the conduct of this research and gives adequate protection to the donors. The lack of public consensus on the subject might be the reason for the UN to remain silent on this aspect. However, the commercial profit and the possibility of commercialisation of this research have to be taken up seriously. Otherwise unmanned and unregulated legal systems might be exploited by countries where this research is seriously pursued. This is again a starkest violation of human dignity.

6.2.5 Application of Genetic Advances in Assisted Reproductive Technology

Assisted reproductive technology (ART) is a fertility treatment by artificial or partly artificial means. The most common techniques to infertile couples are artificial insemination, invitro fertilisation (IVF), gamete intra-fallopian transfer[159] (GIFT), Zygote intra-fallopian transfer[160](ZIFT) and frozen embryo transfer (FET). In vitro fertilisation is understood as a fertility procedure in which both eggs and sperms are manipulated outside the body in the laboratory. Once an embryo has developed from the fertilised egg it can be implanted in the woman's uterus and gestated to be born. This is quite different from the Intrauterine insemination or artificial insemination in which fertility drugs are used to stimulate egg production in ovaries into which sperms are injected. Generally, they are not included within the category of assisted reproductive technologies yet are commonly held as that of included in that category. However, the appropriateness of these techniques has evoked concerns in the ethical and legal

[158] Commission Directive 2006/86/EC 24 October 2006 also contain provisions with regard to this.

[159] Eggs and sperms are mixed and are inserted directly to the fallopian tube through laparoscopic procedure.

[160] Embryonic transfer to the fallopian tube.

circles.[161] The application of this technology requires human participants, donors and donated embryos, oocytes or human egg and sperms.

The application of this technology has challenged our understandings of parenthood and biological relationships since it brought forth new and innovative ways of making children. However the genetic tools applied in this technology has raised wider concerns. Pre implantation genetic screening (PGS) and the Pre Implantation genetic diagnosis (PGD) offer the unique ability to characterise the genetic composition of embryos prior to embryonic transfer.[162]

The pre implantation genetic screening involves the test for anatomical, physiological and genetic conditions of the embryo before the implantation[163]and Pre implantation genetic diagnosis is as a result of development and convergence of ART and genetic methods. It allows the couple at risk of transferring hereditary genetic diseases to their offspring to diagnose such abnormalities as early as immediately before or after conception.[164]Thus it is a potential diagnosis option which brings within it a range of options which enables the infertile couples to screen the future child of genetic disease. This is also called as *embryonic profiling.*

Earlier in the area of reproductive medicine, parents could detect genetic disorders in uterus by methods like amniocentesis[165]where cells from amniotic fluid is analysed or samples from placenta is taken and the only option was abortion. But with the onslaught of ART and molecular genetics, new ways to test genetic disease in vitro for genetic markers and characteristics have come into light. This is done through PGS and PGD techniques.

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[161] Available at http://www.bioethics.org.au/Resources/Resource%20Topics/Reproductive%20Technology.html (visited on 24-12-2012).

[162] Paul R. Brazina & Yulian Zhao, "The Ethical, Legal and Social Issues Impacted by Modern Assisted Reproductive Technologies", 2012 (1-7) *Obstetrics and Gynecology International* (2012), available at www.hindawi.com/journals/ogi/2012/686253 (visited on 26-12-2012).

[163] Available at en.wikipedia.org/wiki/Preimplantation-genetics-diagnosis (visited on 26-12-2012)

[164] Bartha Maria Knoppers, "Modern Birth Technology and Human Rights*",* 33 *Am. J. Comp. L,* 1 (1985).

[165] Bernard Dickens, "Abortion, Amniocentesis and the Law"*,* 34 *Am. J. Comp. L,* 249 (1986).

After such testing only, embryos with desired genetic characteristics are transferred to initiate pregnancy in woman. Methods to screen and test the sperm and embryo also have been developed. Though this can be considered as a positive step in reproductive technology it has raised concerns as to the extent of control to be given to prospective parents to choose the genetic traits of their offspring. It results in treating the child as a means to the end of the parents. Moreover it is feared that it might result in "*enhancement"* purpose such as intelligence, memory, height, sexual orientation, colour, beauty etc. Thus it brings in the spectre of "*eugenics."*[166] Thus the issue of selection of the offspring's traits is the major area of concern. Moreover it is feared that if PGD is resorted to it would result in inequality and widen the gap between the haves and the have-nots since it stigmatizes existing persons. Thus it creates acceptable child birth which shakes the concept of family and ultimately leads to the disruption of the society. Hence it is viewed as offending human dignity. The next concern is the destruction of embryos due to such screening. This is viewed as impinging the concept of the sanctity of human life.

Embryonic screening reveals the onset of various diseases in adulthood which may create a psychological trauma both in the minds of the parents and the children alike. Another medical indication is that such methods enable the parents to have a child as a hematopoietic stem cell donor for their already existing sick child.[167] This has lead to the popular notion of "perfect child"[168]which portrays the parent's unbridled autonomy over their future of their children. Though highly expensive, it is feared that these methods would perpetuate gender selection also and thereby create gender discrimination. Moreover the cryopreservation of pre

[166] Available at https://bioethicsarchive.georgetown.edu/pcbe/reports/reproduction and responsibility/ chapter 3. html (visited on 26-12-2012).

[167] J. Robertson, "Extending Preimplantation Genetic diagnosis: Medical and Non-Medical Uses", 29 (4*) J. Med. Ethics* 213 (2003), available at http://jme.bmj.com/content/29/4/213.full (visited on 28-12-2012).

[168] Chantal Bouffard et al, "Genetic Diagnosis of Embryos: Clear Explanation, not Rhetoric is Needed", 181(6-7) *Canadian Medical Association Journal* 387 (2009).

implantation embryos for therapy has raised larger concerns since that may lead to eventual destruction of the same.[169] Thus this technology has raised wider concerns.

However, countries having different religious and cultural background view the techniques in a different angle. Hence we find different regulations with regard to it. This is more or less similar to their views on abortion. The Roman Catholic view is that human life begins at conception and so PGD is not approved this is different from the Jewish tradition which regards an early zygote not as a human being and hence PGD is allowed. As for the Islamic view research aimed at changing the inherited characteristics of pre-embryo is forbidden.[170]

Finding the ethical implications as that of far reaching consequences, countries like Austria, Germany, and Switzerland legally prohibit the technique while countries like United Kingdom, Netherlands and France permit it with exceptions. US has no law on the subject but restricts it based on professional standards. There is no binding law as far as countries within the Council of Europe. Hence it is found that each state is bound to follow its own regulatory pattern.

However in a landmark judgment in Costa and Pavan v Italy[171] the European Court of Human Rights held that the Italian ban on pre-implantation genetic diagnostic technique is violative of Article 8 of the European Convention on Human rights. Article 8 of the Convention deals with the right to respect one's private and family life. The applicants in this case were carriers of cystic fibrosis. Since their first daughter was also detected with the disease, they opted for a child through in vitro and to genetically screen the embryo prior to implantation. The Italian Law prevented it. The court, while holding the Italian Law as violative of Article 8, held that the need stressed by the couple amounted to an expression coming within private life and hence protected.

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[169] ESHRE task force on Ethics and Law, "The Moral Status of Pre implantation Embryo", 16 (5) *Human Reproduction* 1046 (2001) available at http://www.eshre.eu/~/media/emagic% 20files/SIGs/ Ethics%20and%20Law/Task%20Forces/Task%20Force%201.pdf (visited on 18-2-2015).

[170] Sozos J. Fasouliotis & Joseph G. Schenker, "Pre implantation genetic diagnosis principles and ethics", 13(8) *Human Reproduction* 2238 (1998).

[171] Application no -54270/10 See http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112993#{"itemid":["001-112993"]}

The International Bioethics Committee considers the deliberate implantation of embryos as unethical since it does not take into account the lifelong and irreversible damage that will burden the future person and states that PGD may be resorted to only for medical indications.[172]

In India, the 1994 Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 also known as PNDT Act was enacted to prevent the misuse of prenatal diagnostic techniques. However this Act was amended in 2003 and is now known as Pre conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994. The Act makes it illegal to select embryos for screening to determine sex.[173] However such techniques are available for detecting the chromosomal defects by registered institutions including IVF clinics.[174] This Act has a well defined objective but the definition to recognised institutions who can conduct this test has failed to define hospitals, labs etc. which could conduct this test. Moreover the Act is exclusively concerned with sex selection and is silent on the ethical concerns raised as far as embryonic screening is concerned. Hence there is a dearth of law on the subject. The problem of embryonic reproductive programming is not addressed in the regulatory framework. This has raised concerns to the application of the techniques.

Conclusion

Certain advances in human genetic research involve risk and this may produce harm or benefit. The application of this technology affects the individual's self perception and his social relations alike such as his family, siblings and offspring. It has both positive and negative impacts. However it is found that:

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[172] Report of the International Bioethics Committee on Pre Implantation Genetic Diagnosis and Germ- Line Intervention, (UNESCO) 24 April 2003, available at http://portal.unesco.org/shs/en/files/2397/10554294261ReportfinalPGD_en.pdf/ReportfinalPGD_en.pdf (29-12-2012).

[173] Section3 (A) reads:"No Person, a specialist or team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection in a woman or man or on both or any tissue, embryo, concepts, fluid or gametes derived from either or both of them."

[174] Section 4(2) reads: "no pre natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely-i chromosomal abnormalities; ii genetic metabolic diseases; iii haemoglobinopathies; iv sex linked genetic diseases; v congenital anomalies; vi any other abnormalities or diseases as may be specified by the Central Supervisory Board.

1) This technology can widen the frontiers of our knowledge with regard to diseases and helps in diagnostic and preventive medicine.

2) Though genetic mapping helps to locate risky genes with genetic disorders, it can be misused in several ways such being used more than for therapeutic purposes such as self-improvement, etc. Patenting of genomic sequences, confidentiality of data, exploitation of indigenous communities and above all discrimination of the individual socially and economically are its impacts. Hence, there is need for regulation to prevent it.

3) Application of Germ line therapy is to be banned as it would perpetuate genetic enhancement or designer babies, changes to common gene pool and poses environmental threats due to viral escapes.

4) Reproductive cloning needs to be banned entirely as it is immoral and affects the social fabric of the society as it affects institutions like marriage, family etc. Moreover, it affects women's reproductive health. Therapeutic cloning needs to be controlled since embryos are destructed and the misuse of the same is done by IVF clinics and DNA banks.

5) Stem Cell research is to be regulated. Women's reproductive rights should be taken care of. Control over research is needed as its long term side effects are still unknown. Stem cell banks are to be regulated so as to avoid exploitation.

6) Pre Implantation genetic screening and Pre Implantation genetic diagnosis need to be banned as it may affect the interest of future generations as the application of this technology can lead to misuse which would eventually lead to discrimination.

Chapter 7

The Concept of Sanctity of Human Life vis-à-vis Implications of Human Genetic Research

The terms '*human dignity* 'or '*the sanctity of human life'* has been performing strategic functions to bring about different sorts of controversial debates to an end. However there is relative uncertainty since the content of the terms have been at times found ambiguous, abstract or uncertain. This is because in some situations it had been power conferring but at times power limiting. It recognises within itself a personal sphere where the individual self is the master and among his fellowmen his individual self should recognise his duty towards other selves. Yet it is found that in cases like abortion there is a conflict of mother's right to self-determination and foetus's right to life. It is found that a fine balance is maintained between individual right and societal interest within the given cultural hemisphere. It should be remembered that uniformity of moral decisions does not necessarily logically follow from uniform recognition of a fundamental norm.[1] But common reference to a fundamental norm necessarily encourages an interpretation capable of addressing different situations based on different living conditions.

Reference to the term *the sanctity of life* within ethical discourse can be treated as an exhortatory appeal to respect for human life which has become more in vogue with the onslaught of tremendous advancement in human genetic research. The question which crops up is whether the advances in human genetics have made serious inroads into the concept of the sanctity of human life.

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[1] Martin Honecker, "On the Appeal for the Recognition of Human Dignity in Law and Morality", in Kurt Bayertz (Ed.), *The Sanctity of Life and Human Dignity,* Kluwer Academic Publishers, Netherlands (1996), pp. 272-273.

7.1 Human Genetic Research and Fundamental Notions of Life

The advances in human genetic research, especially in the field of biomedicine, have numerous implications but the strong resentment against certain advances in this field has questioned some fundamental notions on humanity. The concept of the sanctity of human life has become a subject of utmost importance as it questions certain fundamental notions on respect for human life such as equality, privacy, autonomy etc. It had also questioned certain fundamental assumptions on human life which may be of both theological and secular in nature. It questions the extent to which scientific freedom should be respected and primacy should be given to genetic research It seeks to probe the areas in which there is a friction between the advances in genomic research with human dignity. The following are some of the areas of conflict:

7.1.1 The Legal Status of Human Embryos and the Sanctity of Human Life

The advancement of biosciences has evoked doubts as to the status of human embryos. The major criticism levelled against cloning technology is the destruction of human embryos used for therapeutic cloning and the legality of embryonic research. The use of stem cells derived from embryos has prompted much apprehension. There is also the question of manipulation of embryos for scientific and commercial purposes which has necessitated a need for redefinition of the role of human embryos.[2]

There are a number of debated legitimate views on the moral and legal status of human embryos. At one end, an argument exists that human embryos should be deemed to be a collection of cells different from other cells and research on them is permissible provided the donors give consent which should be well informed. At the other end of the spectrum, some believe that human embryo is a person with the same status as that of a human being.[3] Accordingly, it is not

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[2] Available at http://www.hli.org/2014/05/artificial-reproductive-technology-constructing-dystopia/ (visited on 11-1-2013).

[3] Simon B. Auerbach, "Taking another look at the definition of an embryo: President Bush's criteria and the problematic application of federal regulations to human embryonic stem cells", 51 (4) *Emory L.J.* 1557 (2002).

possible to experiment on them.[4] This is more so due to the influence of the Christian conception of the divine origin of man. Some countries have sought to debate on the question of the moral status of embryos not only on the basis of religious or socio cultural context but also on the basis of the embryonic developmental period.

Usually it is understood that an embryo at a very early stage of development has the potential to develop into one or several individuals (for example identical twins) since each cell of the embryo has the potential, if separated, to develop into an individual foetus. But after a certain period of time, an embryo can no longer develop into more than one individual because cells of an embryo start to differentiate into specific cell types and become an inseparable and integrated part of a whole. Thus the earliest stage of "*no return*" can be obtained at around 14 days after the fertilization when the primitive streak i.e., the rudiments of the nervous system appears.[5] This is the reason for making a critical distinction in time.

Some legal systems have approved that prior to fourteen days of development, the embryos can be used for research if the potential benefits contribute to the relief of the suffering of other human beings. After fourteen days, they argue that the moral status of the embryo outweighs the (potential) interest of others.[6] However, some countries treat that even this should not be allowed.[7] Some arguments on human cloning make a distinction of the use of embryos on the basis of the principal use of embryos. Creation of embryos for research purpose is differentiated with the use of surplus embryos for research purpose. Countries like Denmark allow the use of surplus embryos but prohibit the creation of embryos for research purpose. Creation of embryos for research purpose

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4 Lori P. Knowles, "The Use of Human Embryos in Stem Cell Research*",* available at www.stemcellnetwork.ca/uploads/File/whitepapers/The-Use-of-Human-Embryos.pdf (visited on 11-1-2013).

5 *Human Cloning: Ethical Issues,* UNESCO (2005), p.15, available at unesdoc.unesco.org/ images/0013/001359/135928e.pdf (visited on 18-2-2015).

6 United Kingdom and Belgium have approved the use of embryos for research purposes within 14 days of fertilization before the primitive streak appears.

7 Costa Rica and Germany prohibit this absolutely.

involves harvesting of eggs which involves invasive procedures on women which is an affront to human dignity. Moreover, if permitted, it may involve commercial exploitation of human eggs and this may affect women's dignity.

Views exist that creation of embryos for artificial conception is hardly objected. But for research purpose some legal systems view it with doubt. Still the fact remains that such a distinction remains vague and self defeating. The reason for this is that even in artificial conception embryos are wasted or frozen and not every embryo gets a chance to live. The question remains therefore that, when an embryo can be considered as a living organism as you and me. Thus the open question remains: when does life begin?

There is no objectively determined degree of differentiation and coordination that are necessary and sufficient to state that there is a higher order of life as far as an embryonic development to human organism is concerned.[8] While it is true that the coordination and functioning of cells lead to a higher order of life, we cannot say with clarity when and at which point life begins.

Some argue that life begins when the zygote is formed due to the fusion of the egg and the sperm.[9] But not all zygotes become humans. They have chances of perishing naturally also. Moreover, it cannot be said categorically that the zygote has all the characteristics of a human organism. However, it is an undeniable fact that embryos are related to human life but then the question is why sperms and eggs are not treated as the same because they also do have the potential to become humans when combined. Therefore, the argument that there is destruction of lives when embryonic stem cell research is pursued is an argument sans any reasoning.

The argument whether human embryos can be considered as a person have been prolonged and marked as a failure to reach agreement.[10] Scientists view

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[8] Jeff Mc Mahan, "Killing Embryos for Stem Cell Research", 38 *Metaphilosophy* 170 (2007), available at philosophy/Rutgers.edu/dmdocuments/killing- Embryos-for-stem-cells-Research.pdf (visited on 16-1-2013).

[9] Maureen L. Cordeen, "When does Human Life Begin? A Scientific Perspective", 1 (1) *Westchester Institute White Paper Series* 12 (2008).

[10] The Use of Embryonic Stem Cells in Therapeutic Cloning, Report of the International Bioethics Committee, UNESCO Ethical Aspects of Human Embryonic Stem Cell Research ,6 April 2001, available at unesdoc.unesco.org/images/0013/001322/132287e.pdf (visited on 18-2-2015).

human beings as persons based on their biological constitution. However, the precise time when personhood begins, what are its attributes and what it means have no conclusive answers.

Different philosophers view the concept of '*person'* in humans differently[11] and so no rational concurrent view emerges in this argument also. For instance, Aristotle held that the soul develops first as a vegetative soul and progresses from it to animalist and finally to human. He stated that abortions are permissible at the earliest stage of biological development.[12] John Locke on the other hand, identified rationality in man to consciousness which was treated by him as part of the human person.[13] The problem with this outlook seems to be that when an individual looses these attributes can he be not said to be a person.

While Kant could not treat the attributes such as memory or consciousness as attributes of personhood but found that all men have equivalent inherent moral worth and cannot be a means to an end since he is a moral subject.[14] Thus the task before man is to protect the humanity within himself and of others. He views that some actions are never to be done no matter what good it produces. Such a notion incorporates an idea against using man as an instrument. This prompted Michael Novak[15] and other bioethists to adopt the stand of Kant to hold that human embryonic research is ethically wrong. But it should be remembered that Kantian ethics hardly deals with the question whether human embryo can be treated to be a person. Being unclear as to whether Kant included an embryo within the terminology of person it is futile to argue that such research is ethically bad.

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[11] Bioethicists view man as a person as a substance of rational nature. Peter Singer finds a person as a being who is self-aware and is conscious being with rational thinking.

[12] Aristotle, *On the Generation of Animals*, Book II, available at https://ebooks.adelaide.edu.au/a/aristotle/generation/book2.html (visited on 18-2-2015).

[13] John Locke, *An Essay Concerning Human Understanding* Book II, available at www.earlymoderntexts.com/pdfs/locke/690book2.pdf (visited on 18-2-2015).

[14] Immanuel Kant, Fundamental Principles of the Metaphysics of Morals in Robert Maynard Hutchins (Ed.)*, Great Books of the Western World*, Thomas Kingmill (trans.), *Encyclopedia Britannica*, USA (1971), p. 276.

[15] Michael Novak, "*The Stem-Cell Slide: Be Alert to the Beginnings of Evil (Controversy over use of Stem Cells for Research and Pres. Bush's Policy)"* (2001), available at www.Icms.org/Documentf.doc/?src=Icm&id=663 (visited on 4-6-2013).

Moreover, the philosophers remain inconclusive as to when personhood begins.[16] Hence it is found that the theories relating to personhood in relation to human beings can never give a concrete idea as to what status should an embryo be given.[17]

Views exist that attributing personhood to different stages of human embryonic development is to gauge human life according to some scale of importance which is equivalent to that of slavery or racism.[18] Hence to treat the embryo as a person is deemed unsuitable since even in in vitro fertilisation, there is loss of embryos. Thus to hold that in embryonic stem cell research alone there is destruction of embryos looses ground.

The next question which would essentially follow is that whether it can be treated as property? To treat it as property again raises question as to who has the right over the embryos among the partners. Moreover, it is feared that it can lead to violation of female reproductive rights (especially with regard to abortion) where it can give rise to competing claims between partners over their right on embryos.[19] Such issues on the competing rights of partners[20] over the frozen embryos used for IVF techniques have already risen before courts.[21]

In US in large number of cases[22] the legal status of frozen embryos in IVF clinics is made between competing partners regarding the disposition of

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[16] Tom L Beauchamp, "The Failure of the Theories of Personhood", 4 (9) *Kennedy Institute of Ethics Journal* 310 (1999).

[17] Jeffrey A. Parness & Susan K. Pritchand, "To Be or Not to Be: Protecting the Unborn Potentiality of Life*"*, 51 (2) *University of Cincinnati Law Review* 257 (1982).

[18] Revised factum of the Appellant Joseph Borowski in Borowski v Canada (Attorney – General) 33 C.C.C (3d) 402 (1987). The Court of Appeal of Sasketchewan discussed this aspect. On appeal the Supreme Court of Canada dismissed the appeal on the ground of lack of standing.

[19] Sina A. Muscati, "Defining a New Ethical Standard for Human in vitro Embryos in the Context of Stem Cell Research", *a*vailable at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1067&context=dltr (visited on 4-3-2013).

[20] Timothy S. Jost, "Rights of Embryo and Foetus in Private Law"*,* 50 *Am. J. Comp. L.* 633 (2002).

[21] One of the leading decisions is Case of Evans v the United Kingdom,(2007) 43 E.H.R.R. 21

[22] Litowitz v Litowitz 48P 3d 261, Dahl v Angle 194 P.3d 834, Roman v Roman 128 S Ct 2469 (2008). In MaureenKass v Steven Kass 696 NE 2d (1998). In this case the partners have agreed for disposition of frozen embryos in IVF clinic for research but one partner retracted , the question was concerned with which right to be given importance whether right to procreation avoidance or women right to reproduce. The court found that since both parties

embryos.[23] However, courts are reluctant in holding them as persons since they only neither have the potential to become a human being nor are willing to term them as property.[24] Embryonic storage and dispositional control has become a crisis.[25]

Here the question which props up in one's mind is that in such cases when embryos are used for research as that of stem cells, to what extent consent of the partners are sufficient. Moreover, can the IVF clinics be given a free hand with regard to the disposal of embryos for research? In case of couples who are separated what would be the law in such situations? These are some of the questions which need legal clarity. Moreover, issues on ownership right over the body and products derived from body parts as distinct from the person's body from whom the biological material was derived based on property conception can add to woes for practical decision making bodies of the nation states which was already visible in Moore v Regents of the University of California.[26]

Moving on to the central question whether destruction of embryos constitute a violation of the concept of the sanctity of life, it is found that the question itself has erupted due to the attribution of absolute inviolability towards human life and human body. This is found to be mainly due to the religious attribution, especially the Christian assumption on human life which has been incorporated in western legal systems. An embryo is deemed special since it is a part of the human body and it has got the potential to become a human being. The concept of physical integrity encompasses within its realm the psychological element also since the life of a human being is interpolated with his cultural, economic and social backgrounds in which he exists. This is true in relation to a community, society or a legal system. Hence questions with regard to ethics and law on research conducted on embryos is

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have expressed clear intention regarding disposing of embryos before divorce and divorce was uncontested, this informed agreement is to be carried into effect. The case did not harp on the ethics of using embryos for research.

[23] Theresa M. Erickson & Megan T. Erickson, "What Happens to Embryos when Marriage Dissolves? Embryo Disposition and Divorce", 35 (2) *William Mitchell Law Review* 474, (2009).

[24] Davis v Davis 842 S.W.2d 588 (Tenn.1992)

[25] John A. Robertson, "Pre commitment Strategies for Disposition of Frozen Embryos", 50 (4) *Emory Law Journal* 990 (2001).

[26] 51 Cal.3d 120 (1990)

marred by differences and differentiations made to suit the interest of the individuals as well as the community.

The sanctity of human life views an individual as the master in his individual sphere but considers him as a part of the community and as a part of human species. This is the reason why the right to physical integrity is recognised but that it is subject to reasonable exceptions when the public interest contravenes. In genetic research, informed consent is recognised but law has to take care that such interest does not affect the person consenting including his future interest as well as the interest of his fellowmen. These are the reasons why certain legal systems consider this type of research as legally permissible and others as not. Since the question when life begins cannot be ascertained with precision, scientific judgments are accepted and even scientific judgments cannot pinpoint a particular stage whether on fertilisation or afterwards that life begins. It is found that legal systems are deciding this based on different scientific conclusions on the point and hence the level of protection given to embryonic development differs.

The sanctity of human life embodies both the subjective and objective experiences of life. It is found that certain areas of genetic research involving human embryos can question one's relationship with his family and society alike. Areas like reproductive cloning, germ line therapy and embryonic stem cell research need control since they not only affect the relationship of an individual with others but the future generation also. Moreover, they question the basic institutions of a society like family, marriage etc.

Pre natal genetic screening can create both physical and psychological impact both on the parents, siblings and offspring. Hence legal systems have to equip themselves to meet the challenges posed by modern science. The conduct of research in this area cannot be considered as violative of human dignity if the legal systems devise their regulatory controls in an effective way.

7.1.2 Freedom of Scientific Inquiry and the Popular Notion of '*Playing God*'

It is found that in democratic systems, freedom of scientific inquiry is recognised as a constitutional right. Though it may not have been specifically enumerated it is found couched in freedom of expression, thought and belief. It is also recognised by international human rights instruments as a basic human right.[27] Ordinarily scientific investigation begins with fact gathering which is a part of right to know. It involves the creation and dissemination of ideas and information.[28] Scientific inquiry can thus be treated as a prime means by which new ideas are developed in a society so as to promote human life and well being. Thus the truth seeking aspect in science needs protection under law. Experimentation is the only way in which scientific theory can be tested and proved. In fact, scientists claim that great inventions erupted due to curiosity within the scientists and for this they cite the examples of Sir Isaac Newton, Faraday, Pau Dirac etc. They claim that discoveries cannot be planned – they pop up in unexpected corners.[29]

Sometimes scientific experimentation may pose certain dangers to social order. It is a fact that DNA research affects our social and political value systems and questions the relationship of man with his family, with his community and within the family of human beings itself. Religious, moral and political opposition exist in addition to the argument that it tampers the natural process. When the recombinant DNA technology was first used in 1970 in the United States several scientists who conducted DNA experiments feared that they may produce unpredictable environmental and occupational hazards. The fear that gene spicing may produce epidemic pathogens was heightened by the fact that the scientists were using microorganisms in their recombinant DNA research that have human hosts, most notably the bacterium E coli.

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[27] See Artice 27 of the UDHR, Article 15 (3) of ICESCR.

[28] Richard Delgado & David Millen "God, Galileo, and Government: Toward Constitutional Protection For Scientific Inquiry", 53 *Washington Law Review* 353 (1978).

[29] John Meurig Thomas, "Intellectual Freedom in Academic Scientific Research Under Threat", 52 (22) *Angewandte Chemie* 5654 (2013), available at http://onlinelibrary.wiley.com /doi/10.1002/anie.201302192/epdf (visited on 29-6-2013).

In the Gordon Conference on Nucleic acids in New Hampshire in 1973, recognising the risk of this research, microbiologists and scientists decided to voluntarily suspend the recombinant experiments with E coli and several other organisms. This self imposed moratorium was endorsed by geneticists in the Asilomalar Conference in 1975. However, due to public outcry there emerged a controversy that freedom of scientific inquiry was curbed. But the government brought about regulations with regard the recombinant DNA research in US.[30] This shows that scientists themselves had limited their freedom when they found that the research can lead to dangerous situations.

However, scientific research is necessarily related to right to quality and improved heath service for which the development of genetic research is essential. However science needs to be controlled due to its positive and negative use. Moreover, today most of the research is undertaken with corporate funding and profit motives and hence the need to control.[31] The unethical practices in clinical trials have added the responsibility of law makers to control clinical research. Research involving humans, especially the germ line therapy and stem cell research pose grave threat to human race if conducted unethically.[32] Hence there is a need to control research in these areas. Moreover, the application of r DNA technology has raised philosophical questions on human dignity and respect for genetic uniqueness. Hence public policy framework should incorporate autonomy and beneficence.

The tinkering of existing machinery called cells and programming it to design life or synthetic biology has raised concerns way back in the 1970's itself. The advancement of genetic engineering has blurred the distinction between matter and information, life and non life, nature and artefact, organic and

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[30] The Donald S Frederickson Papers: The Controversy over the Regulation of Recombinant DNA Research, 1975-1981, available at http://profiles.nlm.nih.gov/ps/retrieve/Narrative/FF/p-nid/74 (visited on 29-6-2013).

[31] Colin Todhunter, "The Corporate Takeover of Science and the Destruction of Freedom", (2012), available at http://www.globalresearch.ca/the-corporate-takeover-of-science-and-the-destruction-of-freedom/5304984 visited on 10-6-2013).

[32] M. D. Fakrudeen et al., "Scientific Freedom and Limits- Clinical Research Perspective*",* 4 (1) *Bangladesh Journal of Bioethics* 31 (2013).

inorganic.[33] Thus evolving individuals become the product of deliberate design. This, according to some, would reduce the special meaning and respect which we attribute to life.

The term 'playing god' was given a theological meaning as of scientists usurping the role of creator until Ted Peters, a theological professor, articulated a secular vision and at the same time discussing the Christian assumption of '*image of god.'*[34] He stresses that he finds no religious objections towards the creation of new life forms.[35] Some liberal bioethists do not find anything wrong with the creation of minima genome. But the question is who would own the responsibility if there is callousness in this construction process undertaken by the scientists. It is here that the responsibility of law makers and the role of international law making assume significance.

Human life does not lose its special status just because scientists can manipulate human genome. This is to view man as a collection of genes. But this manipulating technique used by scientists has to be restricted if it leads to a situation in which disrespect to human life may occur not only to existing human race but becomes a threat to future humanity. This is where it is found human dignity is threatened. And this is precisely where freedom of scientific inquiry needs to be conditioned keeping human dignity in view.

The application of international human rights principles in scientific research need not be considered as hampering scientific inventiveness but it should be understood as certain writers point out, science is a transnational pursuit.[36] Hence the application of human rights law is deemed justifiable.

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[33] Hen van den Belt, "Playing god in Frankenstein's Footsteps: Synthetic Biology and the Meaning of Life", 3(3) *Nanoethics* 257 (2009).

[34] Ted Peters, *Paying God-Genetic Determinism and Human Freedom*, Routledge, London (1997), p.57.

[35] *Ibid.*

[36] John M. Ziman et al., *The World of Science and the Rule of Law*, Oxford University Press, New York (1986), p. 263.

7.1.3 Commercialisation of Human Genes and the Sanctity of Human Life

The fast pace of genetic research and the commercial value of the products and techniques of genetics have raised concerns on the propriety of pursuing research in this area. The most common apprehension is that humans may become "*commodified"* with each person valued solely or primarily on the basis of the monetary worth of her physical components.[37] This has resulted in the cry against advances in human genetic research since it can devalue human life, consequently eroding human dignity.

The number of patents is found to be increasing with regard to biomedical materials and processes especially with regard to cell lines including stem cells, methods of replicating them such as cloning, human proteins, genes etc.[38] Though this increase is more in case of the biological sciences , it is more prominent in human genetics. This has evoked hot debates on the ethics of biomedical patents. Some of the questions raised are whether it is acceptable to assert ownership right over material which is derived from human body, what would be the impact of this on biomedical research i.e., whether patents would slow the pace of innovation by restricting access to biological materials and processes and does the criteria fixed for legal patenting takes into account protection of human dignity, is allowing patenting a way of' commoditising of human body etc. And finally whether the increase in research activities involving biological material and the rush for commercialisation of inventions derived from it may result in unethical practices in the conduct of research.[39] All these concerns have correspondingly questioned the conduct of genetic research and its validity. An analysis of human gene patenting and its relation to human dignity necessarily has to focus on two main directions: whether human genes are un-patentable product of nature (or gift of god) and whether it is ethically justifiable to create a commodity from human body and create a proprietary interest thereof.

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[37] Paul Mahoney, "The Market for Human Tissue", 26 *Virginia Law Review* 164 (2000).

[38] Josephine Johnston, "Intellectual Property and Biomedicine", in Mark Crowley (Ed.), *From the Birth to Death and Bench to Clinic- Bioethics Briefing Book for Journalists*, *Policymakers and Campaigns*, The Hastings Center, New York (2008), pp. 93-96.

[39] Devaiah V. H., "Impact of Bioethics on Patentability of Inventions*"*, 7 (1) *Indian J. Med. Ethics* 14 (2010).

Generally patents are understood as serving the goal of fostering the development of innovation promoting the growth of knowledge by providing innovators an incentive to risk their time and costs for research and development.[40] However, this notion has been questioned when patenting system entered into the realm of human biological research.[41] Patents confer a monopoly status to the holder for a specific period after which they are supposed to enter into public domain. They provide exclusive rights to the holder to prevent anyone - including the doctor, patient and researchers - from studying or testing their product.[42]

In human biological research the human body becomes the source of materials that can be privately claimed and commercially exploited. This has raised concerns on how far patenting can be allowed in this field of research. Moreover, doubts have been raised as to the affordability of genetic tests, availability of medicines at cheap rate and reduced access to effective medical treatment etc.[43] There exist views that since genes function in concert and there are a multitude of functional genes in human body, it is possible that a single strand of DNA could be owned by several researchers. Hence, to start with the basic research itself the researchers will have to pay huge amounts. Thus this inhibits innovation.[44] This has raised the concerns of whether patenting a human material which may be isolated, extracted or purified allows commoditisation of human life and thereby offending human dignity.

It should be borne in mind that initially human biological material as in its natural state has never been eligible for patent protection. Isolated or purified biological material has been held patentable if the material is created through

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40 Eyal H. Barash, "Experimental Uses, Patents and Scientific Progress", 91 *Nw.U.L.Rev.* 667 (1997).

41 Rebecca S Eisenberg, "Proprietary Rights and Norms of Science in Biotechnology Research", 97 *Yale L. J.* 178 (1987).

42 Available at http://www.redfortyeight.com/2009/08/20/the-battle-to-patent-your-genes/ (visited on 17-1-2013).

43 Lisa Larrimore Oeuellette, "Access to Bio knowledge: From Gene Patents to Biomedical Materials", *Stan.Tech.L. Rev.* (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431580 (17-1-2013).

44 Jacob D. Moore, "The Forgotten Victim in the Human Gene Patenting Debate- Pharmaceutical Companies", 63 *Fla. Law Rev.* 1277 (2011).

human intervention which may be through isolation, extraction, purification or synthesis and the material has commercial application.[45] This reasoning came to the forefront with the decision of the US Supreme Court in Diamonds v Chakrabarty[46] wherein the court held that genetically engineered bacterium was patentable. Pointing out the fact that it is the inventive effort which the patent law rewards and not the discovery of naturally occurring raw materials, the court added that the starting point of invention is a product of nature but when the inventor adds his ingenuity and labour it becomes a 'non-natural, human–made product.' Thus the case differentiated for the first time product of nature and product of man. Thus three categories were excluded from patentable subject matter namely, nature, natural phenomenon and abstract ideas. The Supreme Court's observation in the case "*include anything made by man under the sun"* was the prime force for widening the subject matter of patentability. This decision can be considered as having opened up the patenting system to genetically modified organisms which may include viruses, bacteria, human cells etc. especially in US.

Having opened patenting to life forms,[47] this decision paved way to enlarging the area of patentability to even human DNA. Moreover, it can be said that this decision gave momentum to human biological research especially in US. Apart from this the Bayh Dole's Act 1980 gave permission to the universities to legally transfer the patents to private corporations, or sell or license them.[48] These changes in the economic structure of research resulted in the promotion of intellectual property claims in fundamental research discoveries in US.[49] Thus, research including biomedical came to be tuned based on corporate interest and

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[45] Available at http://www.lexology.com/library/detail.aspx?g=95f5957c-2fa9-4a1e-882d-5ed54501f97e (visited on 16-1-2013).

[46] 447 U.S 303 (1980)

[47] Ryan M. T. Iwasaka, "From Chakrabarty to Chimeras: The Growing need for Evolutionary Biology in Patent Law", 109 *Yale L. J.* 1505(2000).

[48] S 401.12 of the Act of 1980, available at. http://www.ecfr.gov/cgi-bin/text-idx?SID=687dc7ccbbce454fef6a5963a2ff591f&mc=true&node=se37.1.401_112&rgn=div8 (visited on 18-1-2013).

[49] Arti Rai & Rebecca S Eisenberg, "Bayh-Dole Reform and the Progress of Biomedicine*",* 66 *Law and Contemporary Problems* 290 (2003).

commercial motives in US which had an impact on the word wide view on patenting. This phenomenon was due to the felt need of the US to boost its economy and we find that the judicial system also tuning itself to meet the nation's economic needs. However we find that this has influenced the law relating to patenting at the international level.

It is found that the Agreement on Trade Related Intellectual Property Rights (TRIPS) is the minimum standard setting instrument followed by majority of the countries especially the members of the World Trade Organisation (WTO) with regard to patenting. But Article 27 (1)[50] of the TRIPS agreement opens the gate for inventions in "*all types of technologies.*" Thus the human genetic technology came to be included within it. The next dilemma created by the TRIPS was that it did not point out what constitutes invention which raised the questions as to inclusion of human genes within the subject matter of patentability. It only left little ideas as to what criteria needs to be incorporated to bring findings within the purview of inventions. This left majority of the countries to decide on it. We find that the reason for letting the countries to interpret it is based on many factors since inventions may cover a wide range of activities which cannot be easily defined in a particular moment of time as such. Thus there exists no consistency with regard to the question whether human genes are patentable.

TRIPS allows but does not require member states to exclude from patentability: (1) Inventions-provided the exclusion is necessary for public order or morality, the protection of life or environment,[51] (2) diagnostic or therapeutic and surgical methods,[52] and (3) plants and animals –other than micro organisms.[53]

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[50] Article 27 (1) reads: "Subject to the provisions of paragraph2 and 3 , patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced."

[51] Article27 (2) reads: "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect public order or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment provided that such exclusion is not made merely because the exploitation is prohibited by their law."

[52] Article27 (3) reads: "Members may also exclude from patentability: (a)diagnostic, therapeutic and surgical methods for the treatment of humans or animals."

Thus vast powers are given to member states to decide on patentability of genetic material. However, members can exclude from patentability any invention which may lead to commercial exploitation on the grounds of public order and morality. Though it is found that the ethics of patenting of biogenetic material and knowledge is charged as unethical, countries are not bringing 'genes' under this category of exclusion.

The question what constitutes patentable subject matter and whether genes come within patentability is a subject hotly debated. Genes are usually treated as troublemakers for the patent system because of their dual nature. As chemical compounds comprised of repeated nucleotides, they fall squarely within the subject matter as being patentable and so the courts especially in US apply patent law to genes. But the problem is that the genes are also informational, (since they cover information code that cell utilizes to manufacture protein) defining fundamental natural processes that can aptly be said as "*wrought" by nature*.[54] This led to the eruption of controversy as to the inclusion of it within the criteria of patentability. The first argument raised was that of religious and moral objections towards patenting.

It is held that DNA is considered to be intimately related to species identity that no parts of it should be controlled by corporate interest. Moreover, it is pointed out that human DNA is unique because it is human as it possesses intrinsic value of a sacred kind.[55]

According to the Organisation for Economic Cooperation and Development gene patent claims fall within one of the four categories namely-(a) whole genes or parts of them, (b) proteins that the genes encode as well as their functions in the organisms, (c) vectors used in the transfer of genes from one organism to the other,

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[53] Article 27 (3) (b) reads: "Members may exclude from patentability plants and animals other than micro organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes."

[54] Richard M. Lebovitz, "Gene Patents: What God hath Wrought", 4 *Jnl of Philosophy, Science and Law* (2004), available at http://jpsl.org/archives/gene-patents-what-god-hath-wrought/ (visited on 18-1-2013).

[55] Ricky Lewis, *Living Things, a*vailable at http://www.columbia.edu/cu/21stC/issue-3.1/lewis.html (visited on 20-1-2013).

and (d) genetically modified cells or organisms, processes used in the making of genetically modified products and the uses of genetic sequences or proteins for genetic tests.[56]

The decision in Amgen, Inc v Chugai Pharmaceutical Co[57] in US can be considered as the first case pertaining to patent claim on human genetic materials. The Federal Circuit court stated that 'purified and isolated DNA sequence' is patentable. Later, in Re Bell[58] and Re Duel,[59] the court ignored the basic requirements of patentable subject matter which resulted in a lenient approach towards the term 'obviousness' as a requirement of patentability. In 1990, US patent rules were changed to include DNA sequences. Non obviousness is a condition in patent law in US which requires to avoid granting patents for inventions which only follow from normal product design and development. Thus such a broad interpretation to patentability criteria was made. According to some writers,[60] this attempt to extend patentable subject matter into fields previously excluded is continuing and this has resulted in the creation of patents to satisfy private monopolies which help certain specific industries, whether they be pharmaceutical, biotechnological or financial to operate without competition. This prompted a further relaxation to patenting of genes. The court in Re kubin[61] held

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[56] OECD- Genetic Inventions, Intellectual Property Rights and Licensing Practices: Evidence and Policies (OECD, Paris) 25 (2002), available at http://www.oecd.org/sti/sci-tech/2491084.pdf (visited on 20-1-2013).

[57] 927F.2d 1200 The Court upholding the decision of the US District court , District of Massachusetts, was looking on to the question of the patentability of erythropoietin a protein consisting of 165 amino acids that stimulated red blood cells.

[58] In re Graeme I. Bell, Leslie B. Rall and James P. Merryweather 991 F 2d 781 The issue was whether the Board correctly determined the amino acid sequence of a protein in conjunction with a reference indicating a general method of cloning renders the gene prima facie obvious. The Court held that the board had failed to establish prima facie obviousness.

[59] In re Thomas F. Deue, Yue-Sheng I, Ned R. Siege and Peter G. Miner 51f.3d1552. The Court held that the existence of general methods of isolating genes was essentially irrelevant for determining their obviousness in the absence of prior art suggesting the actual sequence. It stressed on structural similarity as a test to prove obviousness.

[60] Luigi Palombi, *Gene Cartels- Biotech patents in the Age of Free Trade,* Edward Elgar Publishing Ltd., UK, (2009),pp. 230-231.

[61] 561.F.3d1351 (2009). The Board in this case had held that the use of conventional methodologies to isolate NAI L polynucleotide rendered the invention obvious. The Court affirmed the decision of the board.

that conventional methodologies are irrelevant in an obvious determination.[62] The court explained that inventions are not rendered obvious simply by characterizing a general approach even where the characterized approach seems to be a promising field of experimentation. More is required, which includes guidelines from the assisted prior art that sets forth the particular form of the claimed invention or otherwise describes ways to achieve it. However, there are opinions that this decision had rendered an apprehension for applicants for patents since 'obvious' challenges may invalidate many gene patents if the protein was known and the gene coding depended on routine methods.[63] Thus in the discussions in this case, laws especially in US, reveal that the criteria for patentability of genetic discoveries have not been able to be evolved properly so as to include genes. The decision reveals the slow trend in US for raising patentability criteria with regard to gene patenting. In fact the Genomic Research Accessibility Act, 2007[64] which was introduced but could not be enacted attempts to exclude human genetic material from patenting and also on general diagnostic testing and federal and federally assisted patents.

Moreover, a lenient attitude towards genetic patenting was incorporated into the US legal system which earlier was solely based on the huge commercial profits it may bring to the nation by the biotech and pharmaceutical enterprises but slowly they began to realise its wider implications when it started to affect their

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[62] KSR International Co v Teleflex Inc 550 U.S 398 (2007) which was not on gene patents relaxed the rule of obviousness. KSR international Co v Teleflex Inc.,550 US 398 (2007) www.law.cornell.edu/supct/html/04-1350Teleflex sued KSR International alleging that KSR had infringed on its patent for an adjustable gas-pedal system composed of an adjusted accelerator pedal. KSR contended that the patent of Teleflex was obvious, hence unpatentable since obvious inventions are unpatentable. The federal District court accepted the stance of KSR that the invention was obvious because each of the invention's components existed in previous patents, hence a prior art. On appeal by Teleflex the Court of Appeal of the Federal Circuit, reversed the District Court decision stating that it had not applied the TSM test. Under the "Teaching-suggestion or motivation" test the District Court has to identify the specific "teaching, suggestion or motivation" that would have led a knowledgeable person to combine the two previously existing components. KSR appealed to the Supreme Court. The Court ruled in favour of KSR. It held that TSM test was not a mandatory rule and held that the patents of Teleflex was invalid since the existence of the technology would have caused any person of ordinary skill to see the obvious benefit of combining the two disclosed prior art reference. Consequently Teleflex patents were obvious and therefore invalid.

[63] Joanne K. Wan, "A Nail in the Coffin for Gene Patents," 25 (9) *B.T.L.J.* 29 (2010).

[64] Available at https://www.govtrack.us/congress/bills/110/hr977/text (visited on 23-1-2013).

public health system. The US Supreme Court in a path breaking judgment in Association For Molecular Pathology et al v Myraid Genetics Inc et al[65] held that naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated but affirmed that synthetic DNA or c DNA is patent eligible because it is not naturally occurring but made by man. The court pointed that Myraids claim is not saved by the mere fact that isolating DNA from the human genome was undertaken by it since the claim did not express any chemical changes resulting from isolation of a particular DNA section and instead the focus was on genetic information encoded in BRCA1 and BRCA2 genes, which is unacceptable.

It is found that this decision has given a warning signal to the biotech companies in US who by using the patent regime have been isolating the natural genes and claiming patents and thereby exploiting the patients who have to pay lump sum amount for genetic tests and related medicines. Though this decision is a reiteration of the reasoning discussed in Diamonds v Chakrabarty,[66] it can be distinguished from it in the sense that it stressed that the mere isolation of a single DNA strand by itself does not change the character of the gene from a natural product to manmade product. In fact the implications of Myraids patents are that they not only cover "*BReast CAncer*" or BRCA mutations themselves but they include diagnostic tests and the use of genes for predictive diseases.

Though the court did not ponder on the ethics behind patenting of human genes but it pointed out patenting of the genetic tests evolved from BRCA1 and BRCA2 would have an adverse effect on the patients especially when there is a

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[65] 133 S.Ct 2107 (2013) decided on June 13, 2013 delivered by Justice Thomas Myraids Genetics Inc, obtained several patents after discovering the location and sequence of BRCA1 and BRCA2 genes mutations of which drastically increases the risk of breast and ovarian cancers. It developed medical tests for detecting the mutations and applied for patents which would give rise to the company's exclusive right to isolate exclusive right to isolate an individual's BRCA1 and BRCA2 genes and would give Myraid the exclusive right to synthetically create BRCA cDNA. The District Court held Myraids claims as invalid because they covered products of nature. The Federal Circuit found both isolated DNA and c DNA patent eligible. The Supreme Court held that-"We merely hold that genes and the information they encode are not patent eigibeunder101 USC simply because they have been isolated from the surrounding materials". Thus the Supreme Court affirmed in part and reversed in part the decision of the Federal circuit.

[66] 447U.S303(1980)

steep rise in the rate of breast and ovarian cancer in America. In fact this decision is itself a result of concerted effort by certain non-governmental organisations against patenting of genes and the genetic tests which can have serious repercussions on the public health system since these tests are conducted by companies at an exorbitant amount.

It is found that the slow change in the American view on limiting patentability to human genes is welcoming since patenting of genes and diagnostic test are highly expensive and thereby the affordability of it can hamper women's health. The silence of the TRIPS as to whether human genetic material is patentable is seen as one among the reasons for such a state of affairs.[67] However, since the patent law in US has a substantial impact on the formation of norms with regard to patenting of human genes, it is hoped that this case would again trigger a deep thinking on the patentability of human genes the world over since in EU countries the approach of the court on this subject seems to be different.

However one finds an overwhelming race among the countries with regard to patenting of genes especially in case of BRCA genes due to its value in medical investigation, diagnosis and treatment with appropriate drugs which have high commercial and financial incentives.

Rejecting the argument that gene patents ethically violate human dignity, the Appellate Board in Breast and Ovarian Cancer, University of Utah[68] held that the EPO need not look into that question since it is only vested with the responsibility to look into questions of patentability and not to the socio-economic effects of the grant of patents in specific areas and thereby limiting the subject matter of patentability. The opponents have argued that the socio-economic consequences of patenting the subject matter should be considered under Article 53 (a) EPC since these consequences touched ethical issues. The point they

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[67] Cydney A. Fowler, "Ending Genetic Monopolies: How the TRIPS Agreement's Failure to Exclude Gene Patents Thwarts Innovation and Hurts Consumers Worldwide", 25 *Am.U.Int'l.L.Rev*. 1088 (2010).

[68] EPO-T1213/05. See also, http://www.epo.org/law-practice/case-law-appeals/recent/t 051213eu1. html

highlighted was that patenting of BRCA1 would not only result in increased costs for patients but also would influence diagnosis and research which is violative of Article 53(a) EPC.

The observation of the board that logically such objection applied to exploitation of any patent and it was the same for all[69] throws light on the inclination of the European approach for gaining commercial profits even at the peril of human dignity. This is further depicted when the University went in for the patenting of a particular mutation relating to the use of the same gene for diagnostic methods which was allowed by the appellate board again.[70]

The next fundamental question which is quiet often raised is whether an entire human being is patentable and the subsequent question is: what is the logic for not allowing patenting of human beings but allowing patenting of human genetic materials? The question of patenting of human beings depends on the question of what definition can be attributed to the term human being. Since there is no consensus on the definition of human being, no direct answer emerges in this regard yet we find that all the legal systems consider humans as unpatentable

However, in the European Union Directive on the Legal Protection of Biotechnological Inventions 1998, under Article 5[71] reference to humans and human material is directly made. Under it, human body in all stages of its development is held to be not patentable but human genes even in its natural form is held to be patentable. This is contrary to the American experience where patenting of products of nature is prohibited.

Again the difference between America and the EU countries is that EU considers genes as mere chemical compounds and not as storehouses of

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[69] *Id.,*at para 53.

[70] T 0666/05 (Mutation/UNIVERSITY OF UTAH) of 13.11.2008, available at http://www.epo.org/law-practice/case-law-appeals/ recent/ t050666eu1.html

[71] Article 5 reads: "1 the human body at the various stages of its formation and development, and the simple discovery of one of its element, including the sequence or partial sequence of a gene cannot constitute patentable inventions. 2 An element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element. 3 The industrial application of a sequence or a partial sequence of a gene must be disclosed in the patent application."

information but this is not so in America. Of late , they have been attempting to consider genes as information givers. This proves the dual nature of genes and how it influences the course of judicial interpretations.

Further , Article 53 (a)[72] of European Patent Convention 1973, prohibits the grant of European Patents for inventions the publication of which is contrary to 'ordre public' or morality irrespective of whether the invention is patentable or not. Patenting of human beings is contrary to Article 53 (a). America is also not in favour of patenting of human beings.[73] Canada[74] and Australia[75] do not permit patenting of human beings as such.[76] The reason behind this may be that it may be against public order policy or common notions of morality.

The term '*human being'* lacks a precise and authentic definition in legal parlance this has resulted in creating confusion in certain countries as to the question of legality of the patenting of processes of stem cell research and human cloning. Though international standard setting instruments such as TRIPS or EPC have limited the patent rights by public order or morality restrictions, they have not been able to provide adequate restriction or exclusions to patent rights, especially with regard to patenting of transgenics.[77] One of the classic illustrations of this is the Oncomouse decision.[78] This decision is viewed as basically promoting bio patents for commercial incentives and thereby totally disregarding

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[72] Article 53 reads: "European Patents shall not be granted in respect of : Inventions the commercial exploitation of which would be contrary to "ordre public or morality" such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the contracting states."

[73] UPSTO order in 1988 Manual of Patent Examining Procedure, available at http://www.uspto.gov/web/offices/pac/mpep/mpep-2100.pdf

[74] The Canadian Biotechnology Advisory Committee recommended that the Patent Act 1985 be amended to prohibit this. Report to the Government of Canada Biotechnology Ministerial Coordinating Committee,2002, available at http://www.iatp.org/files/Patenting_of_Higher_Life_Forms_and_Related_Iss.htm.

[75] Section 18(2) of Patent Act 1990 reads: "Human Beings and the biological processes for their generation are not patentable."

[76] Sina A. Muscati, *"*Some More Human than Others: The Scope of Patentability Related to Human Embryonic Stem Cell Research*"*, 44 *Jurimetrics Journal* 227 (2004).

[77] Timothy Caulfield et al., "Patenting Human Genetic Material: Refocusing the Debate*"*, 1 (3) *Nat. Rev. Genet.* 227 (2008), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2220019/ (visited on 24-1-2013).

[78] T19/09Harvard v Oncomouse (1990) OJ EPO464. See www.epo.org/law-practice/case-law-appeals/pdf/1900019.exi.html

respect for life. But we ought to see that patents are given for further development in medical science which needs to be understood and acknowledged. The test proposed in the Oncomouse decision, that of balancing of animal suffering and medical benefit, sounds good but the ultimate findings were allowing patenting of transgenic. Even if one admits the test propounded, yet it should be accepted when the test is put to action. In course of time it would lead to disregarding animal suffering and giving prominence to the latter.

Some writers[79] place biocentrism as an argument against patenting of life forms whether it is a human being, animal or plant. All living beings possess morally considerable interests that ought to be restricted which has its roots in Schweitzer's respect for life thesis. Despite possessing artificial features created by the biologists the organism possesses its own original traits which ought to be respected. This view regards patenting as abhorrent, since it denies the right of the species to decide on its welfare even if it is an artificially altered one. This view presents the dichotomy between value considerations in the policy behind patenting and the concept of respect for life.

One of the major questions which arises with the patenting of human cells is to what extent an ownership interest can be given to a person's biological material? The question is who should be given ownership interest: Whether the person who gave the tissue for research or the person who finds the working of the genes which is useful towards ensuring health and medicines? The Californian court in Moore's decision[80] in fact dealt with this issue and ruled in favour of the patent holder. Third party interest in human body was valued greater that the individual person's interest. However, the court explicitly placed the ownership interest on the patent holder, thus giving momentum to the notion that human genes are patentable. The decision, though favoured the property rights approach to human body towards the interest of the patent holder, did not take into account the personal rights view.

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[79] Ned Hettinger, "Patenting Life: Biotechnology, Intellectual Property and Environmental Ethics*"*, 22 (2) *Boston College Environmental Affairs Law Review* 282 (1995).

[80] 51 Cal.3d120 (1990)

The personal rights view which is of classical common law tradition, springs from the notion that human genetic material has an essential connection with the person from whom it is taken. The personal rights approach includes respect for the individual's right to integrity which includes respect for bodily material once removed from the body and still identifiable to the person.[81] Thus this relates to the fundamental rights to dignified existence i.e., privacy which has not been looked into in this decision.

Thus it is found that the decisions of the court not only raises legal issues but has the potential to transcend to our social and moral fabric.[82] Patenting of human genome can intrude on a person's genetic privacy, which includes his genetic predisposition since genes are carriers of "information' which needs confidentiality and adequate protection. Even in European case laws on the subject,[83] the proprietary interest of the patent holder was given more prominence than the donor's integrity until the European Directive came into existence.

The rise in the number of patents has given rise to a term called "*thickening*" wherein the number of patents stacks the inventiveness. This according to some impedes innovation and research especially in the area of genetics. Article 30[84] of the TRIPS sets certain limitations to the rights of the patent holders in this regard wherein research and experimental work can act as a limited restriction on the patent holders' rights thereby ensuring access to patented knowledge. However the problem is that different jurisdictions interpret this exemption in different ways which had paved the way for uncertainty.[85] Moreover, the dispute resolution panel of WTO in its ruling as to the

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81 Available at https://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/ip00167.html (visited on 27-1-2013).

82 A. M. Chakrabarty, "Patenting Life Forms: Yesterday, Today and Tomorrow", *a*vailable at http://www.ncbi.nlm.nih.gov/pubmed/14714683 (visited on 25-1-2013).

83 Relaxin/Howard Florey Institute. See ,

http://www.epo.org/law-practice/case-law-appeals/recent/t950272eu2.html

84 Article 30 reads- Exceptions to Right Conferred: "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with the normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking into account of legitimate interest of third parties."

85 Geertrui Van Overwalle et al., "Models for facilitating access to patents on genetic inventions", 7 *Nature Reviews* 145 (2006).

interpretation of Article 30 in Canada Patent Protection of Pharmaceutical Products[86] held that there are three criteria which should be read cumulatively to claim an exception under Article 30, namely – (a) it must be limited, (b) it must not unreasonably conflict with normal exploitation of the patent, and (c) it must not unreasonably prejudice the legitimate interest of the patent owner ,taking into account the legitimate interest of the third parties. Lastly the panel observed that the "syntax of Article 30 supports the conclusion that an exception may be limited." This means that the conditions must be interpreted in relation to each other but each condition is separate and independent and requires being satisfied. This makes the research and experimental exemption an empty promise. This is the reason it is alleged that patents have stalled research.

In Europe, the research exemption is part of patent law and different national legislations and court rulings had resulted in the exact scope of exemption differing from country to country.[87] This is because large ambiguities and differences exist across jurisdictions as to what are the criteria to qualify '*inventions.'* However there exist views that it would affect the availability of genetic diagnostic services since patent imposes restrictions on further research on the particular gene patented or tool applied.[88]

In America, various case laws[89] on the interpretation of exemption clause in its patent law proved the limitations for a researcher to get access to patented

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[86] WT/DS114/R decided on 17-3-2000. See, https://www.wto.org/english/tratop_e/dispu_e/7428d.pdf the dispute relates to the challenge by European Community against Section55(1) and Section55(2) of Canada's Patent Act which allowed drug manufacturers to override, in certain situations the rights conferred on patent holders as violative Art27(1), Art28,Art33 &Art30 of TRIPS.

[87] Naomi Hawkins, "Human Gene Patents and Genetic Testing in Europe: A Reappraisal*",* 7-3 *SCRIPTed* 453(2010), available at http://www2.law.ed.ac.uk/ahrc/script-ed/vol7-3/hawkins.asp (27-1-2013).

[88] Isabella Hugs et al., "The Fate and Future of Patents on Human Genes and Diagnostic Methods*,"* 13 *Nature Reviews Genetics* 441 (2012).

[89] John J. Madley v Duke University 307 F 3d 1351, Madey was a famous physics professor who had obtained several patents prior to coming to Duke University and while in service of Duke University also he continued to experiment with his inventions. Duke University terminated his services but retained his patented equipments. He sued for infringement. Duke University argued that the equipments were used for experiments and so fell under exemption clause. District court ruled in favour of Duke University. On appeal the Federal Circuit experimental use defence had an intent element. The court held that Duke university's non profit status was irrelevant The Court has to inquire as to what Duke University intended to do with the

information. Even before the Supreme Court ruling in Myraid Genetics decision, [90] the Report by the Department of Health and Human Services, 2010[91] found that patents harm genetic research and do not stimulate individual research. They stated that patents on genes threaten the development of new and promising technologies; in particular, the genetic tests[92] especially multiplex tests which may involve multiple genes and multiple claims to genes, parallel sequencing and whole genomic sequencing. Hence it recommended creation of an exemption from patent infringement liability for those who use patent protected genes in the pursuit of research and development.[93] This reveals that patent system in human genes can lead to a situation where the innovative stimulus is crippled and can affect the public health system. Hence patenting in the area of genetic research needs to be reassessed and serious thoughts on limiting the patent system with regard to human genes and genetic tests and diagnostic methods is to be undertaken. Certain advances in genetic research necessitate this.

Embryonic stem cell research funding become subject to patent rights not only as a product but also under several methods of isolation and application.[94]

In America, embryonic stem cell patenting is already in vogue. It had been objected on social and economic grounds; however this is slightly different in Europe where patenting is objected on morality clause.[95] The European Directive1998 prohibits patenting on human beings, embryos and human body

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knowledge gained from the experiment. The court has to look into specific use and specific intent. Even non profits can make a lot of money through selling the results of their research. Plus research brings in students and research grants. Hence ruled against Duke University. Partly reversing and partly remanding the judgment of District Court. See also Embrex Inc v Service Engineering Corp 216 F3d.1343 (fed cir 2000).

90 133 S.Ct 2107 (2013)

91 Report of the Secretary's Advisory Committee on Genetics, Health and Society on April 2010.

92 The report stated that exclusive rights possession was not necessary for the development of a particular genetic test. For this it cited without a nonexclusive license for cystic fibroid in America, still there are 50% private and public entities.

93 Available at http://osp.od.nih.gov/sites/default/files/SACGHS_patents_report_2010.pdf (visited on 28-1-2013).

94 Roger Brownsword, "Regulating Human Genetics: New Dilemmas for a New Millennium", 12 (1) *Med Law Rev* 14 (2004).

95 David B. Resnik, Embryonic Stem Cell Patent and Human Dignity, 15 (3*) Health Care Analysis* 211 (2007), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2695597/ (visited on 28-1-2013).

parts. In a significant decision by the European Union Court of Justice in Oliver Brustle v Green Peace[96], patenting of human embryonic stem cells by destruction of human embryos was held to be not patentable, even if it is for the purpose of advancing scientific research and not for promoting commercial motives. This decision is the reassertion of the view of the EPO in the Edinburgh patent case or WARF.[97] The main argument put forward before the Enlarged Board of Appeal by the applicant in this case was that the use of human embryos for retrieving human embryonic stem cells was not for industrial or commercial purpose. The Board observed that the destruction of embryos for the purpose of retrieving hESC is an essential and integral part of industrial and commercial activity for which patent cannot be granted as per Rule 28 (c) of EPC.[98] Throughout the decision it can be found that the inviolable nature of the human embryos being stressed as a reason for not patenting embryonic stems cells.

In India, the question of patentability of stem cell research is not clear due to the dearth of case laws on the matter. The Kolkata High Court in Dimminaco

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[96] Decided by EuropeanUnion Court of Justice(Grand Chamber), available at curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7dod56d95b6a The Process and Product Patent Claim filed by Brustle concerned the isolated and purified neural precursor cells obtained from human embryonic cells for treatment of several neural defects. The Federal Patent Court, Germany held that patent at issue is invalid in so far as it covers precursor cells obtained from hESC and processes for the production of those cells. The Federal Court of Justice referred the matter to the European Court of Justice. The Court held that-

(a) Any human ovum after fertilization, any non-fertilized human ovum into which the cell nucleus from a mature cell has been transplanted, and any non- fertilized human ovum whose division and further development have been stimulated by parthogenesis constitute a human embryo.

(b) The exclusion from patentability concerning the use of human embryos for industrial or commercial purpose set out in Article6 (2)(c) of Directive 98/44 also covers the use of human embryos for purposes of scientific research only use for therapeutic or diagnostic purposes which is applied to the human embryos and is useful to it being patentable.

(c) Article6(2)(c) of the Directive excludes an invention from patentability where the technical teaching which is the subject matter of the patent application requires the prior destruction of human embryos and their use as base material , whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos.

[97] EPO G0002/06, available at http://www.epo.org/law-practice/case-law-appeals/recent/g060002ex1. html (visited on 12.4.2013)

[98] Rule 28 deals with exceptions to patentability. Under clause(c) it is stated that European Patents may not be granted to uses of embryos for industrial or commercial purposes.

AG v Controller of Patents [99] held that there is no statutory bar to patentability of a process even if it contains a living organism as its end product, provided the process fulfils the patentability criteria. Section 2 of the Patent Act 1970, did not pose a restriction to the patentability of a living organism. Through this decision it is doubted whether this case would lead to patenting of essential biological processes which is a prohibited path as per the mandate of the TRIPS and Indian Patent Act.[100] The Indian Guidelines for Examination of Biotechnology Application for Patents [101] states that an application for biotechnological inventions may also include stem cells both process and product. From this it can be inferred that embryonic stem cells can be patented. There is much uncertainty as to bringing embryonic stem cells within the realm of patentability.

The Manual of Patent Office Practice and Procedure 2011 however mentions methods of cloning as un-patentable since they are likely to violate socio-cultural and legal norms of morality.[102]

The question whether gene patenting offends human dignity can be answered only after considering whether it affects the subjective and objective experiences of human life. Gene patents are granted in biomedical research since they promote innovative research and result in improved drugs, medical diagnostic and testing services thereby assuring quality medical services. However, it is found that now the major objection to patenting is that it affects the quality, access and the cost of medical diagnosis and cost of medicines. Moreover,

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[99] AID no1 of 2001 Jan 15,2002 Cal HC as cited in Tanuja V Garde, "India's Intellectual Property Regime: A Counterbalance to Market Liberalization", CDDRL Working Papers (2009),p.13.

[100] Abhinav Kumar, "Towards Patentability of Essentially Biological Processes," 13 *J.I.P.R.* 133 (2008).

[101] Issued by the Controller General of Patents, Designs and Trademarks, March 25, 2013, available at http://ipindia.nic.in/whats_new/biotech_Guidelines_25March2013.pdf (visited on 6-6-2014).

[102] Published by the Controller General of Patents, Designs and Trademarks 2011 Chapter 8, available at http://www.ipindia.nic.in/ipr/patent/manual/HTML%20AND%20PDF/Manual%20of%20Patent%20Office%20Practice%20and%20Procedure%20-%20pdf/Manual%20of%20Patent%20Office%20Practice%20and%20Procedure.pdf (visited on 30-1-2013).

healthcare will be limited to only those who can afford which became evident in the discussions on Myraids decision[103] in US.

Patient autonomy and confidentiality is hardly taken care of in the patenting process.[104] The patient's body may be exploited and genetic integrity affected when genes, the carriers of information, are commoditised. Consequently the patient who donates the material is hardly rewarded. The balancing of the health care possibilities by the advancement in genetic discoveries cannot be equally ignored. Certain incentives are to be given to the researcher who makes inventions possible whether it should be in the form of patenting or otherwise needs a rethought. Conduct of medical research is a need but practice reveals that patents have a deleterious effect on this and hence human genetic research needs to be taken out of the patenting system.

7.1.4 Genetic Information and Privacy

Genetic information is understood as all information encoded in the genetic material with which all living organisms are endowed. DNA information is vital since it represents the organism's biological inheritance, and controls that organism's development, reproduction and self repair.[105] Within the DNA information flows to different products namely proteins, RNA, amino acids, nucleotides etc. Human Genetic Research involves the study of this information in humans and includes the identification of genes that comprise the human genome, functions of the genes, the characterisation of normal and disease conditions in individuals, biological relatives, families, communities and groups and studies involving gene therapy.[106] Genetic research has profound impact on the individual and social sphere of human life. This is so with regard to human genetic information on the basis of which the research is carried out. Genetic information is identified as special and mandates protection due to certain reasons such as-

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[103] Available at http://laws.findlaw.com/US/000/12-398.html.

[104] Suzanne Ratcliffe, "The Ethics of Genetic Patenting and the Subsequent Implications of Health Care*",* 27 *Touro L. Rev.* 444 (2011).

[105] Available at Pespmcl.vub.ac.be/ASC/GENETIINFOR.html (visited on 30-1-2013).

[106] Panel on Research Ethics, Government of Canada online at www.ethics.gc.ca/eng/policy-politique/initiatives/tcps2-eptc2/chapter13-chapitre13 (visited on 31-1-2013).

- It focuses on particularity and difference
- It is inextricably linked to a person's identity
- It may provide critical probabilities concerning a person's future health
- Genetic information may even point towards certain behavioural traits, such as intelligence, sexual orientation, anxiety or aggression, adding layers of complexity.[107]

Thus, genetic information may have a profound impact on the participant's individual self and his relation with others. Rather , it may reveal the genetic information of the biological relatives or others with whom the participant may share a common genetic ancestry; hence the relevance of genetic information and its relation to human dignity.

Genetic information can present data not only on the present status of the individual but can also open windows on his future predisposition to certain diseases or genetic defects.[108] It can also bring knowledge on possibly unwanted (e g., formerly unknown information on paternity) and thereby bring changes to a person's life.[109] This propels the need for a legal and ethical control on the confidential nature the information embodies. This does not mean that research on genetics and the information it mobilises are of little relevance to society. It promises advanced health care through early intervention, detection and therapy. It also contributes to the development of reproductive sciences and nanotechnology. Thus genetic information carries within its fold the knowledge about past, present and future of human health and wellbeing and is both a blessing as well as a curse when misused. It has individual and social consequences; hence questions of privacy and confidentiality are relevant. The development of genetics thus has led to greater understanding as to the interrelatedness of individuals and the way in which the interest of one family

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[107] Astrid H. Gesche, "Genetic Testing and Human Genetic Databases*"*, in Michela Betta (Ed.), *The Moral, Social and Commercial Imperatives of Genetic Testing and Screening-The Australia Case,* Springer Pub., Netherlands (2006), p.75.

[108] Pamela Jensen, "Genetic Privacy: The Potential for Genetic Discrimination in Insurance*"*, 29 *V.U.W.L.R.* 347 (1999).

[109] Available at http://www.medscape.com/viewarticle/467175 (visited on 31-1-2013).

member cannot be entirely isolated from the interest of the others.[110] Preserving the confidentiality of the information is essential so that individuals avail the genetic services on the belief that their genetic secrets would be duly protected against disclosure. Thus public health is promoted whereas the duty to warn the genetic risk to which an individual is inclined to is equally important.[111] So, genetic information warrants special protection.[112]

Law is charged with the task of setting out the parameters under which there is a duty to reveal genetic information and the circumstances under which it should not be. The mapping of the human genome and genetic screening or testing has triggered various ethical and legal discussions. Prominent among these is the issue of the "*ownership*" of information. This is interconnected with the question of privacy. The potential for discrimination and stigmatization is significant and the dignitary harm one may suffer due to careless dissemination of this predictive data is beyond dispute.

There is a view that conferring property right to one's genetic information would be the most practical means of protecting the confidentiality of the information.[113] But this information, if restricted in this way, the downstream research would be affected. Thus the overstress on data protection and privacy hampers biomedical research. Again whether the property right is to be given to the donor or patent holder is another contentious question and hence it is found that conferring property rights to the information adds to the ethical dilemma. However it is undisputed that the genetic information needs protection to a certain

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[110] Ann Sommerville & Veronica English, "Genetic Privacy: Orthodoxy and Oxymoron?*",* 25 *J . Med. Ethics* 144 (1999).

[111] Marcia J. Weiss, "Should Genetic Information be Protected? An Ethical and Legal Dilemma*",* available at www.bc.edu/bc-org/avp/law/st-org/iptf/commentary/content/1999060509.html (visited on 4-2-2013).

[112] Margaret Otlowski, "Genetic Discrimination: Meeting the Challenges of an Emerging Issue,*"* 26 (3) *U.N.S.W. Law J.* 764 (2003).

[113] Richard A. Spinello, "Property Rights in Genetic Information", *Ethics and Information Technology* 30 (2004).

limit. Confidentiality and privacy are a long cherished ideal of biomedical studies. This is a fundamental norm found in the field of medicine.[114]

Genetic privacy is associated with the question of the patient's right to keep genetic information secret with the right to know about genetic risks involved (self and family members). This is also intimately connected with the right of family members not to know about their genetic predisposition.[115] To this extent genetic information embodies the results of the genetic tests, screening etc. As a source of the genetic information, the DNA molecule can be collected and stored for multiple and unknown uses.[116] Since copies of it can be made and the same can be used for myriad purposes the question of the extent of informed consent for the use of the donor's tissue also assumes significance.

Privacy rights are not absolute but must be judged by weighing the competing interests at stake.[117] This consent extends not only to the use of the donor's material but also to the use and disclosure of information which pertains not only to the participant or patient in clinical research but to their relatives who share common genetic predispositions. Hence the question of disclosure and the areas of confidentiality have to be prescribed by law.

In the United States the duty of disclosure of genetic information and the right not to know the genetic information and the consent of the patient towards disclosure have been subject to judicial scrutiny. In Pate v Threlkel[118] the Supreme Court of Florida held that a duty exists if the standard of care requires a reasonably prudent health care provider to warn a patient of the genetically transferable nature of the condition for which the patient is receiving the

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[114] Hippocratic Oath 4th century BC says: "Whatsoever things I see or hear, my attendance on the sick or even apart from, which no account one must spread abroad, I will keep to myself holding such things as sacred secrets."

[115] Beatrice Godard et al., "Guidelines for Disclosing Genetic Information to Family Members: From Development to Use", 5 *Familial Cancer* 104 (2006).

[116] Patricia A. Roche & George J. Annas, "New Genetic Privacy Concerns", Gene Watch, Council for Responsible Genetics, available at http://www.councilforresponsiblegenetics.org /Gene Watch/Gene Watch Page.aspx? page Id=196&archive=yes# (visited on 5-2-2013).

[117] Pauline T. Kim, "Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace", 96 *Nw.U.L.Rev.* 1497 (2002).

[118] 661So.2d. 278 (fla1995)

treatment. The court observed that though there is only a privity between the doctor and the patient yet it may be extended to the third party when there is a foreseeable risk. According to the court, direct disclosure to the relatives may be impractical and so it may be made to the patient directly. This view can be seen as an affirmation of the reasoning in Tarasoff v Regents of University of California[119] though the subject was not in relation to the disclosure of genetic information. In Safer v Pack[120] though the court held that a duty exists to warn the patient about probable genetic disease to offspring, the court stressed it cannot be said precisely as to how the disclosure is to be made, especially when the third party is a child.

There is no consistency in the decision making process as to whether the doctor has to inform the relatives or to the patient that his relatives are likely to suffer from certain genetic disorders. However, with the passing of the Genetic Information Non discrimination Act 2008[121] in the United States, the misuse of information and the consequent discrimination have to a certain extent been curtailed. Moreover, certain conditions have been laid down where disclosure can be made to the relatives without the consent of the participant.

The WMA's position, in its Declaration on Human Genome Project 1992[122] and the WHO Guidelines of 1998,[123] stresses on disclosure when there is a threat to life of third parties due to nondisclosure. The International Instruments especially the Universal Declaration on Human Genome and Human Rights

[119] 551p2d334 (Cal.1976), available at http://www.publichealthlaw.net/Reader/docs/Tarasoff.pdf (visited on 16.11.2013). The case related to nondisclosure of the intention to kill revealed by a psychiatric patient to the doctor.

[120] 291NJSuper619 (1996), available at http://biotech.law.lsu.edu/cases/genetics/Safer.htm (visited on 25.11.2013).

[121] GINA 2008 is an enactment which aims to prohibit the use of genetic information for employment and for the health insurance.

[122] Available at http://www.wma.net/en/30publications/10policies/20archives/g6/ (visited on 6-2-2013).

[123] Review of Ethical Issues in Medical Genetics: Report of Consultants to WHO/ Professor D. C. Wertz, J. C. Fletcher, K. Berg, Clause 8.2.2, available at http://www.who.int/genomics/publications/en/ethical_issuesin_medgenetics%20report.pdf (visited in 6-2-2013).

1997[124] and the UNESCO Declaration on Protection of Human Genetic Data 2003[125] attempts to make a balance between confidentiality and disclosure. It attempts to put the concept of informed consent to the forefront and disclosure without consent restrictively based on public interest. However the basic apprehension raised is that this had led to the need to redefine "*family"* in order to determine the degree up to which information can be disclosed. This had consequentially led to different interpretations by legal systems as to which extent the information may be disclosed.

Moreover, it is pointed out that while the Council of Europe[126] had given a wide definition to Genetic data,[127] the member states have defined the concept of family restrictively for the permissible disclosure.[128] This had led to greater confusions. However, it is found that there is no existing rule in the world stating the obligation of the participant to reveal the information conveyed by the physician to the third parties and it still exists as a moral obligation.[129] Therefore, disclosure of the information and the extent of retaining confidentiality are crucial questions which remain unsettled.

The use of genetic material and the question of bodily privacy have emerged as a focal area of bioethical debates. The reason behind this is that the

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[124] Article 9 reads: "In order to protect human rights and fundamental freedoms limitations to the principles of consent and confidentiality may only be prescribed by law, for compelling reasons within the bounds of public international law and International Law of Human rights."

[125] See Article 6(d), Articles13,Article 14

[126] Council of Europe, Committee Of Ministers Recommendation R(97)5 of the Committee of Ministers to Member states on the Protection Of Medical Data Feb15,1997, 584th Meeting.

[127] Clause 1 "the expression "genetic data" refers to all data, of whatever type, concerning the hereditary characteristics of an individual or concerning the pattern of inheritance of such characteristics within a related group of individuals.

It refers to all data on the carrying of any genetic information (genes)in an individual or genetic line relating to any aspect of health or disease, whether present as identifiable characteristics or not.

The genetic line is the line constituted by genetic similarities resulting from procreation and shared by two or more individuals". Online at https://www1.umn.edu/humanrts/instree/coerecr97-5.html (visited on 6-2-2013)

[128] Lee Black et al., "Intrafamilial Disclosure of Genetic Risk Information for Hereditary Breast Cancer: A Communications Framework?", 8:2 *GenEdit* (2010), available at

http://www.humgen.org/int/GE/en/2010-2.pdf (visited on 7-2-2013)

[129] The Nuffield Council on Bioethics (A UK based independent and charitable body on bioethics) had placed the responsibility on patient but no coercion in case of non-disclosure.

further research on the biomaterial opens the flood gate of information about the genetic makeup of the individual and his genetic lineage alike.[130] Moreover, the data derived from the biological sample can be used for myriad purposes which may not be known to the person from whom it is taken. Therefore the relevance of the "informed consent" of the participant which is based on the ethical principle of the respect for person. Informed consent promotes respect to individual autonomy and fosters rational decision making in the area of research and over and above that, to protect the patient – the subject's status as human being who includes not only protecting people physically but non-physical aspect namely the power of thought.[131] Access to stored bio specimens is relevant to biomedical research so as to study various complex disorders. The way in which specimens are collected, stored, for how long and by whom and for what purpose varies widely.[132] As far as storage is concerned certain countries create bio banks.

However, there is an inherent tension as to the interpretation and application of informed consent.[133] Since the consent given is for basic research for which it was informed, the ability to store and use for all future research for indefinite purpose creates doubts and confusions. Whether a re-contract would be necessary for additional use is a doubt. Thus questions remain not only on the aspect of the use of bio specimens and data in future research unspecified at the time of consent but indefinite storage, ongoing medical record access, development of commercial products, large scale and unlimited data sharing, access to research results and ability to withdraw consent has raised severe concerns. This raises questions of privacy and confidentiality to genetic information and how far it impinges human dignity. The question of human dignity comes in because there are chances of the misuse of information which

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[130] William Keough, "Human Genetic Information, Genetic Registers and the Subpoena Tecum: Balancing Privacy, Confidentiality and the Administration of Justice", 16 *B. L. R.* 141 (2004)

[131] Alexander Morgan Capron, "Informed Consent in Catastrophic Disease Research and Treatment", 123 *U.Pa.L.Rev.* 364 (1974).

[132] Amy L. McGuire & Laura M. Beskow, "Informed Consent in Genomics and Genetic Research*",* 11 *Annual Review of Genomics and Human Genetics* 361 (2010), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3216676/ (visited on 7-2-2013).

[133] Peter H. Schuck, "Rethinking Informed Consent*",* 103 *Yale L. J.* 938 (1994).

can do both psychological and social harm to the participant and his genetic linkages whether it be his relatives or offspring. This brings about family disruption and social stigmatisation and discrimination. There have been attempts in several countries[134] to protect confidentiality and protection for DNA storage.

It is found that with the commercialisation and patent regime coming in, the participant's or donor's interest is given a secondary position. DNA banking practices had raised questions on problems of human dignity, privacy, ownership and commodification. The commercial interest in DNA banking necessitates a need for monitoring.[135] This is because private companies either through hospitals or through the internet collect and study the samples and personal information for the purpose of selling them to researchers. Thus companies emerge as DNA brokers and the result is that the relationship between the researcher and the subject is severed so as to avoid the legal obligations to reduce the risk to the participant, privacy and the obligation to maintain confidentiality.[136] The security of the genetic database has also emerged as a potential threat to privacy.

One finds that the basic imbalance in this field of research is due to the fact that individual and collective interests are involved in this research. It is found that human rights law has protected humans not only as individual per se but also as a part of human species which includes the genetic heritage of man. Hence the individual is protected as a part of the whole i.e., the individual represents the human community. The individual here is protected as a depository of genetic

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[134] HUGO's 1996 Statement on the Principled Conduct of Genetic Research recognized privacy and the need to protect against unauthorized access by putting in place mechanisms to ensure the confidentiality of genetic information. The Council of Europe Recommendations on Protection of Medical data 1997 also contains provisions for maintaining confidentiality of medical data. Apart from this the French Bioethics Law 1994, the Swedish Act1991, Austria (1994), Estonia (2000) etc. contain provisions for maintaining privacy and confidentiality.

[135] Beatrice Godard et al, "Data Storage and DNA Banking for Biomedical Research: Informed Consent, Confidentiality, Quality Issues, Ownership, Returns of Benefits: A Professional Perspective", 11 *European Journal of Human Genetics* s88 (2003), available at http://www.nature.com/ejhg/journal/v11/n2s/full/ 5201114a.html (visited on 10-2-2013).

[136] Patricia A. Roche & George J. Annas, "DNA Testing, Banking and Genetic Privacy", 355 (6) *New Engl. J. Med.* 545(2006), available at www.ncbi.nlm.nih.gov/pubmed/16899773 (visited on 18-2-2015).

heritage of the species.[137] Thus human rights law seeks to protect the interest of future individuals and species over time. Hence we find that the law makers have to keep this in mind while regulating genetic research and associated genetic information it seeks to unravel. Genetic banking and flow of information need a strict vigil since they can have a perilous impact on humanity as such.

7.1.5 Genetic Discrimination and the Sanctity of Human Life

The idea that all human beings are equal stems from the concept of the sanctity of human life. This has been embodied into human rights instruments. Article 1 of the UDHR proclaims this intention by declaring that all men are born free and equal in dignity and rights. Non discrimination and respect towards fellowmen is an essential facet of rule of law.

Genetic information can be secured in several ways.[138] The participant's consent might have been secured for one particular test but this can be stored and used for several purposes. Though privacy and confidentiality of the information gathered is the rule yet in legal systems having weak regulatory framework, there is free access to information. This may be because in cultural contexts genetic defects are deemed immutable; hence stigmatisation on this basis will naturally flow.[139] Thus human genome has become the latest form of the threat to humanity in the form of discrimination. No humans can have perfect genes.

But of late human genome has become a great threat for individuals in matters of employment, insurance etc. in countries where genetic science is taking giant leaps. This is because of the access to genetic information revealed through genetic tests. Moreover we find that research conducted on vulnerable groups in society has led to their exploitation. This is more so in case of selection of research participants like children, institutionalised persons (which includes the

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[137] N. N. Gomes de Andrade, "Human Genetic Manipulation and the Right to Identity: The Contradictions in Human Rights Law in Regulating the Human Genome", 7(3) *SCRIPTed* 429 (2010), available at http://ssrn.com/abstract=1726130 (visited on 13-4-2013).

[138] Anita Silvers and Michael Ashley Stein, "Human Rights and Genetic Discrimination: Protecting Genomics Promise for Public Health"*, Journal of Law, Medicine and Ethics* 377 (2003), available at http://scholarship.law.wm.edu/facpubs/712 (visited10-3-2013).

[139] Thomas Lemke, "Beyond Genetic Discrimination: Problems and Perspectives of a Contested Notion", 1 *Genomics, Society and Policy* 35 (2005).

prisoners, the mentally challenged, the orphans etc.) women, persons in PVS conditions etc.[140]

With the proliferation of biomedical research, exploitation of vulnerable population in low income countries by highly developed countries is multiplying.[141] Thus arbitrariness in selection of research participants and consequent exploitation are threats to basic human dignity and privacy which is evident from earlier days,for e.g. the Nuremberg trials.

Apart from this there is another type of genetic discrimination wherein discrimination occurs as a result of altered genes. It is feared that by the advancement of technologies such as cloning and germ line therapy there would be two classes of people, the naturals and the Gen Rich or genetically enhanced, which would widen the gulf in human relationships. Thus the practice of genetic discrimination has the potential of creating a new group of disadvantaged people[142] who will need the same protection that is now accorded to those discriminated on the basis of sex, race, caste, class etc. This is the reason why writers like Francis Fukuyama opined that the post human world as a result of biotechnological revolution would be far more hierarchical than the present and competitive marred by social conflicts and would erode the notion of "*shared humanity*" which we cherish at present.[143]

At this juncture, it is to be understood that our knowledge of how genes produce clinical illness is quite unclear.[144] So a premature judgment without any scientific basis can result in stigmatisation and loss of social acceptance to individuals, thereby affecting societal interest. Moreover, discrimination may

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[140] Ethical and Policy Issues in Research and Involving Human Participants-National Bioethics Advisory Committee, August 2001, Bethesda, Maryland, available at https://bioethicsarchive.georgetown.edu/nbac/human/overvol1.html (visited on 2-7-2013.)

[141] Misti Ault Anderson*, "*Ethical Considerations in International Biomedical Research*",* 2 *Synesis* 56 (2011).

[142] Marwin R. Natowicz et al., "Genetic Discrimination and the Law", 50 *Am .J. Hum. Genet.* 465 (1992).

[143] Francis Fukuyama, *Our Post human Future-Consequences of the Biotechnology Revolution,* Picador, USA (2003), p.218.

[144] Paul R. Billings et al., "Discrimination as a Consequence of Genetic Testing,*"* 50 *Am. J. Hum. Genet.* 476 (1992).

result in foregoing a genetic test so that early diagnosis and treatment is curtailed. Hence it is found that the advancement of DNA research can have a deleterious effect of perpetuating discrimination;[145] hence the need to control. In fact, Bartha Maria Knoppers had pointed out that genetic information is the most "sensitive medical information" and therefore the need for confidentiality since it affects the individual and the society alike.[146]

Discussions on the instances of genetic discrimination came to the forefront in the US when the Equal Employment Opportunity Commission settled the law suit concerning such discrimination in 2001.[147] There was a great fear in America that participating in research or undergoing genetic test would lead them to being discriminated and hence they were reluctant to be participants. On the contrary there were arguments that if this is not allowed it would perpetuate inefficiency.[148] In order to address this issue, the Genetic Information Non discrimination Act was passed in 2008 which prohibited discrimination in the workplace and by health insurance issuers based on genetic information.[149] It is accused that the scope of the Act is limited.[150] The Act has given a wide definition

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[145] Brian R. Gin, "Genetic Discrimination: Huntington's Disease and the Americans with Disabilities Act", C*olum. L. Rev*, 1406 (1997).

[146] Bartha Maria Knoppers, "Who Should have Access to Genetic Information", in Justine Burley (Ed.), *The Genetic Revolution and Human Rights-Oxford Amnesty Lectures,* Oxford University Press, UK (1999).

[147] EEOC filed a suit against the Burlington Northern Santa Fe (BNSF) Railroad for secretly testing its employees for a rare genetic condition (hereditary neuropathy with liability to pressure palsies- HNPP) that cause carpal tunnel syndrome as one of its many symptoms. BNSF claimed that the testing was a way of determining whether the high incidence of repetitive-stress injuries among its employees was work related. Besides testing for HNPP, Company-paid doctors also were instructed to screen for several other medical conditions such as diabetes and alcoholism. BNSF employees examined by company doctors were not told that they were being genetically tested. One employee who referred testing was threatened with possible termination. On behalf of the BNSF employees, EEOC argued that the tests were unlawful under the Americans with Disabilities Act because they were not job related, and that any condition of employment based on such would be cause for illegal discrimination based on disability. The lawsuit was settled quickly, with BNSF agreeing to everything sought by EEOC. Cases of Genetic Discrimination, National Human Genome Research Institute, available at www.genome.gov/12513976 (visited on 2-7-2013).

[148] Colin S. Diver & Jane Maslow Cohen, "Genophobia: What is Wrong with Genetic Discrimination?", 149 *U. Pa. L. .Rev* 1439 (2001).

[149] Available at www.genome.gov/10002077 (visited on 2-7-2013).

[150] Laurie A. Vasichek, "Genetic Discrimination in the Workplace: Lessons from the Past and Concerns for the Future," 3 *St .Louis.U.J.Health.L&Pol'y* 38 (2009).

to genetic information[151] which might lead to a wide range of interpretations proving useful to those who are discriminated. It is reported that such instances have also occurred in the United Kingdom and Australia.[152] Hence the need for a strict regulatory framework.

The legal regime of genetic discrimination is influenced by the history of genetic discrimination specifically by its use in the genocide and crimes against humanity during World War II.[153] Though the Universal Declaration of Human Rights is silent as to discrimination based on genetic characteristics, under Article 5[154] we find the clause relating to prohibition of cruel, inhuman and degrading treatment and punishment which may have been incorporated due to Nazi Eugenic policy, consequent discrimination and mass persecutions. The ICCPR under Article 7[155] while prohibiting cruel and inhuman treatment and punishment mentions medical and scientific experimentation.

The Helsinki Declaration of 1964[156] laid down the rule regarding informed consent. WHO International Ethical Guidelines for Biomedical Research Involving Human Subjects 2002 stipulates respect for human persons[157] which is antithetical to stigmatization and discrimination.[158]

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[151] Title II Section 201(4) defines Genetic Information as" (A)In General-The term "genetic information" means, with respect to any individual, information about-(i) such individual's genetic tests, (ii) the genetic tests of family members of such individual and (iii) the manifestation of a disease or disorder in family members of such individual. (B) Inclusion of genetic services and participation in genetic research- Such terms include, with respect to any individual , any request for or receipt of genetic services, or participation in clinical research which includes genetic services, or participation in clinical research which includes genetic services, by such individual or any family member of such individual. (C)Exclusions-The term "genetic information" shall not include information about the sex or age of any individual."

[152] Margaret F. Otlowski et al., "Genetic Discrimination: Too Few Data*",* 11 *European J. of Human Genetics* 1 (2003).

[153] Lulia Voina Motoc, "The International Law of Genetic Discrimination: The Power of Never Again", available at https://www.academia.edu/2065779/The_International_Law_of_Genetic _Discrimination_The_Power_of_Never_Again (visited on 3-7-2013).

[154] Article 5 UDHR reads- "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[155] Article7 ICCPR reads- "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[156] Basic Principles: clause 9 and 10 deals with informed consent.

[157] It states that "Respect for Persons incorporates at least two fundamental ethical considerations, namely: (a). Respect for autonomy, which requires that those who are capable of deliberation

It was the 1997 Universal Declaration on Human Genome and Human Rights, while stressing on the inherent dignity and worth , prohibited all forms of discrimination based on genetic characteristics under Article1.[159] Under Article 2 (a) the right of everyone to have respect for his dignity and rights regardless of genetic characteristics is ensured. It further stated that dignity makes it imperative for the individuals not to be reduced to mere genetic characteristics but to respect based on their uniqueness and diversity.[160] Article 6[161] again specifies that genetic discrimination is prohibited. Thus the Convention laid down strict rules on informed consent[162] and the rule of confidentiality since loose regulation on privacy breeds discrimination.

During the very same time at the regional level we find the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to Application of Biology and Medicine or Oviedo Convention 1997 under Article11 ban all forms of discrimination based on a person's genetic makeup and permitted predictive genetic test only for health or scientific purposes.[163] The EU Charter on Human Rights under Article 22 prohibits it.[164] By a resolution passed by the ECOSOC in 2001[165] on Genetic Discrimination and Privacy it was appealed to the states to prevent the use of genetic information for

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about their personal choices should be treated with respect for their capacity for self-determination. (b). Protection of persons with impaired or diminished autonomy, which requires that those who are dependent or vulnerable be afforded security against harm or abuse."

158 Guideline 18.

159 Article 1 reads– "The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity."

160 Article2 (b).

161 Article 6 reads– "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."

162 Article 5 and Article 9.

163 Article 12.

164 Roger Brownword, "Freedom of Contract, Human Rights and Human Dignity" in Daniel Friedmann and Daphne Barak-Erez (Eds.) *Human Rights in Private Law*, Hart Publishing, Oxford, (2001), pp. 195-196.

165 ECOSOC Resolution 2001/39 urged the states to ensure that no one shall be subjected to discrimination based on genetic characteristics.

social, medical or areas such as employment and insurance which might lead to stigmatisation.

The UNESCO Declaration on Human Genetic Data in 2003 specifies about the uniqueness of human genetic characteristics and the obligation to respect the same[166] and under Article 7 prohibits discrimination and stigmatisation based on genetic information.[167] Such a prohibition can be found under Article11[168] of the UNESCO's Declaration on Bioethics and Human Rights 2005. In all these provisions anti discrimination clauses are included since it offends human dignity and fundamental freedoms. Since disclosure of genetic information and patentability are permitted, how far privacy can be balanced with them is a question. It is found that though these conventions are setting minimum standards in bioethical matters,[169] how far it can protect individuals against discrimination is yet to be seen.

Since the states are cast with the responsibility to ensure non discrimination, the lethargy of some states can add to the woes of the individuals who have great susceptibility. Moreover, the growing trend of the developed world actors conducting research in the developing world can lead to exploitation of vulnerable groups since there is a lack of regulation in less developed countries and hence the research sponsors in high income countries would exploit the vulnerable population of such countries. Thus it is found that genetic

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[166] Article 3 reads- "Each individual has a characteristic genetic make-up. Nevertheless, a person's identity should not be reduced to genetic characteristics, since it involves complex educational, environmental and personal factors and emotional, social, spiritual and cultural bonds with others and implies a dimension of freedom."

[167] Article7 reads-" Non discrimination and non-stigmatization: (a). Every effort should be made to ensure that human genetic data and human proteomic data are not used for purposes that discriminate in a way that is intended to infringe or has the effect of infringing human rights, fundamental freedoms or human dignity of an individual or for purposes that lead to the stigmatization of an individual, a family, or group or communities. b). In this regard, appropriate attention should be paid to the findings of population–based genetic studies and behavioral genetic studies and responsibilities."

[168] Article11 reads- "No individual or group should be discriminated against or stigmatized *on* any grounds, in violation of human dignity, human rights and fundamental freedoms."

[169] R. Andorno, "Global Bioethics at UNESCO: in Defence of the Universal Declaration on Bioethics and Human Rights", 33 (3) *J. Medical Ethics 150 (2007), a*vailable at http://jme.bmj.com/content/33/ 3/150.full (visited on 5-7-2013).

discrimination is a serious violation and is a threat to human solidarity and dignity which needs to be curbed by law.

Conclusion

The advancements made by human genetic research , though a great solution to debilitating disease , it had questioned the basic premise of the sanctity of human life i.e., respect for life. It takes serious inroads to the questions of physical and psychological integrity of humans, questions human identity especially genetic identity, affects posterity, privacy and notions of equality. It is found that:

1) The advancement in this field of research makes serious inroads into the concept.
2) The legal status of embryos and questions as to whether the sanctity need to be attributed to embryos has been influenced by the cultural, theological, ideological inclinations of the particular nation state. Hence, inconsistency between legal systems as to status of embryos. Moreover, inconclusiveness remains as to the question when life begins (both scientifically and theologically).Therefore States left with choice to decide on the status of embryos.
3) Use of embryos without restriction affects women's reproductive health and may lead to exploitation.
4) It is found that the use of embryos in research affects the physical and psychological integrity of the person. It affects social relations of the individual and their future interest. The law of storage and disposal of embryos is not sufficiently developed, hence it leads to commercialisation and affects woman's reproductive rights. The law relating to informed consent is also not well developed. Controls are needed in terms of reproductive cloning, embryonic stem cell research, germ line therapy etc.
5) Freedom of scientific inquiry needs to be conditioned keeping in view the concept of dignity especially in view of huge corporate investments in this research.
6) Patenting of human genes should be disallowed since:

- Patenting reduces humans to mere commodities. It creates third party interest in human body and thereby affects bodily integrity and autonomy. Thus it impinges human dignity.
- It affects the public health system and thus increases the cost of medicines and diagnostic tools.
- It stalls research and inventiveness.
- Lack of regulatory norms on gene patenting based on human dignity.

Instead of patenting, the scientific community should be provided with other modes of innovation incentives by the state. In fact the WIPO itself had come up with suggestions as direct government funding, relaxation in tax policies for research, mandates on fund research based upon a percentage of product sales etc.[170]

7) The genes are the storehouses of information. Privacy and confidentiality of genetic data should be ensured.

[170] Committee on Development and Intellectual Property, WIPO, Geneva, Nov10-14, 2014. (Sept19, 2014), available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=32093 (visited on 18-2-2015).

Chapter 8

Regulatory Approaches towards Human Genetic Research

The basic moral commitment to human genetic research is based on certain fundamental needs and imperatives such as alleviating human suffering due to illness, the search for improved treatments and drugs, the desire to acquire new scientific knowledge and information so as to dispel ignorance thereby contributing to individual and social welfare. Thus it is found that norms for the ethics of research involving human beings are developed and refined within an ever evolving societal context which considers the individual as a master in his personal sphere and individual as a part of the society and culture in which he lives. This is the reason why human dignity plays a pivotal role in biomedical research.

This principle aspires to protecting the multiple and interdependent interests of the person - from bodily to psychological to cultural integrity.[1] Thus it forms the basis of many ethical principles of biomedical research. Most of the ethical principles of biomedical research incorporated in different international regulations deal with it.[2] It is of no doubt that to conduct human genetic studies scientists must use individuals as a means to that end. While this activity would appear to violate the fundamental ethical principle of respect for persons, such exploitation of individuals in the interest of health and welfare is rationalized and justified by a presumption that such studies will be performed responsibly within an established framework of ethical principles.[3] But this does not occur and hence the reason for law making for setting standards.

With the advancement in biomedical research, questions on concerns on human dignity have been raised. Human rights issues based on dignity had been

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1 Available at www.ncehr-cnerh.org/english/code_2/intro03.html (visited on 5-7-2013).

2 Subhash Chandra Singh, "International Bioethics and Human Rights: Ethical and Legal Principles in Biomedical Research", 51 (2) *J.I.L.I.* 201 (2009).

3 Greg Koski, "Research, Regulations and Responsibility: Confronting the Compliance Myth- A Reaction to Professor Gatter", *52 Emory Law J.* 403 (2003).

raised by the international community. Hence an analysis of how far this research is regulated at the international realm and how far the standards set up by the regulatory regime is sufficient and how far the regulatory pattern is in conformity with the concept need scrutiny.

8.1 The Concept of the Sanctity of Human Life in International Human Rights Regime and Human Genetic Research

International Human Rights instruments can be regarded as the most appropriate law making process in the direction of standard setting for the conduct of this type of research since it is the contemporary culmination of man's long struggle for all his basic values.[4]

Respect for persons recognises the moral status of the person and acknowledges the capacity of man to take rational decisions affecting him and through that to the entire fellowmen. The sanctity of human life recognises the individual capacity to take decisions affecting his physical or bodily interest, since this has a psychological effect on the individual. This requires the exercise of individual consent. Hence it is found that this is included under regulatory framework as a principle to be adhered to both at national level and international level.

Since the Nuremberg trial, consent has been one of the central bioethical issues. The concept of informed consent emerged as a result of respect for persons.[5] This is evident in the Belmont Report[6] which states thus:

> *"Respect for persons requires that subjects, to the degree they are capable, be given the opportunity to choose what shall not happen to them. This opportunity is when adequate standards for informed consent are satisfied…."*

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[4] Myres S. Mc Dougal & Gertrude C. K. Leighton, "The Rights of Man in the World Community: Constitutional Illusions versus Rational Action", 14 *Duke University Law Journal* 490 (1999).

[5] Sigurdur Kristinsson, "The Belmont Report's Misleading Conception of Autonomy", 11 *Vitrual Mentor* 611 (2009).

[6] Part C clause 1. See also, Part B- Ethical Principles, The Belmont Report- Office of the secretary Ethical Principles and Guidelines for the Protection of Human Subjects of Research. The National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research, April 18, 1979.

Respect for privacy and confidentiality is again found to be incorporated under most of the conventions and laws regulating biomedical research. Respect for human dignity mandates respect for privacy and confidentiality. Standards of privacy and confidentiality have been incorporated into provisions of the international conventions to protect as well as to control the access and dissemination of genetic information which is personal information also. Respect for the person also entails recognising those who are unable to take prudent decisions based on one's well being hence protection of the vulnerables and provisions for non discrimination are found to be ethical principles in most of the international conventions pertaining to biomedical research.

It is found that there is a need for balancing of benefits and harms in genetic research. There are areas of research such as germ-line therapy, cloning etc. which may prove to be fatal to a certain extent to individual and social relationships. However, the benefits of certain areas of genetic research, if overlooked, can be an obstacle to innovation and improvement to the quality of life. Hence respect for human life requires a balancing of benefit and harm and this in found in most of the conventions pertaining to biomedicine.

In this analysis, it is found that the principle of beneficence imposes a duty on the researcher to pursue research which benefits others. Consequently, the duty to minimise harms to others is the principle of non-malfeasance incorporated as ethical principle in documents relating to genetic research. Moreover, stress on equity considerations and notions of distributive justice to assure benefits of the research are enjoyed by the humanity as a whole and not by a selected few and this undoubtedly springs from the sanctity of human life concept.

However, the international conventions regulating human genetic research came rather late. Some of the international conventions have been crafted based on regional conventions. The ethics of human genetic research remains contentious. The ethics of this type of research is discussed and requires an ethical realisation that this research touches or is an intervention with the life of another person. This is the relevance of the concept of the sanctity of human life being addressed in this

type of research. Moreover, it is found that it is helpful in formulating universal standards, because international human rights transcend cultural diversity.[7]

The Pericivel's code of 1803 is one of the old ethical instruments which laid down ethical principles for human experimentation. It was more inclined to protect the interest of the researcher or physician rather than that of the research participants. This was followed by the Beaumont Code of 1833 which laid down American code of ethics for the conduct of medical research. The distinct feature of the code is that it laid down the principle of voluntary consent and the research can be ceased if it causes any distress or discomfort to the participant. There were also self regulatory codes during this time. Official regulation of experimental research on humans came out from the Prussian government in 1900. It prohibited non therapeutic research on incompetent individuals especially children and on subjects who had not given unequivocal consent.[8] The Nuremberg Code formulated in August, 1947 is considered as the first document embodying the principles which should govern medical research. This was laid down by the American judges sitting in judgment of the Nazi doctors accused of conducting murderous and torturous human experiments in the concentration camps.[9] It serves as a blueprint for today's principles that ensure the rights of the subjects in medical research.[10] The most important principle it incorporated in the 10 point code was the concept of informed consent wherein it assured respect to the autonomy and integrity of the individual , who is a fellow human being of the researcher. The code specifies the need for the research to produce certain benefits though it did not specify how the

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7 Roberto Andorno, "Human Dignity and Human Rights as a Common Ground for a Global Bioethics", 34 (3) *Journal of Medicine and Philosophy* 11 (2009).

8 Adam M. Laughton, "Somewhere to Run, Somewhere to Hide?: International Regulation of Human Subject Experimentation," 18 *Duke Journal of Comparative & International Law* 182 (2007).

9 The Doctor's trial or USA v Karl Brandt was conducted by the International Military Tribunal. It considered the fate of 23 doctors who either participated in the Nazi program to euthanize persons deemed "Unworthy of life" (the mentally ill, mentally retarded or physically disabled) or who conducted experiments on concentration camp prisoners without their consent. The Doctor's trial lasted for 140 days. Sixteen of the doctors were found guilty. Seven were executed. Karl Brandt was the personal physician of Hitler. Brandt was guilty and hanged to death.

10 Evelyne Shuster, "Fifty Years Later: The Significance of the Nuremberg Code", 13 *The New . England Journal of Medicine* 1436 (1997).

benefits are to reach the society. Hence, there is the need for the elaboration of ethical principles.

This was further exemplified by the Helsinki Declaration, 1964 by the World Medical Association and was the first International Instrument to declare that Respect of Person forms the central tenet of research ethics and laws was this declaration. While the Nuremberg Code related the principles to medicine, the Helsinki Declaration asserted that this was the cardinal ethical mandate for all types of research.[11]

The term *'dignity'* was used in the declaration[12] to specify the investigator's obligation to respect the participant's life and integrity by virtue of him being a fellow human being. Apart from the provision to informed consent,[13] it casts a responsibility[14] upon the investigator to discontinue the research if it is harmful to the participant in case the research is continued.[15] This is in addition to the subject or the subject's guardian's freedom to withdraw consent at any time.[16] Thus it recognises that the participant in research should be given primacy in research activities.

Man's scientific temperament is to be advanced in conformity with his environment.[17] This was stressed in the declaration and this is one of the positive features of the ethical guidance provided in the declaration. However, the introduction of an independent committee review of research protocols makes the declaration stronger since it was the first of its kind to implement a review mechanism.

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[11] Available at http://www.wma.net/en/30publications/10policies/b3/ (visited on 8-7-2013).

[12] Article 11 reads: "It is the duty of physicians who participate in medical research to protect the life, health, dignity, integrity, right to self determination, privacy and confidentiality of personal information of research subjects."

[13] Part B Article 24 of the Declaration deals with it. Available at www.wma.net/en/30publications/ 10policies/b3/17c.pdf (visited on 9-7-2013).

[14] Article 6 and Article 20 read together gives us an insight as to the extent of the protection afforded.

[15] Robert V. Carlson et al., "The Revision of the Declaration of Helsinki: Past, Present and Future*",* 57 (6) *British Journal of Clinical Pharmacology* 695 (2004).

[16] Part B Clause 29 protects the interest of the incapacitated or vulnerable research participants

[17] Article 13 reads-"Appropriate caution must be exercised in the conduct of medical research that may harm the environment."

The Helsinki Declaration was considered as a minimum standard setter[18] at the international level and also by most of the legal systems. In fact, the Ethical Guidelines for Biomedical Research on Human Subjects issued in 2000 by ICMR referred specifically to the convention in this dimension.[19] The Belmont Report of 1976 in the US also laid down three fundamental values which were taken into account in articulating international conventions such as respect for persons, beneficence and justice which emanate from the concept of the sanctity of human life.

The formulation of ethical guidelines at the international level came to be undertaken by the Council for International Organisations of Medical Sciences (CIOMS), an NGO and World Health Organisation from 1982 onwards. In 1993, guidelines known as International Ethical Guidelines for Biomedical Research Involving Human Subjects provided guidance to the practical application of the principles set out in the Helsinki Declaration. These guidelines were subjected to revisions in 2002 since it was felt that legal protection should be made in favour of low resource countries in defining national policies on the ethics of biomedical research so as to enable the application of ethical standards in local circumstances and protection against exploitation of vulnerable groups. It emphasised that human subject research should be based upon the foundation of three ethical principles such as respect for persons, beneficence and justice. However it pinpointed that the principle of respect for person includes two fundamental ethical considerations namely:

(a) Respect for autonomy, which requires that those who are capable of deliberation about their personal choices should be treated with respect for their capacity for self determination.

(b) Protection of persons with impaired or diminished autonomy, which requires that those who are dependent or vulnerable be afforded security against harm or abuse.[20]

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[18] International Ethical Guidelines for Biomedical Research Involving Human Subjects, 1993, developed by CIOMS stresses this aspect.

[19] In the Statement of General Principles in Biomedical Research Involving Human Subjects, the Ethical Guidelines issued in 2000 by ICMR reveals this.

[20] CIOMS guidelines 2002, available at http://www.cioms.ch/publications/guidelines/guidelines_nov_2002_blurb.htm (visited on 11-7-2013).

This raises the question whether dignity or sanctity of human life denotes *'respect to person.'*

One finds that the sanctity of human life requires respect for human life. Understanding and acknowledging the inherent worth in the human person - both physical and psychological - is a prerequisite and human dignity or sanctity requires this. Thus respect for the human person embodies within itself this particular aspect. The CIOMS guidelines prefer to use the term respect to person than human dignity. Throughout, the guideline containing provisions protecting the integrity and dignity of research participants in the matter of consent, privacy, protection for vulnerable sections of society etc. and also advocates establishment of implementation mechanisms at the national and local levels. In 2009, the CIOMS issued guidelines for ethical review of Epidemiological studies also.

However, it is found that since the end of 1990, most of the international instruments dealing with biomedical research assign a central role to the concept of human dignity or sanctity, the reason being that it is closely associated with the most basic human rights like bodily integrity, access to basic health care, privacy etc. The next cogent reason seems to be that certain areas of genetic research such as reproductive cloning, germ line therapy etc. not only affect the individual but also future generations as well and can be a threat not only to the individual concerned but to the integrity of human species as such,[21] hence the term human dignity. Dignity denotes any aspect which can affect the human species as such including a potential individual who would become a member of the human species.

In 1994 the Director General of UNESCO stressed that the Organisation need to contribute more fully to the construction of a common human destiny grounded on the essential values of mankind.[22] This should be related to bringing a global consensus legally and ethically especially in view of scientific advancement.

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[21] *supra* n.7.

[22] F. Mayor, "Preface in the Proceedings of the First Session of the IBC" (Paris: UNESCO, 1994) Available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/2VolumeI_en.pdf

In 1993, UNESCO's newly created International Bioethics Committee (IBC) began its drafting on a convention regulating research in human genetics. Among the various purposes enlisted for its function, the most pertinent is the one relating to the conduct of debate on the ethical, social and human consequences of genetic development and prepare international instruments for the protection of human genome. Thus, after four years of drafting and deliberation the Universal Declaration on Human Genome and Human Rights 1998 took its birth. It is being christened as a "*dignitarian instrument*"[23] since it fundamentally stressed humanity and its elated moral status cutting across liberaterian, conservative and religious thinking. In seven articles[24] dignity seems to be explicitly stated.[25]

Human dignity was given a central place since it had both a universal appeal and also easily fitted into a particular cultural understanding on the inherent human worth. Consistent values that emanate from the concept of the sanctity of human life or dignity have been incorporated into the convention such as autonomy which affirms the human capacity of self determination and which values humans both in psychological and physical entities. Equality stems from the concept of the sanctity of human life which stresses the fact that all humans have equal worth and so to respect the life of fellowmen. Hence it prohibits all sorts of discrimination especially based on biomedical research.[26] Finally solidarity conveys the idea of natural unity of the entire humanity. Thus these principles reflect both individual and group interests.

Though many conventions stressing human dignity exist, particularly autonomy and equality aspect, the need for addressing new concerns on questions of the protection of genetic privacy, consent, propriety of patenting, to what extent

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[23] Shawn H. E. Harmon, "The Significance of UNESCO's Universal Declaration on the Human Genome and Human Rights", 2(1) *SCRIPTed* 18 (2005) , *a*vailable at http://www2.law.ed.ac.uk/ ahrc/script-ed/vol2-1/harmon.asp (visited on 13-7-2013).

[24] Article 1, Art 2 (c), Art 4 (b), Art 5, Art 7 and Art 12.

[25] Deryck Beyleveld & Roger Brownsword, "Human Dignity, Human Rights and Human Genetics", 61 *M.L.R.* 664 (1998).

[26] Article 2 and Article 6 reflect the nondiscriminatory aspects which human genetic research may perpetuate.

research may be allowed, required restrictions etc. demand specified the need for specific conventions on the matter.

The most important argument which the human genome triggered was that it was declared as the '*heritage of humanity'* under Article 1.[27] It is stated that formerly the International Bioethics Committee wanted to term it as "*common heritage of mankind*."[28] However, it met a stiff resistance on the ground that though genes have a common element that it is common to all human beings but it also has an individual dimension. This individual dimension relates to the distinctive element in every individual or human being which he receives from his parents. Hence the term '*common heritage of mankind'* was excluded from Article 1. It is often criticised that if it was included as common heritage of mankind it would be catastrophic since it would rob each individual of his or her identity thus negating human dignity.[29]

The objective of research or any other activity concerning the human genome is the improvement of human life. This is essentially a public interest. The human genome encompasses the past, present and the future of humanity.[30] The application of the research and the results it gives influences or even decides the future of each human person and thus the entire humanity. Thus it cannot become a subject of appropriation by anyone.

Objections exist that being a part of the entire humanity, patenting should be prohibited.[31] However, it is found that the Declaration is silent on this aspect. Some scholars who view it as a common resource and applying the Christian conception of the sanctity of life offer a duty of stewardship to conserve the

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[27] Article 1 reads: "The human genome underlies the fundamental unity of all members of the human family as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity."

[28] The Common heritage of mankind postulates that all people have equal proprietary interest in the natural world. It is usually related to deep sea bed, the moon, Antarctica etc.

[29] Available at www.catholicculture.org/culture/library/view.cfm?recnum=291 (visited on 13-7-2013).

[30] Ryuichi Ida, "Human Genome as Common Heritage of Mankind," in Norio Fujiki & Darryl R. J. Macer, Bioethics in Asia- Proceedings of the UNESCO Asian Bioethics Conference (ABC97) and the WHO-assisted Satellite Symposium on Medical Genetics Services, available at www.eubios.info/ASIAE/BIAE59.htm (visited on 13-7-2013).

[31] Jasper A. Bovenberg, "Mining the Common Heritage of our DNA Lessons Learned from Grotius to Pardon", *Duke Law & Technology Review* (2006), available at scholarship.law.duke.edu/ cgi/viewcontent.cgi?article=1154&context=dltr (visited on 13-7-2013).

same.[32] Thus it is termed as the heritage of mankind and not the common heritage of mankind.

Again the notion that human lives are interconnected and the role of human genome as a characteristic feature which underlies the fundamental unity of all members of the human family have been espoused through this provision.

Article 4 prohibits individuals from gaining financial profits out of human genome in its "*natural state.*" The problem is the clash between patent law and the human right standard stipulated in the Convention. Though genes in their natural form are un-patentable the exception given to isolated, extracted genes etc. creates difficulty. This is evident by the different stands taken by different legal systems in the issue of patenting of genes.

In fact, at the time of drafting the convention this question erupted and a consensus was reached on Article 4 and thus the conspicuous absence of the prohibition of patenting since several interests were at stake especially the economic interest which could not be discussed by the UNESCO alone. Giving a third party ie; the patent holder an interest in human genome while not allowing the donor seems unfair and would create problems later. The Declaration fails to address the issue of patenting which can be said to be a major defect.

Article 5 stressing informed consent specifies on full disclosure of the potential risks and benefits of research or treatment. The crucial point here is that in genetic tests, "*full disclosure"* involves a lot of criteria's such as the potential risks, psychological repercussions, unexpected results etc. and no guidance is laid down in the provision as to guide the investigators as to the disclosure. This is in addition to the absence of guidance as to what all factors are to be considered in fixation of terms as to informed consent. Though the provisions give ample powers to domestic law makers it is found that at times domestic law oscillates without any proper guidance as to conditions to be included in the consent.

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[32] David R. Resnik, "The Human Genome: the Common Resource but not Common Heritage", available at http://www.researchgate.net/publication/255581513_The_human_genome_common_resource_but_not_common_heritage (visited on 13-7-2013).

By ensuring a right to the donor to avoid from knowing the results of the genetic tests the Declaration creates an obstacle as it avoids the family members also the risk of knowing probable genetic diseases. The need for maintaining confidentiality is stressed but circumstances in which this may be dispensed will have not been mentioned.[33]

The Declaration is silent on certain advances in genetic research such as pre diagnostic genetic testing, human embryonic stem cell research etc. although it states about prohibition to germ line therapy[34] and reproductive cloning.[35] Though it stresses equality there is no provision to incorporate a mechanism to check the violation of this concept nor does it envisage a mechanism to oversee equitable distribution of benefits. Thus we find that the Declaration lacks foresightedness and hence there emerged numerous instruments regulating biomedical research even after the Declaration came into existence.

At the regional level, during the very same year the Council of Europe brought into force the European Convention on Human Rights and Biomedicine 1997 or Oviedo Convention. It is generally treated as more comprehensive than the UNESCO Declaration since the former dealt with the whole range of bioethical issues while the latter focussed exclusively on genetics.[36] This instrument was added subsequently with three additional protocols on specific fields such as - on human cloning (1998), organ transplantation (2002) and on biomedical research (2004).

Respect to human dignity and moral worth is stressed from the title, the preamble and it echoes itself down to the provisions in the Convention. The Preamble asserts at three occasions on human dignity when it stated that:

- It recognises "the importance of ensuring the dignity of human being,"

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[33] Article 7.

[34] Article 24.

[35] Article 12.

[36] Roberto Andorno, "The Oviedo Convention: a European Legal Framework at the Intersection of Human Rights and Health Law", 2 *J.I.B.L.* 134 (2005).

- secondly when it recalled that" the misuse of biology and medicine may lead to acts endangering human dignity" and
- thirdly, it takes a resolution that "it would take necessary measures to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine."

Article 1 of the Convention guarantees to all humans the inherent dignity and integrity and all freedoms. A deliberate avoidance of terms like "person" or "human beings" in the second part of the provision with regard to the application of biology and medicine is found since a precise definition is impossible in this regard.

Just as Article 5 of the Helsinki Declaration and Article 10 of the UNESCO Declaration on Human Genome and Human Rights 1997, Article 2 addresses the primacy of human beings and opposes man being made instrumental for the sake of scientific progress. Equitable access to health care and its benefits is a part of equality which is one of the fundamental values embedded in the concept of the sanctity of human life and has been enclosed in this Convention.[37]

However, views[38] exist that there is no consensus on certain provisions among the member countries, since human rights are understood and practised by different legal systems differently. This had reduced the effectiveness of the Convention. The Convention seeks to prohibit creation of embryos for research purpose. It is found that only already created embryos in fertility treatment is used for research.[39] The very same Article says that national laws should provide protection to the embryos used in research without specifying the levels of protection to be offered.[40]

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[37] Article 3.

[38] Corinna Delkeskamp Haynes, "Implementing Health Care Rights versus Imposing Health Care Cultures- The Limits of Tolerance, Kant's Rationality and the Moral Pitfalls of International Bioethics Standardization*",* in H. Tristam Engelhard (Ed.), *Global Bioethics –The Collapse of Consensus*, M & M Scrivener Press, Massachusetts (2006), p.58.

[39] Article 18 para 2.

[40] Ismini Kriari-Catranis, "The Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine", 12 *E.J.A.I.B.* 90 (2002), available at http://www.eubios.info/ EJ123/ej123d.htm (visited on 15-7-2013).

Apparent inconsistencies exist in European law as to the status of embryos and we find no provision in the Convention which throws light on the moral status of embryos. Moreover, the European approach towards patenting of human genes is marked by commercial profits. Hence the effectiveness of this document is doubted.

However, its approach towards reproductive cloning and germ line therapy is well accepted. The European Commission is for harmonisation of research ethics[41] in this area so that the fundamental values of respect for the intrinsic worth of human beings are achieved. Moreover, steps have been initiated at the European level to protect genetic data and human biological materials including cells such as the Directive setting standards of Quality and Safety for the Donation, Procurement, Testing, Processing and Preservation, Storage and Distribution of Human Tissues and Cells (2004) in research and Data Protection Directive1995.[42]

Genetic information is a data which has got immense value and it has the potential to give details of a person's genetic predispositions and genetic makeup so that his susceptibilities to certain disease and all the particulars regarding his individual physical, psychological or behavioural characteristics including his sexual inclinations can be known. Hence, there is the need for protection.

The advancement of research, data banking collection, storage etc. necessitates a regulatory framework. Developing countries that have not kept in pace with the scientific progress need adequate protection since the advanced biotech nations may take the benefit of their lag in law making. So the UN was charged with this responsibility.

As an extension to the UNESCO Declaration on Human Genome and Human Rights 1997, the International Bioethics Committee mooted for a global instrument for the protection of the genetic information and this resulted in the

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[41] The European Countries have come about with a slew of regulations for conduct of research in this area such as the European Codes of Practice 2002, CODEX a Swedish ethics collection at national level, the European Information Network Ethics in Medicine and Biotechnology 2002, EURETHNET an international information network and the European Group of Ethics (EGE) which influences shaping of research ethics.

[42] Available at http://www.brynmawr.edu/grants/documents/Human Subjects guidelines for international researchers.pdf (visited on15-7-2013.)

International Declaration on Human Genetic Data, 2003 came into being. The preamble itself again stresses that the collection, processing, use and storage of scientific, medical or personal data shall be done keeping in view the underlying principle of human dignity. In the preamble itself it is stated that medical data includes human genetic data and proteomic data. Article 1 and 2 stress that all activities associated with genetic data needs to bear this principle fundamentally. Article 4 stresses the special status under the eyes of law to genetic information. Provision for informed consent exists but the question of information to what extent in a family is broad and had been left free.

Doubts have been raised as to what extent the concept of informed consent can be applied to DNA banks.[43] This is because the use of information is myriad and even after the death of the participant the data can be used. Moreover, at the time of consenting the participant may have given for a particular project and the question is whether such consent can be deemed for all future projects remains doubtful.[44]

Moreover, commercialisation tends to ignore both individual autonomy and collective interest. To this extent, the Declaration fails to address the issue. Human tissue has become an expensive one.[45] A case like Moore v Regents[46] establishes the proprietary interest in tissue and throws light on the limits of the extent of consent. Hence there is the need for a new articulation for maintaining a balance between access and confidentiality on genetic information.

The recognition that man is an integral part of the biosphere and the recognition that he as an individual is affected and associated with the social, religious and cultural milieu in which he exists came to be proclaimed expressly

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[43] Lori Luther & Trudo Lemmens, "Human Genetic Data Banks: From Consent to Commercialisation-An Overview of Current Concerns and Conundrums*,"* 12 *BIOTECHNOLOGY, a*vailable at http://www.eolss.net/sample-chapters/c17/e6-58-11-13.pdf (visited on 16-7-2013).

[44] Bernice S. Elger & Arthur L. Caplan, "Consent and Anonymization in Research Involving Biobanks*",* EMBO Reports, available at www.ncbi.nlm.nih.gov/pmc/articles/ PMC1500833/pdf/7400740.pdf (visited on 16-7-2013).

[45] Sharon Lewis, "The Tissue Issue: A Wicked Problem", 48 *Jurimetrics* 195 (2008).

[46] 793 P.2d 479 (1990)

by the UNESCO in 2005 through the Universal Declaration on Bioethics and Human Rights. The Preamble of the declaration asserts the uniqueness of human life and the responsibility of man to respect the physical and psychological integrity of the life of his fellowmen especially in the context of advancement in science and technology. It affirms that due respect to human life and dignity is essential in the advancement of science and that by enshrining bioethics in international human rights it attempts to ensure respect for human life. This was a recognition that the advances in biosciences and application of related technologies have an impact not only on the health of a particular individual but also on the family, group, community, society in which he exists and thereby on the entire human species.

The argument that science is value neutral and so ethical values are irrelevant in its advancement came to be internationally disowned with the adoption of the declaration. It stated that this declaration sets out the universal principles which attempts to settle the problems associated with advancement in science and technology to man and his environment alike. However, being a non binding instrument it laid down the foundational principles which nation states would have to incorporate in their regulatory framework.

The term '*bioethics'* has not been defined in the declaration. Moreover, it is found that the declaration is silent as to the socio-economic consequences of unethical research especially with regard to patenting and consequent social impact due to commercialisation and application of certain technologies like germ line therapy, pre-genetic diagnosis testing etc. on individual, families and society. Some writers term this declaration as wide and vague. However, it is found that what is needed is a synchronisation of ethical values and practical realities and to this effect the declaration can be considered as a first move towards this.

Superficial insights have been made by the UN in its law making process of late, into problems created by the advancement of genetic research. A classic illustration of this is the International Declaration on Human Cloning, 2005.[47] The

[47] Available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/493/06/PDF/N0449306.pdf?Open Element (visited on 18-7-2013).

drafting process revealed the opposing views on the subject and the ethical dilemma which the UN itself faced both at the drafting and final voting stage.[48] The Declaration is accused of consisting of ambiguous formulations which can be interpreted in different ways.[49] In fact, in the Report of the IBC on Human Cloning and International Governance 2009, reasons for the ethical dilemma created by cloning are viewed thus:

> "*There exists a diversity of opinion in the issue of cloning since it begs the fundamental questions about dignity of life, beginning of life and status of embryos*."[50]

It is found that the reason for opposition to reproductive cloning seems to be directly linked with the question of ethics on replication of human individuals and the chances of genetic enhancement which can have a serious impact on both the subjective and objective experiences of human life. The practical question is how far it can affect the individual, his community and human species as such which includes both present, past and future of human life.

It is found that the Resolution in 1998 of the World Health Organisation on cloning was more appropriate as it stated that the cloning for the replication of human individuals is ethically unacceptable and contrary to human dignity and integrity.[51] However it is found that primacy to human life was given a status over and above scientific experimentation by way of the declaration.[52]

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[48] Available at http://www.un.org/press/en/2005/ga10333.doc.htm (visited on 18-7-2013).

[49] Zeljko Kaludjerovic, "Bioethical Analysis of the United Nations Declaration on Human Cloning", 1 *J.A.H.R.* 40 (2010).

[50] Available at http://portal.unesco.org/shs/es/files/12828/12446291141IBC_Report_Human_Cloning_en.pdf/IBC%2BReport%2BHuman%2BCloning_en.pdf (visited on 18-7-2013).

[51] 101st Session, Agenda item 9 EB101.R25. Ethical, Scientific and Social Implications of Cloning in Human Health. 27-1-1998, available at http://apps.who.int/gb/archive/pdf_files/EB101/ pdfangl/angr25.pdf (visited on 18-7-2013).

[52] Preamble reads ,"…Emphasizing that the promotion of scientific and technical progress in life sciences should be sought in a manner that safeguards respect for human rights and the benefit of all.." Clause (a) of the Declaration reads as, "Member States are called upon to adopt all measure necessary to protect human life, in the application of life sciences."

It is found from the wordings of the declaration that cloning as such is prohibited if it impinges human dignity and fundamental freedoms.[53] Thus nation states are left to their sweet will to decide whether a particular form of cloning is against dignity or not. It does not define human cloning. This is a serious lacuna.

However, in the preamble it recalls Article 11 of the Universal Declaration of Human Genome and Human Rights which explicitly bans reproductive cloning and so it can be inferred that this declaration prohibits reproductive cloning. The danger of the exploitation of women's health if cloning is pursued finds its expression in the form of a prohibition under clause (d) of the Declaration.[54] The non binding nature of the declaration and the abstention from acceding to this declaration makes it an ineffective instrument.

As for the conduct of embryonic stem cell research, the International Society for Stem Cell Research came about with a guideline in 2006 which called in for special scrutiny of the human embryonic stem cell research. An attempt had been made to define permissible and impermissible experiments and set out ethical standards for the scientist for the conduct of research worldwide. It provides regulations to oversee procurement of genetic material for the research and an institutional mechanism for overseeing the same,[55] detailed rules on informed consent,[56] principles with regard to derivation, banking and distribution of pluripotent stem cell lines[57] and dispute settlement mechanisms.[58] Reliance is not placed on human dignity or respect for human life in the guidelines. The guideline being a self drawn instrument by scientists, we find that it is ineffective and the principal aim of the Society which articulated this guideline is promotion of research and is not concerned with how far it should be ethical.

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[53] Clause (b) reads: "Members are called upon to prohibit all forms of human cloning in as much as they are incompatible with human dignity and protection of human life."

[54] Clause (d) reads: "Member States are called upon to take measures to prevent the exploitation of women in the application of life sciences."

[55] It mandates to establish Stem Cell Research Oversight (SCRO) at the institutional, local, regional, national and international level which would mandate ethical research practices and constant monitoring (Clause8).

[56] Clause 11 (3).

[57] Clause 12.

[58] Clause 13.

The search for common responses towards bioethical issues is an arduous task. Moreover, given the present state of socio cultural diversities and differing religious outlook, it might be seem that there is absence of any universal principle which can reconcile these contradictions. The concept of the sanctity of life transcends all socio economic, cultural, and religious distinctions. It is found that this is the reason UNESCO had attempted to focus on this particular principle which can be characterised as the mother of all human rights and fundamental freedoms and ethical mandates.

The inherent worth of human life or respect for human life forms the basis of any legal system and remains the fundamental guiding democratic principle or rule of law. Human dignity is often described as a universal ethic or "*lingua franca"* of international relations.[59] Of late certain international bioethical instruments are drawn as though dignity is a magic wand to solve all ethical issues. This trend can be seen as a way of eye washing and running away from the real problem which confronts the field of genetic research.

Human life is not possible to define. Acts which offend the life of the individual, society and the species of mankind itself should be termed as unethical even though it may alleviate the sufferings of man. This is the reason technologies such as germ line therapy or reproductive cloning or prenatal genetic diagnosis needs control. Since it can perpetuate destruction of human species and can have a devastating effect on the future of humanity, though it has the potential to cure certain diseases. It might be true that the UN has not made any effective binding regulatory framework since the UN itself functions on certain universal consensus. Yet we find that it had been effectively able to bring an agreement on certain vital issues based on the concept of human dignity.

Though no precise answer is drawn by the international instruments, it is found that it had drawn consensus on questions like the need for informed consent, protection of privacy, maintenance of confidentiality, protection of the

[59] Roberto Andorno, "Biomedicine and International Human Rights Law: in Search of Global Consensus", 80 (12) Bulletin of the World Health Organisation (2002), available at www.scielosp.org/scielo.php? pid=S0042 (visited on 18-7-2013).

vulnerable, the need for balancing benefit and harm, equitable benefit sharing etc. Now, having laid down the minimum requirements it provides a basis for the nation states to look into specific issues and address these issues in their socio-economic and cultural context. Hence we find that it is for the national legal systems to incorporate these principles into their laws and thereby balance genetic advancement with human dignity.

8.2 Dearth of Legislative Action in India on Human Genetic Research

Research in molecular genetics is a late comer in India, primarily after the 1980's. The Department of Biotechnology under the Government of India established in 1986 took the task of monitoring genetic research in India. Several other institutions like the Indian Council of Medical Research, Department of Health, Council of Industrial and Scientific Research (CSIR) and the University Grants Commission (UGC) monitor and regulate the conduct of biomedical research in India.[60]

The Department of Biotechnology (DBT) along with other institutions have articulated several guidelines with regard to the conduct of genetic research including that for exchange of biological materials for research.[61] However, the Policy Statement of the ICMR issued in 1980 on Ethical Considerations involved in Research on Human Subjects can be regarded as the first of its kind. This statement is regarded as the first policy statement which gave official guidelines for the establishment of ethics committee in all medical colleges and research centres in India.[62] It laid down rules regarding informed consent, protection of children, mentally disadvantaged and those with diminished autonomy. After a range of controversies, the ICMR laid down the Ethical Guidelines for Biomedical Research on Human Subjects in 2000 which was subjected to revision in 2006.

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[60] K.C. Garg et al., "Scientometric Profile of 'Genetics and Heredity' Research in India", 57 *Annals of Library and Information Studies* 196 (2010).

[61] M. K. D. Rao & V. K. Gupta, "IPR and Sharing of Biological Research Materials in R&D*", 8 J.I.P.R.* 112 (2003).

[62] J. Sanmukhani & C. B. Tripathi, "Ethics in Clinical Research: The Indian Perspective", 73 (2) *Indian Journal of Pharmaceutical Sciences* 125 (2011).

The ICMR Code or Ethical Guidelines for Biomedical Research on Human Participants of 2006 in its general statement emphasises the relevance of human dignity and the notion of Kant's categorical imperative in biomedical research.[63] One of the objects of the guidelines is to establish Institutional Ethics Committee (IEC) but practice reveals that this is hardly resorted to. Moreover, we find that in the guidelines small institutions could align it with existing institutional ethics committees or approach registered IEC. Doubts have been raised that hardly anybody would take initiative in this direction.[64] The principle of essentiality under the guideline is relevant since it considers how far the research is absolutely essential to serve humanity. Principles of non exploitation require the research participant to be fully informed about the risk - both physical and psychological - of the participant.

In 2012, the Department of Biotechnology brought out a guideline for stem cell research in India. It proclaims that any research for stem cells shall have to respect human dignity and fundamental freedoms. Research pertaining to germ line genetic engineering or reproductive cloning is banned.[65] Similarly the derivation of embryo is restricted beyond 14 days or formation of primitive streak, whichever is earlier.[66]

The Biomedical Research Human Subject (Regulation, Control and Safeguard) Bill drafted by ICMR could not seek parliamentary approval. However, recently, the Biotechnology Regulatory Authority of India bill 2013 is pending which aims at promoting safe use of modern biotechnology. The bill seeks to establish Biotechnology Regulatory Authority of India, whose function would be to monitor research in this area. But, it is visible that there is paucity of

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[63] General Statement ii-" Such research is conducted under conditions that no person or persons become a mere means for the betterment of others and that human beings who are subject to any medical research or scientific experimentation are dealt with in a manner conducive and consistent with their dignity and well being , under conditions of professional fair treatment and transparency; and after ensuring that the participant is placed at no greater risk other than such risk commensurate with the well being of the participant in question in the light of the object to be achieved.

[64] George Thomas, "Institutional Ethics Committees: Critical Gaps", 8 (4) *Indian Journal of Medical Ethics* 200 (2011).

[65] Clause 7.3.1.

[66] Clause 7.3.2.

laws in this area and the absence of law in this area would lead to exploitation of the vulnerable groups. Since the guidelines lack legal backing, non existence of law in this area is a basic threat to dignity and life.

Conclusion

Genetic research of humans involves both positive and negative impacts. Hence the task of law is to devise tools so as to maintain a balance between benefit and harm. Regulatory approaches on this subject should be articulated in such a way that the benefits of the research should be enjoyed at the fullest while the perils of the research be curtailed. Some of the findings based on the existing legal framework are:

1) The International human rights regime relating to human genetic research is practically based on the principle of the sanctity of human life. Instead of the term *sanctity t*he term r*espec*t for human life is used in all the legislative endeavours by the UN.

2) The incorporation of the concept in the international regulatory framework had helped in formulating uniform standards sans cultural diversity. Hence the principles of non discrimination, self determination, privacy etc. came to be recognised as primary principles in this area of research.

3) Human genome came to be considered as the common heritage of humanity by way of incorporating it in the human rights instrument. This leads to the acceptance of the dual dimension of human genome i.e., the individual dimension in genome and the dimension as it being a part of humanity.

4) International Declaration on Human Rights on this subject completely remains silent on the issue of patenting especially when genome is regarded as a common heritage of humanity.

5) Lack of proper guidance on issues of informed consent and absence of explicit ban on germ line therapy, pre implantation genetic screening and pre implantation genetic diagnosis etc. are the existing defects in the regulatory regime.

6) The UN Declaration on Human Cloning 2005 is superficial in the sense that the declaration states that cloning is prohibited to the extent to which it impinges human dignity. So nation states are left to their will to decide on abiding to the declaration or not. Similarly, the UN Declaration on Bioethics and Human Rights 2005 does not define bioethics and is silent on the socio economic consequences of unethical research.

7) Most of the Declarations on the subject are not legally binding. Hence they are weak in terms of enforcement.

8) Lack of effective law making in India on the subject.

Chapter 9

Conclusions and Suggestions

The term "the sanctity of human life" is often found to be devoid of being given a precise definition. The reason is that human life cannot be quantified nor easily be defined. However, it is found that the inherent worth of human life needs to be respected. This is essential for the sustenance of humanity and for ensuring a peaceful coexistence. Man needs to lead his life not only in conformity with his fellowmen but has the obligation to protect the interest of the future of human beings of which he is a part and this is depicted through this concept. The questions that how did he get this worth and what is the rationale in attributing a superior moral status to the life of man compared with other beings has been a subject of inquiry from time immemorial. However, on the question of how human life got its worth is marred by different views and outlooks such as natural, religious, secular and scientific justifications and this is the same with the other question. Though different cultures attribute significance to human life in their own way it is beyond dispute that they consider human life as having inherent worth. Hence there is a universal appeal to protect and respect human life. However, one can find certain characteristic features with regard to the concept of the sanctity of human life. The use of the term 'sanctity' had resulted in dumping the concept as theological, and it is found that in order to remove this attribution, the fine principles of this concept has been termed as human dignity, respect for the inherent worth of life etc. Since the application of the concept is universal without any distinction as to race, religion, sex, culture etc., certain norms need to be framed which can have universal appeal but at the same time be applied to any situation and cultural context. At this juncture, it is worthwhile to find that certain fundamental values are embodied within this principle and hence the nature and application of this concept are distinct. From this inquiry it is found that this doctrine embodies certain features.

- **The Sanctity of Human Life is a concept which cannot be termed as merely religious or secular or natural or scientific but an all-encompassing concept**: **The Conceptual dilemma**

It is difficult to deny that there exists much significance to the concept in both practical and theoretical realm. The concept can be viewed as a notion which can be applied in a variety disciplines and from differing perspectives. Despite the general acceptance that this concept is the fundamental basis of law and human rights, there is a general disagreement as to its meaning, origin, content and its effectiveness in application. This is because the reasoning in the natural, religious, scientific and secular fields is drastically different. In the religious outlook itself, it is found that extreme disparities exist with regard to eastern and western conception of the sanctity in human life. Moreover, it is found that no particular religion or moral philosophy could incorporate the practical resonance of this concept. However, it is undisputable that all these approaches categorically assert two aspects:

1) Respect to inherent worth of human life.
2) Humans enjoy a higher status than other living beings due to existence of certain attributes.

Respect to the inherent worth of human person embodies respect to the life of fellowmen. Notions of equality, universal brotherhood or fraternity, concept of physical and psychological integrity, human autonomy, privacy, etc. can be seen embedded within the concept.

- **Impossibility of being Given a Precise Definition**

Conceptual tensions exist in this concept. It is found that certain legal systems and certain international instruments conceive respect to human life as a natural characteristic of humans, while others perceive the concept in a metaphysical plane as based on divine origin or divine will. Some others view this concept as an artificial characteristic articulated by man himself consensually to carry out a political system. Thus, there exists difficulty in articulating the precise extent and limits of the concept. Moreover, in the international sphere, where diverse cultures

are involved and where the implementing mechanism is based on consensus, definition to the concept of life is crucial and problematic.

Moreover, a tension exists between the individual and the universal character of the concept. The individual nature of conception reveals that man is the master of his mind and body and all his rights need to be respected. The universal conception regards man as one among the human species and so needs to respect his fellowmen. Again it is found that the concept is often understood as incorporating absolute inviolability but at the same time under certain situations deviating from it. These tensions mandate an abstract view on the concept since a specific enunciation of the concept can lead to watering down the fundamental values embedded in the concept based on individual choices and its ineffectiveness in different cultural contexts or pluralistic societies. This conceptual tension is visible in different human rights instruments. There was a wilful abdication of the term "the sanctity of human life" and instead terms like "human dignity," "respect for inherent worth of human person" were incorporated into human rights instruments. Hence it can neither be termed as an abstract value since it is effectively applied in concrete situations nor can it be termed as a specific value that is included in various spheres of human activity. Thus, it is found that it is not possible to define it precisely nor should that exercise be undertaken since it can limit the application of the concept.

- **The Fundamental Norm of a Legal System and Universal in Appeal**

It is found that this concept is the fundamental norm of a legal system. In most of the legal systems having written constitutions it is found that it is recognised as the fundamental norm.[1] Moreover, it is the basis of the rule of law and democracy. It incorporates the principle of equality and non - discrimination. It is estimated that 75% of the national constitutions in the world use the concept of human dignity and 25% impliedly accept it in their legal systems.[2] Even though most of

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1 Indian Preamble declares the commitment of Indian Legal system. In German legal system the term 'Menschenwurde' or human dignity is declared as a fundamental principle. Countries like Israel, South Africa etc accord a central place in their constitutions.

2 Available at www.nnet.gr/historein/histreinfiles/histvolumes/hist07/historein7-baets.pdf (visited on 29-7-2013).

the legal systems have accommodated this concept in their legal system based on their socio-cultural tradition yet it is found that especially after the Second World War there was a general feeling that ensuring peaceful coexistence should be universally guaranteed and hence the birth of human rights instruments guaranteeing the same. Both Criminal law and Civil law has this concept as its basis. However, it should be remembered that violations of this concept can be seen when there is an arbitrary exercise of power, hence the need for incorporating it at national and international levels.

- **Both power conferring and power limiting**

Liberty assures the power to do what one wants. This power is often circumscribed by the implicit limitation in it. Your power to exercise your liberty is absolute but limited to the extent that it may not hurt your neighbour's right of exercising his liberty. The recognition and acceptance of this particular aspect is conveyed through the doctrine of the sanctity of human life. This follows that it incorporates both subjective and objective view of life.

- **Embodies both individual and collective interest**

Human dignity embodies a social ideal that all individuals deserve respect and liberty. It embodies within itself the formula that the individual's rights are to be respected and protected and that individuals have the responsibility to protect the collective interest. Thus it embodies both individual freedom and social responsibility. The recognition of the respect to the inherent value of human life produces two main results namely, non-instrumentalisation of human body or recognition of bodily autonomy and non-authoritarianism by the state. Thus the concept joins men to make society but at the same time preserves for them freedom which makes them a single autonomous human being.

- **Human Dignity as a guiding concept behind human rights law: Internationally approved pragmatic consensus**

It can be found that human rights are a particular mechanism or practical means for achieving the sanctity of human life or human dignity. We have found that human rights accrue as a result of us being a member of the human species.

And as a part of human species all of us have equal rights and have inalienable rights which cannot be alienated on account of the factors such as status, birth etc. since we belong to human community. Thus they are universal rights since all human beings have them. It reminds us the need for responsible human relations and respects the rights of our fellowmen. This is ensured by human rights law and the practical function of the concept of human dignity is to achieve this. Herbert Spencer, the great philosopher subtly puts this idea thus:

> *"Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man."*[3]

Human rights act as a vehicle which enables the individuals to understand this philosophy of life. It is not only a collectivist approach but assures the individual that he is the master of his own life by assuring the right to life and the right not to be discriminated. Right to life incorporates the aspect of protection of physical integrity both physical and mental. Thus notions of privacy or confidentiality are embedded within it. Autonomy is a part of human dignity and finds expression through the concept of self-determination. Equality mandates non-discrimination. The sanctity of life postulates all conditions necessary to contribute an existence worthwhile. Hence quality of life is not an antithesis to the sanctity of life but a condition necessary towards achieving the worth of human life. Moreover, it should be understood that the sanctity of human life postulates not only respect for the value of life but mandates the requirement for creating conditions for flourishing life. It is this reason why socio economic rights also fall under the category of human rights. Certain acts denigrate the worth of human life and hence condemned, e. g., torture, degrading punishments etc. Certain ideas also affect its worth and hence outlawed e g., slavery, racism, eugenics etc. Thus it is found that the sanctity of human life is the basis of human rights law. Hence, we find that respect for human dignity is termed as inviolable. Again, the sanctity of human life should not be understood as absolute inviolability of human life but it mandates respect to human life as inviolable. It basically lays emphasis on the fact that acts or conduct should not demean human life.

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[3] Herbert Spencer, *The Principles of Ethics,* vol. II, D. Appleton & Co., New York (1908), p.45.

- **Postulates free and responsible search for truth**

A free and responsible scientific investigation is essential for the wellbeing of the human species. Thus for scientific endeavours reliance on dignity is essential. Shared scientific knowledge and responsible conduct of research is mandatory if science exists for man. However, it should be remembered that freedom of scientific research is a part of freedom of thought which is a human right. Since science exist for man, this freedom on its exercise should look into the aspect of whether the advancement it promises adds value to his life or has it got the repercussion of demeaning humanity. Hence, this concept establishes and enforces the need for a responsible form of scientific investigation. In fact, it is found that the Indian Constitution under Article 51 A (h)[4] in Part IV A, enumerating the Fundamental Duties insists that scientific temperament and spirit of inquiry be based on humanistic values. Jacob Bronowski,[5] a scholar, has pointed out that:

> *"The Society of scientist is simple because it has a directing purpose: to explore the truth. Nevertheless, it has to solve the problem of every society, which is to find a compromise between man and men."*[6]

Thus there is a need to balance between the urge of a scientist with that of the dignity of humankind. The urge for truth exists not only in a scientist but also in creative writers, poets, artists etc. but the difference with the scientist is that he can touch areas affecting physical, biological and psychological aspects of humans, hence the need for acceptance of certain limitations in this urge. Moreover, it is to be understood that human search for empirical truth is a process of learning by steps of which none can be said to be final, and the mistake done by a scientist is rectified by the next. This is precisely the reason why human dignity should be given prime status in the search for scientific truth.

Thus it is found that this concept has been applied in scientific investigations. However, certain advances in human genetic research have necessitated the need for

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4 Article 51 A (h) reads: "to develop the scientific temper, humanism and the spirit of inquiry and reform."

5. See http://en.wikipedia.org/wiki/Jacob_Bronowski (visited on 29.7.2013)

6 Jacob Bronowski, *Science and Human Values*, Julian Messner, New York (1956), p. 87-88.

recognition of this concept legally and hence the stress on the need for strict enforcement. As for predictive genetic mapping, it is found that there are ethical issues as to how far it should be ethically feasible since it not only intrudes into human privacy but also has the impact of creating psychological trauma for the participant from whom such information is gathered. Moreover, we find that it can perpetuate discrimination to certain groups when mapping is based on genetics of a given set of population. Thus the application of the concept of human dignity mandates a restriction on genetic mapping and adequate measures to protect the dignity of the communities involved so that it does not perpetuate discrimination. As for the use of recombinant DNA technology, it is found that somatic gene therapy may be allowed. However, germ line therapy requires absolute prohibition since there are chances for misuse of the technology for genetic enhancement for the offspring and hence mandates prohibition. As for cloning techniques, reproductive cloning mandates complete ban whereas restrictions need to be placed on therapeutic cloning. Destruction of embryos cannot be viewed as a matter of serious concern since there is no consensus on the question of the beginning point of life or the end of life. However, we find certain apprehensions on harvesting of eggs for research purpose which can have serious repercussions on the dignity of women and consequent commercial exploitation as far as therapeutic cloning is concerned. It is apprehended that it would lead to commercial rise in the market for human embryos. Moreover, in case of reproductive cloning it is not the genetic identity but the genetic exclusivity and uniqueness which pose threat to human dignity. Furthermore, the created clone has been given life not for its own sake but for the interest of the scientist, hence it can be safely said that it poses a potential threat to dignity since it can perpetuate discrimination and cause psychological trauma to both the individual and fellowmen alike. Derivation of pluripotent stem cells from embryos has triggered controversy. The destruction of embryos for the derivation of cells has evoked questions on the moral and religious plane in which embryos are treated. Embryos are regarded as bearers of human life by most of the western countries where Christianity prevails, and hence treated as unethical. Moreover, we find that stem cell research offends women's dignity since she can be subjected to exploitation for derivation of eggs. Besides it can affect female reproductive rights. Issues with regard to the protection of

genetic information, stem cell banking etc. are still unsettled. The commercialisations of this area of research and the absence of absolute predictability of the effects of the therapy have questioned the application of this type of research. However, we find that this type of research is essential for the cure of certain diseases which remain otherwise incurable. Hence we find that by balancing the benefit and harm the countries are not required to completely ban the research on this area but to take a cautious approach by requiring strict vigilance under its laws. The pre implantation genetic screening and pre implantation genetic diagnosis should not be allowed since they can lead to genetic reproductive programming which can lead to selection of genetic traits by the parents for the offspring. Hence, the need for controlling research in this area. Legislative restraints need to be placed to the extent this can be used for "enhancement purpose."

The commercialisation of human genetic research had raised wide concerns as offending human dignity. The rise of biotech and pharmaceutical companies in this area of research has laid stress on monopolisation and commercial profits and little interest is shown to the future of human life. Privacy and confidentiality have been given a secondary position. Most of the public universities performing this research are private funded. Hence these trends affect human dignity. Moreover the presence of the patent regime in this area has added to the woes. The criteria fixed for the legal patenting of genes overlooks the question of how far it is permissible and whether it offends human dignity. It overlooks the dimension of how far it is justifiable to create proprietary interest in human genes. It is found that the TRIPS allows the member states to decide on patentability of human genes and hence it is found that no coherent position exists on the question of the patenting of human genes. The role of WTO as the standard setting institution is being questioned due to its partisan attitude toward the interests of developing countries, closed nature of its proceedings, lack of democratic procedures and human rights principles.[7] Hence the effectiveness of TRIPS in protecting human dignity by way of this research is doubted.

[7] Audray R. Chapman, "A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science", available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_5.pdf (visited on 24-9-2013).

America, which is considered a pioneer in the area of biopatents, especially gene patenting had accepted their position based on commercial profits which helps it to boost its economy. Hence at the earlier stage it permitted patenting of genes even for naturally occurring genes but later when it understood that patents in this area can create questions which affect human dignity, restrictions on were put patenting on naturally occurring genes. In the European block it is found that that patenting of naturally occurring genes is still not deemed to be as offending human dignity. It is found that this is because of the commercial profits that these patents would fetch in. However EU's approach towards patenting is that it treats genes as mere chemical compounds and not as information store houses. Patents have affected the public health system and had increased the cost of therapies which makes it not affordable to all. This can be found in America itself.[8] Moreover, it is alleged that it stacks follow up research. Commercialisation of genetic science had discouraged data sharing. Hence we find that there is a need to exercise severe restrictions in this area, lest commercial motives may sweep away human uniqueness and dignity. Though international instruments for protecting human dignity exist in this area of research, the non binding nature of these instruments has affected its effectiveness. Moreover, the issue of ownership of the genetic information and ownership of the biological material especially the genes remain unsettled. Hence there is serious encroachment on privacy and the consequent threat of discrimination. There exist no proper yardstick as to the extent of confidentiality and the extent of disclosure as to genetic information. Moreover, the obligation of the doctor or the participant to his relatives as to susceptibilities to certain genetic conditions is hardly addressed by the law and still remains a moral obligation. There is an unsettled position with regard to DNA storage and DNA banking. Even in the case of informed consent, the use of material for basic research for which consent was obtained and for the subsequent usage, there is no legal clarity. This aspect extends not only to bio specimens but also to genetic information. Thus protection of information from the biological material, its continued use, development of

[8] The decision in Association For Molecular Pathology et al v Myraid Genetics et al 133S.Ct 2107 (2013) reveals this.

long term commercial use and exploitation, unlimited data sharing, refusal for further consent etc. have been hardly addressed. Though the international human rights instruments in the area of genetic information are non-binding yet they can be treated as standard setters. We still find lack of any international instrument in the area of stem cell research, germ line therapy and embryonic profiling. However, since 1990's we find several restrictions to the area of genetic research in the name of human dignity and respect for the human person which is a positive direction in this regard. Thus human dignity has emerged as a severe limitation on the research in this area. It establishes a requirement for the state to undertake a very vigorous analysis of the impact of inventions pertaining to genes, especially due to the intellectual property paradigms. When making choices and decisions, it calls for a particular nature of sensitivity. In fact, it is found that UN had consistently emphasised that scientific progress should be for the benefit of mankind.[9] This commitment is not only limited to the present generation but to future also. Hence certain areas of genetic advancement which have a deleterious effect on humanity and affect human dignity need to be controlled. Hence the concept of human dignity acts as a check on such advances and prompts us to question the authenticity and reliability of the scientific inquiry.

Suggestions

- **Control on genetic mapping needed: Strict regulatory supervision essential**

Advances in certain areas of genetic research require certain restrictions since it can corrode the faith in human dignity. Though genetic mapping helps to locate defective genes and thereby helpful to predictive and preventive disease yet our experience proves that it creates social and ethical implications. The confidentiality of the data secured, the protection of the interest of the donors and privacy are questions which need to be tackled. The lack of protection of the confidential nature of the data results in discrimination. Countries like America had already experienced and had witnessed it. Moreover, patenting of the data

[9] See the 1975 Declaration of the Use of Scientific and Technological Progress in the interest of peace and for the benefit of mankind.

secured by way of mapping had raised concerns especially when mapping is undertaken of vulnerable groups, especially indigenous population. Though the UN Declaration on Human Genome and Human Rights 1997 addresses the issue of potential discrimination, it is for the states to decide on the modus operandi of preventing the same. We find that the nation states which are not fully developed in this field of biotechnology may be misused by the developed due to the laxity regulatory regime. This is hardly addressed in any of the international conventions. Hence the states are required to specifically bring about strict regulatory measures on the studies on genetic mapping and the issue of control on translational research and genetic mapping needs to be addressed. Moreover, strict implementation of these controls needs to be monitored by the International Bioethics Committee since the disparity in regulations can be a source of exploitation by the strong countries against the weak.

- **Germ line Therapy to be banned**

Germ line therapy needs to be banned entirely since it offends human dignity. It has the propensity to be used for enhancement purpose which paves way for eugenic considerations. Though the Universal Declaration on Human Genome and Human Rights, 1997 declared that it is contrary to human dignity, certain countries like the US still pursue it. Since it involves the tampering of embryos for therapeutic as well as the enhancement purpose, it can be an area of possible abuse. It can lead to commercial exploitation by private fertility clinics.[10] Moreover, the question of informed consent of the offspring is a question which cannot be addressed with certainty. In India, though the regulations ban, it still lacks the essential legislative force. Hence there is the need for legislative stipulation in India.

- **Strict enforcement of ban on reproductive cloning essential and monitoring of therapeutic cloning essential**

Reproductive cloning has been banned entirely but there is the lack of an effective monitoring mechanism in this area. Moreover, there is no unanimity

[10] Torsten O. Neilsen, "Crossroads where Medicine and the Humanities Meet: Human Germ line Therapy", 3 *McGill Journal of Medicine* 126 (1997).

among the countries with regard to control on therapeutic cloning. Since there is no consensus on the moral status of the embryo, the regulatory approach differs. The lack of consensus on the status of embryos has left the countries adopting different stance on therapeutic cloning. However, therapeutic cloning cannot be considered as having a deleterious effect when compared to reproductive cloning. But it should be remembered that both types of cloning depend on fertility clinics for derivation of ooctyes. This has raised concerns on exploitation of women and as this affects women's reproductive health. Moreover, it is apprehended that uncontrolled power given to fertility clinics to decide on aborted foetuses, unutilized zygotes and embryos morphologically incapable of in utero implantation[11] can lead to commercial exploitation with profit motive. Hence strict monitoring and control is needed for therapeutic cloning, if pursued.

- **Need for Legislative control and monitoring of embryonic stem cell research**

Stem cells extracted from embryos through the process of somatic nuclear transfer or therapeutic cloning has got a great value in replacement and regenerative medicine. However, this field of research is controversy ridden ranging from consent to donate the biological material to destruction of embryos and clinical trials to control over the research. Apart from concerns of the legal status of embryos, the coercion exercised for donation of embryos on women and the reproductive health of women who donate embryos for such purpose has necessitated thinking for the need for control on this type of research. A balance of benefit and harm principle is to be secured by the legal system. Moreover, the stem cell banking needs to be controlled since genetic information which the cells hold can be exploited to such an extent that human dignity and privacy would be affected. The huge investment by private hands, especially the pharmaceutical industry, has necessitated the need for strict monitoring and enforcement of laws. Norms need to be developed with regard to the deposit and access to these stem cell banks. Thus questions ranging from data protection to handling of samples

[11] Charlotte Kfoury, "Therapeutic Cloning: Promises and Issues," 10 (2) *McGill Journal of Medicine* 117 (2007).

need control. Some countries have adopted certain rules regarding this type of research while the majority remain silent. Moreover, at the international level also there is no convention giving a guideline as to controlling stem cell research. The lack of law can lead to exploitation and uncontrolled commercialisation and the big scientifically advanced countries would try to exploit countries with no law on the subject especially in the area of translational research. In India itself we find that absence of control or strict monitoring and the lack of legislative control have resulted in huge investment being made by pharmaceutical industry with commercial motives with least concern for human dignity. Though the Indian Council of Medical Research 2007 had set up an institutional mechanism to control this research we find that no sanctions have yet been prescribed. This is again hardly been addressed by the draft guidelines of ICMR in 2012. At the international level also we find that the conventions hardly address the issues pertaining to stem cell research, especially stem cell banking.

- **Prohibition of Pre implantation genetic screening and pre implantation genetic diagnosis**

Pre implantation genetic screening and pre implantation genetic diagnosis are the techniques known as embryonic profiling applied in conjunction with artificial reproductive methods. Though they have the potential for casting away certain carriers or cells having genetic disease to the offspring, the threat is its potential to be used for enhancement purpose. It has got the ability to shake the institution of family because it propagates the idea of acceptable child making which is ethically against the notion of human dignity. The question of embryonic reproductive programming is hardly addressed in particular by any international convention and hence it is addressed by different legal systems in different ways based on their socio cultural ethos. The Indian Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994 hardly addresses this issue. So there is the need to control this research even under the Indian legal system.

- **Human Genetic Research for biomedical advancement needs to be removed from the patent regime**

Gene patenting in humans has been allowed initially since it is an incentive for the researcher. It promotes research, makes improved drugs and diagnostics thereby assuring improved health care system. However, of late, experiences in certain legal systems, especially in America had proved that it stacks innovation. It had affected the public health care system since there has been voluminous increase in the prices and availability of drugs and diagnostic tools. This had affected the public health care system and equal access to all to the benefits of the advancement of biotechnology. Moreover, it has led to exploitation of man for commercial interest which is against human dignity. TRIPS does not give a clear view on the patentability of human genes. The WIPO has suggested certain alternatives to the patent system including innovation inducement prizes or open source development projects.[12] Rational Construction of law is the need so as to exclude patenting of human genes. Scientific incentives may be given to researchers to promote research but patenting rights may be excluded from this type of research.

- **Need for Legislative endeavour in India regarding control of certain advances in human genetic research**

Certain advances in human genetic research have contributed to the development of newer medicines and therapies. However, we found that due to commercial motives running behind this type of research, there is a need to control certain areas of research. Though the existing Ethical Guidelines for Biomedical Research on Human Participants 2006 mandates the establishment of Institutional Ethics Committees (IEC) it is hardly resorted to. Legislative efforts should be taken for the establishment of central monitoring autonomous body which supervises and monitors the research. Commercial funding of research in public universities and research centres and Private research should be brought

[12] Committee on Development and Intellectual property, WIPO,Fourteenth Session, Nov 10-14 , CDIP/14/INF/12, available at http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_14/cdip_14_inf_12.pdf (Visited on 3-4-1974)

under the control. Strict monitoring of transfer of information from genetic databanks and the use of biological materials and transfer of the same should be made. Criminal prosecution and strict penal liability for those who contravene the law may be prescribed. Research participants should be adequately rewarded and the consent for research should be restricted to first principal use.

Other Suggestions

a) Unethical clinical trials in this area of research needs to be controlled. Since genetic research is a transnational pursuit, international law making on this aspect is needed.

b) Genetic information mandates both confidentiality as far as the participant is concerned and the social need for dissemination of information to genetic linkages of the research participant. In case of genetic linkage of the participants who are carriers of grave genetic disorders which may affect the offspring or other family members information needs to be divulged. The thin divide between confidentiality and disclosure needs to be legally defined. At present there is no law on this particular aspect. Hence this should also be included.

c) Commercial interest in DNA banking necessitates a need for monitoring. Security of genetic data base is to be ensured. Private companies either through hospitals or with the help of internet collect and study the samples and genetic information for the purpose of selling them to researchers in this field. These companies emerge as brokers so that the legal obligation towards the participant is reduced. Hence law needs to address this issue also both at the national and international realm.

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