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Dr. Pradeep Kumar
Executive Editor & Managing Director
Journal of Legal Studies

Analyzing the debate on execution of Yakub Memon

Prof. Bibha Tripathi*

Introduction

It is not less than a herculean task to discuss about the utility of death sentence. A capital sentence made for capital offences is debated, argued and interpreted differently by different countries, organizations and judiciary. Authors, writing on death sentence set their mind prior to down their pen as to whether they should be tagged as retentionists or abolitionists.

The debate on death sentence remains an age old issue which begins afresh after each incident shaking the mindset of countrymen. Sometimes it is demanded vehemently by the feminist scholars and activists, sometimes by the social activists, sometimes by the parliamentarians and sometimes by the religious fanatics. Against this backdrop few questions emerge as, after 2004 no rapist has been executed till 2015. Is it a moratorium to Capital Punishment for a capital offence of rape? Whether death sentence should be counted on the basis of execution and not on the basis of award of the same? Is terrorism remains the only Capital Offence? Is it whimsical? Is it Political? Is it a lethal lottery or just deserts? And had there not been the NDA government, Yakub would have not been hanged?

With reference to the recent execution of Yakub Memon, the abovementioned questioned are floating in the air. After the decision of Hon'ble Supreme Court in Santosh Kr. Bariyar v. State of Maharashtra case[1], the ordinary people become aware with the fact of per- incuriam judgments means judgments delivered out of error or ignorance. The paper attempts to discuss the execution of Yakub Memon on substantive as well as procedural aspects to discern the fact of per- incuriam.

Yakub Abdul Razzak Memon, who has been executed for his role in the 1993 Mumbai blasts, the apex court has observed on the one hand that no principle of natural justice has been violated and thereby dismissed his curative petition[2] and on the other hand, asked the Centre whether it should lay down the law on the procedure for moving mercy petitions because repeated filing of mercy pleas frustrates the principle of finality[3].

Professor, Faculty of Law, Banaras Hindu University, Varanasi.

[1] (2009) 6 SCC 498.

[2] Krishnadas Rajagopal, SC dismisses curative plea of Yakub Memon, The Hindu, 22nd July, 2015.

[3] The Hindu, 23rd July, 2015, "Should we lay down the law on mercy pleas, asks SC".

The execution of Yakub Memon is questioned on both the grounds i.e. substantive as well as procedural. On substantive aspect of "rarest of rare[4]" it is questioned that does Memon's role qualify as the "rarest of rare" when Memon persuaded his family, including his wife, to return and surrender and provided precious details about the involvement of the Pakistan Inter Services intelligence in the planning of the blasts and expecting in return for a lighter sentence, has been chosen (after spending two decades in jail) for execution to satisfy "the collective conscience"[5]. It has also been commented as satisfying the bloodlust of society by being a whimsical lottery, tilted a bit against Muslim community[6].

So far as the procedural aspect is concerned authorities are opining that the procedure followed to obtain a death warrant for Mumbai blasts convict Yakub Memon suffers from serious constitutional flaws. If seen through, it will set a very wrong precedent[7].

As the law stands after the decision of the Supreme Court in *Shabnam v. Union of India*[8], a black warrant or death warrant proceeding cannot take place without the accused and his lawyer being present. *Shabnam* now requires that five elements be satisfied: that a convict be given prior notice of the death warrant proceeding; that the warrant specify the exact date and time of execution and not a range of dates; that a reasonable period of time be fixed between the date of the order on the warrant and the date set for execution to enable the convict to meet his family and pursue legal remedies; that a copy of the execution warrant be made available to him; and that he/she be given legal aid at these proceedings.

In Memon's case, the death warrant that was issued on April 30, 2015 scheduling his execution for July 30, 2015 was unnecessary and invalid in law. The Maharashtra government should have known that Memon still had the option of filing a curative petition. Before proceeding to execute an individual, it is the government's obligation to ensure that all legal options have been explored.

It is also observed that moving for an execution in a clandestine manner, hoping that the prisoner would not exercise his constitutional options, reeks of vengeance. It is also submitted that we should not forget the judgment delivered by the Supreme Court in *Shatrughan Chauhan v. Union of India*[9] that once again affirmed the rights of death row prisoners to challenge the rejection of their mercy petition on certain grounds. After rejection of the mercy petition by the governor and the president Memon was entitled to

[4] *Bachan Singh v. State of Punjab* (1980) 2SCC 684.
[5] The Hanging Question, Editorial, EPW, July 25, VOL.L.NO.30 at 8.
[6] Manoj Joshi, Why Yakub Memon Should Not Be Hanged, id, at 30.
[7] Lubhyathi Rangrajan, Justice or Vengeance? The Hindu, 23rd July, 2015.
[8] Decided in May 2015.
[9] Decided in January 2014.

ask the courts to examine the rejection on various grounds, including that of procedural impropriety.

For this and other procedural flaws former Supreme Court judge Justice Markandey Katju said that there has been "gross travesty of justice" in the case of Yakub Memon, he also said that the evidence on which Memon has been found guilty is very weak.

It has been reported in various news papers that Yakub Memon was hanged two hours after SC rejects his petition[10]. But when one goes through the minute to minute detail then it becomes clear that Supreme Court was hearing the case in court and jail authorities were preparing for his execution. The Hindu reports that at 2.a.m. Suleman received a sealed envelope containing intimation of Yakub's hanging between 6 to 7 a.m. It makes it amply clear that the jail authorities were quite sure about his execution. The efforts made by yakub and his advocates were taken as sheer formality so that no one could allege procedural lapses in his hanging. But any reasonable man can think that on the one hand Supreme Court is boasting to create history in the field of criminal justice system by giving opportunity of hearing Yakub that the very court sat with a pre – occupied mind to refuse his pleadings ultimately. That is why Supreme Court refused to stay his death warrant at 5.a.m. until then all formalities were over except hanging in the very jail premise.

Aggrieved by the court proceeding, Anup Surendranath, Deputy Registrar in the Supreme Court resigned over what happened during the hearing of the petition of Yakub Memon. He said that it was the darkest hours for the Supreme Court of India showing instances of judicial abdiction[11]. This execution has showed different yardstick followed by subjective factors[12].

The scapegoat theory has been applied in letter and spirit in Yakub Memon's case[13]. Sanjay Hegde, lawyer of the Supreme Court opines that Capital punishment, now even more than before, appears to be a "lethal lottery". Actual execution is dependent on variable factors like the personal inclinations of judges, administrators and the political environment of the moment. As Prof. Singh has also rightly pointed out even in 1981 that; "In a time frame continuum, different political communities have dealt with it differently and its have and have not depends on the socio economic conditions, state structure and political milieu of a particular society. A proper treatment to capital punishment depends also on the degree of scientific approach with human content of the societal reaction towards this diabolic penalty."[14]

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[10] The Hindu, 31st July, 2015, "Yakub Memon hanged on Birthday".
[11] The Hindu, 2nd August 2015, at 12.
[12] The Hindu, 27th July at 12.
[13]Sanjay Hegde, Letha lottery or just deserts? The Hindu, 5th August 2015.
[14] Prof. Mahendra. P. Singh, "Capital Punishment: A Political Compromise", Banaras Law Journal, 1981, 92-101, p. 92.

It is submitted in the paper that we should not forget Santosh Kr. Bariyar v. State of Maharashtra case[15]revealing the errors committed by the apex court in awarding death sentence. As gravest miscarriage of justice two of them have even been executed too[16]. Consequent upon the decision fourteen retired judges of the Supreme Court filed an appeal in the form of separate letters to the president requesting to commute their death sentence in life imprisonment.

Concluding Observation

The paper is written with an intention of highlighting the concept of per incuriam judgments (out of error or ignorance) delivered by the apex court. Since executions of persons wrongly sentenced to death severely undermines the credibility of the criminal justice system and the authority of the state to carry out such punishments in future. Abolition of death sentence is in the womb of future. Therefore, it is submitted through the paper that it must be seen by the common man that the executions are not being alleged as per incuriam. And the statement of Nick Robinson that there are many supreme courts in India should not be the reality.

[15] (2009) 6 SCC 498.

[16] Rawji Rao and Surja Ram on May 4, 1996, and April 7, 1997, respectively See, V. Venkatesan, A case against the death penalty, Cover Story, September, 7, 2012.

Theorising Semiotic Perspectives of Basic Structure Theory : A Plea for Modern Narratives of the Constitutional Text

Dr. A. P. Singh*

Abstract

Indian Constitution has been culpably ignored as far as qualitative and quantitative research techniques are concerned, therefore, the document asks for a post-modern critique by considering as to how the document ought to be received / interpreted, by the Constitutional functionaries, and, by 'we the people' in the times to come. Traditionally, the Constitutional scholarship has confined itself to descriptive analysis only. This paper rivets its focus on Basic Structures / Features of the Constitution and suggests a theoretical research reference frame / Model for a newer understanding of Basic Structure Theory. Basic Structures / Features of the Constitution can be explored and studied on the basis of this reference frame. This paper relies on many concepts and terms, put in italics, which are popular in post-modern theory and semiotic theory and a basic discussion of the same will be outside the scope of the present paper. In the 'traditional narratives', the Basic Structure Theory (BST) has been elucidated and projected in an 'illustrative/declaratory' manner. The 'modern narratives' warrant a need for 'deconstructing' the 'illustrative/declaratory' discourse and pleads for a 'reconstruction' for understanding and developing the inner folds of Basic Structures/Features by exploring its deeper semantics. As this paper relies on some concepts drawing heavily from semiotics, semantics, and post-modern tools of textual analysis , the first part of the paper explores and suggests the perspectives of content analysis, and the second part suggests semiotic and semantic dimensions of the Constitutional Text Analysis.

Keywords: Basic Structures, reconstruction, constitutional identity

Content Analysis of Basic Structure Jurisprudence

Professor Herman Oliphant, in his 1928 inaugural address as President of the American Association of Law Schools, said-

Our case material is a gold mine for scientific work. It has not been scientifically exploited. . . . We should critically examine all the methods now used in any of the social sciences and having any useful degree of objectivity.[1]

Introduction

Content analysis is a standard social science technique that could form the basis for an empirical methodology that is uniquely legal. On the surface, content analysis appears

Associate Professor, RML National Law University, Lucknow, U.P. Formerly Visiting Faculty, Deptt. of Linguistics, Lucknow University.

[1] Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 161 (1928).

simple, even trivial, to some.[2] Using this method, a scholar collects a set of documents (for instance, judicial opinions on a particular subject), reads the document systematically, records consistent features of each one, and then draws inferences about the use and meaning of those documents. The method comes naturally to legal scholars, because it resembles the classic scholarly routine of reading a collection of cases, finding common threads that link the opinions, and commenting on their significance. But content analysis is much more than a better way to read cases. It could bring social science rigor to our understanding of case law, which could create a distinctively legal form of empiricism.[3]

The content analysis of the Basic Features and Structures of the Indian Constitution may be drawn from a variety of text literature available on the theme. The bare provisions of the Indian Constitution itself may be a good index of measuring the same. The second significant text may be the texts of the judgments available on the issue. The third relevant text may be the critical case comments by scholars and jurists. When we examine these texts by comparative and contrastive tools, a different picture and pattern may be generated / elucidated for newer perspectives of Basic Features and Structures. This technique may be useful for making replicable and valid inferences from texts and this may be helpful in linking the text and context together.

It has certain advantages, along with substantial limitations, compared with conventional legal analysis. What is claimed is that, when one chooses to read cases this way, one is engaged in a uniquely legal empirical method — a way of generating objective, falsifiable, and reproducible knowledge about what courts do and how and why they do it. Other social scientists can use this or other methods to study questions that *relate to* the law. Econometricians, political scientists, or sociologists can measure various external drivers and effects of law and legal institutions.

But content analysis aims for scientific understanding of the *law itself* as found in judicial opinions and other legal texts, a subject matter that plays to the strengths of legal scholars. One early advocate of this method claims that it points us more directly toward

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[2] *See* Klaus Krippendorff, Content Analysis: An Introduction to Its Methodology 18 (2nd ed. 2004) (defining content analysis as "a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use").

[3] For a debate about how well legal scholars have applied standard social science methods, *see, e.g.*, Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Frank Cross, Michael Heise & Gregory C. Sisk, *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135 (2002); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L.REV. 819; Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169 (2002); Gregory Sisk & Michael Heise, Judges and Ideology: Public and Academic Debates About Statistical easures, 99 NW. UNIV. L. REV. 743, 791-793 (2005).

the Holy Grail of a century-long quest for a true legal science.[4] We can maintain that content analysis makes legal scholarship more consistent with the basic epistemological underpinnings of other social science research. The method combines a disciplined focus on legal subject matter with an assumption that other researchers should be able to replicate the results of the research.

Semiotic Theory of Constitutional Jurisprudence[5]

Mapping the Issues:

The analysis of Constitutional law/text involves the taking of positions on a range of legal and semiotic theories. The Basic Structure Jurisprudence contains a *Text Analysis* of the court judgments, scholarly case analyses, case comments and writings of well-known authorities on the Constitution etc. Law may be regarded as a dual semiotic system, the language in which it is expressed and the discursive system expressed by that language. In legal philosophy, Scandinavian legal realism has come closest to the view that language is central to the nature of law.

The Range of Legal and Semiotic Theories

The question 'what is law?' has many meanings, and its polysemicity is increasingly recognized in legal theory. It may mean: what universals, if any, are found in that phenomenon to which we attach the name 'law'?; what do we seek to refer to when we use the word 'law'?; What underlying concept is pre-supposed in our use of the word 'law'?; What kind of objectivity, if any, corresponds to our concept called 'law'?; what empirical realities are to be observed in that to which we refer as 'law'?; Lurking behind all these questions is the further epistemological issue: why should our answer to any one- more likely, in practice, to any cluster of these questions-be regarded as significant?

It we put a similar analogy of semiotic analysis over the controversies surrounding BST in Indian Constitutional jurisprudence, it may be worked out as – the question 'what are the Basic Structures/Features of Indian Constitution?' has many meanings, and its polysemicity may be increasingly recognized in constitutional legal theory of the day. It may mean: what universals, if any, are found in that phenomenon which we attach the name 'Basic Structures/ Features'? What are the origins of that phenomenon to which we attach the name 'Basic Structures/Features'? ; what underlying concept is pre-supposed in

[4] Reed C. Lawlor, *Personal* Stare Decisis, 41 SO. CAL. L. REV. 73 (1967). For the beginnings of this quest, *see, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (calling for a more "exact justice, that is for a justice whose operations within reasonable limits, may be predicted in advance of action"). *See* generally Benjamin N. Cardozo, *The Paradoxes of Legal Science* (Greenwood Press 1970) (1928), *reprinted in* Selected Writings of Benjamin Nathan Cardozo 253 (M. Hall, ed. 1947); Oliver Wendell Holmes, *Law in Science and Science in Law*, in Collected Legal Papers 242 (1920).

[5] For developing a semiotic theory of constitutional text analysis, I have liberally drawn an analogy from Bernord S. Jackson; *Semiotics and Legal Theory* (Routledge & Kegan Paul, London & NY, 1985) pp 4-8.

our use of the word 'Basic Structures/Features'?; What kind of objectivity if any, corresponds to our concept 'Basic Structures/Features?; what empirical realties are to be observed in that to which we refer as 'Basic Structures/Features?; Lurking behind all these questions is the further epistemological issue: why should our answer to any one-more likely, in practice, to any cluster of these questions-be regarded as significant?

Therefore, the philosophy of Basic Structures / Features may be supposed to have an autonomous meaning of its own which can be interpreted and understood under different 'Textual Reference Frames'. Let us illustrate this point further – If we take the Chronological Reference Frame, the idea of Basic Structures/Features can be found to be shifting over the decades since the time of its first formulation in early 1970s. Similarly within the Territorial Reference Frame – the idea of Basic Structures/Features can be compared with the similar 'originalist' debates in other constitutional studies across major legal system, by keeping the Chronological Reference Frame as fixed and constant…….. so on and so forth, different perspectives of understanding these Basic Structures / Features can be elucidated and reconstructed in Indian context.

Descriptive vs. Prescriptive Narratives

The traditional way in which the judiciary in India has captured the idea of Basic Structures/Features is characterized by 'descriptive' search of the same within the constitutional text/document. Its basic premise has been to show as to what is 'described' within the constitutional text as basic. Therefore, the fault lies in scanning the constitutional text by the 'descriptive' tools only. It is suggested in this regard that the Basic Structure Theory is not only 'descriptive' of the will of the people – but it also postulates a 'prescriptive' role/function as to BST. For eg., If tomorrow a section of the people, through their elected representatives, begin to subscribe to a monarchial regime, the question will be, whether such systemic changes can be fitted within the four corners of the Indian Constitution – the question will also be posed as to whether such changes can justified merely on 'majoritarian' principle – the answer is an emphatic no! Contrarily, if tomorrow the economic-world-order warrants a change asking for a belief and switchover towards the liberalized open economy model by diluting some features of a rigid socialist economic model, the consequential response can be safely presumed to be affirmative under such a world order.

One example of constitutionalism's descriptive use is Bernard Schwartz's 5 volume compilation of sources seeking to trace the origins of the Federal bill of rights.[6] Beginning with English antecedents going back to the Magna Carta (1215), Schwartz explores the presence and development of ideas of individual freedoms and privileges through colonial charters and legal understandings. Then, in carrying the story forward, he identifies revolutionary declarations and constitutions, documents and judicial decisions of the Confederation period and the formation of the federal Constitution.

[6] Bernard Schwartz, *The Roots of the Bill of Rights* (vol. 5, Chelsea House Publisher, 1980).

Finally, he turns to the debates over the federal Constitution's ratification that ultimately provided mounting pressure for a federal bill of rights. While hardly presenting a "straight-line," the account illustrates the historical struggle to recognize and enshrine constitutional rights and principles in a constitutional order. Used descriptively, the concept of constitutionalism can refer chiefly to the historical struggle for constitutional recognition of the people's right to "consent" and certain other rights, freedoms, and privileges.[7]

The prescriptive approach to constitutionalism addresses what a constitution should be. Two observations might be offered about its prescriptive use. There is often confusion in equating the presence of a written constitution with the conclusion that a state or polity is one based upon constitutionalism. As noted by David Fellman[8] constitutionalism "should not be taken to mean that if a state has a constitution, it is necessarily committed to the idea of constitutionalism. In a very real sense… every state may be said to have a constitution, since every state has institutions which are at the very least expected to be permanent, and every state has established ways of doing things." But even with a "formal written document labelled [sic] 'constitution' which includes the provisions customarily found in such a document, it does not follow that it is committed to constitutionalism…." . Often the word "constitutionalism" is used in a rhetorical sense – as a political argument that equates the views of the speaker or writer with a preferred view of the constitution. For instance, Professor Herman Belz's critical assessment of expansive constitutional construction notes that "constitutionalism . . . ought to be recognized as a distinctive ideology and approach to political life…. Constitutionalism not only establishes the institutional and intellectual framework, but it also supplies much of the rhetorical currency with which political transactions are carried on."[9]

In contrast to describing what constitutions are, a prescriptive approach addresses what a constitution should be. As we know that constitutionalism embodies "the idea … that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations. This idea brings with it a host of vexing questions of interest not only to legal scholars, but to anyone keen to explore the legal and philosophical foundations of the state."[10] For eg., a prescriptive analysis of Basic Structure will collaterally ask a question whether a 'transitory' will of the people can override a 'long-cherished' will of the people. A philosophical calculus of the proposition

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[7] Leonard Levy, ed., *Encyclopedia of the American Constitution*, (Gerhard Casper, "Constitutionalism"), vol 2, p. 473, 473 (1986).

[8] Philip P. Wiener, ed., "Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas", (David Fellman, "Constitutionalism"), vol 1, p. 485 (1973-74).

[9] Herman Belz, "A Living Constitution or Fundamental Law? American Constitutionalism in Historical Perspective" (Rowman & Littlefield Publishers, Inc. 1998) at pp. 148-49.

[10] *Stanford Encyclopedia of Philosophy*, Wil Waluchow (Constitutionalism) (Intro Jan 2001).

will easily suggest that – *systemic* changes on the basis of 'transitory' will of the people will be too costly to be easily affordable within a peaceful social order.

The purpose of the present work is to argue that the Basic Structure Jurisprudence (BSJ) should be understood/analyzed at inner levels of complexity and in the process of analysis, to examine the 'descriptive' and 'prescriptive' aspects of Basic Structure Jurisprudence as well. Constitutional text in India has been explored by employing *Surface Semantics* only whereas the need of the hour is to explore the *Deep Semantics* of the Indian Constitution in order to develop a mature Constitutional Jurisprudence. It is thus located at the crossroads of two major issues of contemporary Constitutional evolution in India: the issue of presenting a 'deeper semantics' of BSJ and the issue of 'functional role' of BSJ in upholding the 'aspirations' of the present as well as of the future generations in regard to issues of permanent importance.

The existent judicial approach is essentially 'declaratory' of Basic Structures/Features – the correct approach must be 'suggestively meaningful' so that similar other structures/features can be identified and catalogued. Therefore, it may be safely concluded that there is an unintentional but deceptive usurpation of power to declare certain structure/features as basic and leaving the others in a state of confusion and chaos. Therefore, the present paper argues for a critically descriptive and suggestively constructive approach in building an alternative theory/ proposition of the Basic Structure Doctrine.

Synchronic Vs Diachronic Identity of Constitutional Text

Constitutions have identities which can be seen in static framework as well as in a dynamic and emerging framework. A *statist* constitutional paradigm is gradually losing its hold on people's minds to the benefit of a *cosmopolitan* constitutional paradigm. The notion 'constitutional identity' is an important turning point in the jurisprudence of European Constitutional Courts – a shift away from 'national identity' towards an identity that originates from the basic principles of the constitutions. This shift finds its best expression the semantic development of European law from the *Treaty on European Union* of 1993 (TEU; also known as the Maastricht Treaty) to the *Treaty of Lisbon*, which entered in force in 2009. *Article 6 (3) TEU says* The Union shall respect the national Identities of its Member States Whereas *Article 4(2) Lisbon Treaty* The Union shall respect [the member States'] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions.

Accordingly European law as well as international law are imagined as constituted and held together by a shared commitment to universal principles. Constitutional imaginaries need not reflect constitutional history. In simple words, it is not important how constitutions came about, but what they represent in the imaginary of those who are subject to them and who believe to be constituted by them. What matters is that they believe that the constituent power constituted them as a political community, regardless

of the fact that the Indian constitution originated as a document drafted by experts, who were not representatives of the people. Modern Constitutional approaches are built upon the distinction between an internal and external dimension to law and deny that the legitimacy of law can be grounded on the intrinsic qualities of the constitution. [11]

Since the European Court of Justice (ECJ) lacks the competence to define what the constitutional identity of a Member State is, European constitutional courts are left alone to resolve this intricate issue. Disputes over the meaning of "constitutional identity" are not merely normative and juridical disagreements. They also involve different conceptual understandings of *identity*. In this respect it might be helpful to distinguish between two forms of identity: one the one hand the concept of identity refers to a certain form of constancy. According to this, a constitution is said to have a certain identity in so far it has remained identical to itself over an extended period of time – for instance through the conservation of a particular normative core. On the other hand identity simply means uniqueness or particularity *hic et nunc*. In other words, a constitution can be said to possess an identity if it can be distinguished from other constitutions with respect to one or more of their main characteristics.

The former form of identity I call *diachronic identity*, the latter *synchronic identity.* This is an analytic distinction. In practice most conceptions of constitutional identity contain both of these dimensions. The respective weighting, however, is of importance. If the diachronic dimension of identity dominates, the constitutional identity tends to be associated with its core content, which itself remains unchanged over time. If however the synchronic dimension is the dominant one, the emphasis is on the particularity of the constitution, relative to other constitutions – ignoring its constancy. Both diachronic and synchronic constitutional identity emphasizes the particularity and characteristic features of a constitution. With one important difference: they use different systems of reference. The notion underlying a synchronic perspective is that the national constitutional identity is merely *one* among several constitutional identities. From the diachronic point of view this pluralist idea is at most secondary. The key here is the self-reference: the identity with itself over time. It goes without saying that such an 'introspective' form of identity does not provide fertile soil for the development of a transnational or international constitutional identity.

We can see the decision of the French *Conseil Constitutionnel* of July 27, 2006, as an example of such a synchronically oriented interpretation of constitutional identity. In this

[11] See generally - Reestman, J-H., 2009, The Franco-German Constitutional Divide, *European Constitutional Law Review* 5, S. 374-390; Teubner, G., 2004, Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory? Transnational Governance and Constitutionalism, in: C. Joerges, I.-J. Sand and G. Teubner. Oxford, pp. 3-28; Kumm, M., 2009, the cosmopolitan turn in constitutionalism: On the relationship between constitutionalism in and beyond the state, in: Dunnoff, J. L. and Trachtman, J. P. (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge. 2009.

decision the *Conseil Constitutionnel* declared that the implementation of a European statute may not infringe upon a rule or a principle inherent in French constitutional identity (la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inherent à l'identité constitutionnelle de la France). *Prima facie*, this way of arguing on part of the *Conseil Constitutionnel* is reminiscent of so called the "identity clause" in the Lisbon ruling. However, this is misleading.

The two positions differ for two reasons. Firstly, this "reserve de constitutionnalité" – contrary to the German case – is not absolute. Already in the very next sentence the courts adds an important proviso: "unless the constitutional legislator has accepted this [i.e. the implementation of the statute]." Secondly, this decision by the French constitutional court is not primarily intended to guarantee the constancy of the French constitutional identity. Its intention is rather the protection of France's constitutional uniqueness within the European context. The focus, therefore, is on the synchronic rather than the diachronic dimension of constitutional identity.[12]

Conclusion

Therefore, the Basic Structures and Features is also actually a search for synchronic and diachronic constitutional identity of our own. Conclusively, it is needless to say that the Indian Constitution also warrants such global gloss to be put over the raging/emergent discourses within our own political framework as well. The BJP government has called for a review of the Constitution and proposed three controversial changes. Since 1950, the successive governments of India have amended the constitution an extraordinary number of times and the document has yet to emerge as an "all powerful symbol of national identity and democratic commitment."[13]

Indeed, the time has come when we cannot long ignore the Constitutional processes of other countries, because of the potential benefits of such inquiry. Consequently, this article suggests that we can learn from the experiences - past and present - of Constitutional processes taking deeper roots in other legal systems.

[12] See generally- Kumm, M., the Cosmopolitan Turn in Constitutionalism: On the relationship between constitutionalism in and beyond the state, in: Dunnoff, J. L. and Trachtman, J. P. (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge. 2009.

[13] See Bruce Ackerman, The Rise of World Constitutionalism, 83 Va. L. Rev. 771, 772 (1997) ("Even the British are debating the need for a new fangled written constitution").

Status of Women in India with special Reference to Domestic Violence Act, 2005

Dr. Roshan Lal*

Introduction

Violence against women is an expression of traditionally unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full development of women.[1] Hindu mythology witnesses that the status of Hindu women during the Vedic period was honourable and respectable. The marriage was regarded as sacrosanct and family ideal was high. The woman on marriage acquired an honourable position and considerable status.

Ancient Period

There are references, which indicate, that equal social and religious status was allowed to boys and girls in Vedic society. Boys and girls had equal opportunity for advanced education. The girls also spent early years of their life in brahamcharya ashram after observing UpanyanSamskara for study of Vedas. It was thought necessary for girls otherwise automatically they would be reduced to status of Shudras. They could quitbefore recommended period of brahamcharya ashram as they were married at 16/17 years of age. They were then called Sadyovahas. If she continued her studies, she was called Brahamvadini Attainment of women in intellectual field is to be inferred from the fact that some of the hymns are attributed to female Rishis. They were on the same footing as men. They learnt Vedas, were entitled to recite the Vedas and they were teachers as well as learners. They were poetesses, teachers and intellectuals of the day.

Marriage was an established institution in the Vedic age. It was regarded as a social and religious duty, it was not taken as a contract. The husband and wife stood on equal footing. There was no tradition of child marriage prevailing in Vedic society. Wishes and choices of girls in the settlement of their marriage are also a strong indication of their status in society. The bride had the right of selecting her own consort. This custom was known as svayamvara. Monogamy normally prevailed in Vedic age and this indicates high status of women in this period. Widows were allowed to remarry if they so desired.

Assistant Professor, Faculty of Law, University of Allahabad, Allahabad.

[1] The United Nations Declaration on the Elimination of Violence against Women, General Assembly Resolution, December 1993.

In the Vedic era women had sufficient freedom of going to attend \fairs, festivals and assemblies. They were not confined to four walls of their family houses. There is no mention of Purdah system. It has been observed by many writers that during the Vedic period women in India had equal status with that of men. Works by ancient Indian grammarians such as Patanjali andKatyayan suggest that women were educated in early Vedic period. Scriptures such as Rigveda and Upanishads mention several women sages and seers (Prophets) e.g. Gargi and Maitreyi. Rigvedic verses further suggest that women were married at the mature age and were probably free to select their husband.

The status of women began to decline with the smritis. Manusmriti (200 B.C.) and other religious texts curtailed women's freedom and rights. Manu's codes are legal authority of the time with respect to Hindu families. He did not treat women at par with man so far as rituals of Vedas are concerned. The women were not entitled for study of Vedas or for use of mantras in performing sacraments except marriage. Manu was of the opinion that women do not need any education. Household duties amounted to yagna for her.

Manu believed that there is vital structural difference between man and woman, each suited for different type of work. He regards women as more emotional and less rational compared to men and lacking much depth of reason. Man was responsible for hard work, earning the bread and women for household duties. Manu said in childhood a female must be subject to her father, in youth to her husband when her husband is dead. To her sons: a woman must never be independent. We can see many verses in Ram CharitManas showing subjugated position of women. Marriages were settled soon after puberty. The institution of caste became very rigid. Manu did not favour inter-caste marriages. Evidences of widow remarriage during this period are conflicting. Women were generally not allowed to remarry. Although women during this period were considered subjugated to men their independence were curtailed but they were not to be given maltreatment. Manu at one place says where women are honoured, there reside the gods.

According to ancient Hindu scriptures no religious rites can be performed with perfection by a man without the participation of his wife. Wives were given status of Ardhangini (half of her husband though not better half). However he insisted that a husband should he constantly worshipped as God (even if he was not an ideal husband). However patriarchal joint family system structure of property ownership lay down by smritikars during this period became obstacles to the development of women as women were by and large denied the right to property.

The birth of a son was regarded very important not only from religious and spiritual point of view but also from worldly point of view. Birth of a son was necessary to pay off the debt to ancestors. Putra signifies one who saves a person from hell.

Medieval Period

The Indian women's position in society further deteriorated during the medieval period. Child marriages. Self-immolation of widows (Sati) or permanent widowhood i.e. ban on

widow remarriages became part of social life in India. In some parts of India the Devadasis or the temple women practice became a source of sexual exploitation of women by temple priests. Polygamy was widely practiced especially among Hindu Kshatriya rulers. In the later period the position of Indian women went on deteriorating due to Muslim influence. During Muslim period or history they were deprived of their rights of equality with men. The Muslim conquest in the Indian sub-continent brought the purdah (curtain) practice in the Indian society and jauhar practice among the Rajputs of Rajasthan. During Muslim rule in India women were compelled to keep themselves within the four walls of their houses with a long veil on their faces. This was definitely due to Islamic influence, even today in some Islamic countries women are not allowed to go out freely. In many Muslim families women arc secluded to Zenana which was followed by many Hindus also during Muslim period, In spite of these conditions some women excelled well during this period in the fields of politics. Literature, education and religion e.g. Razia Sultan. Rani Durgawati, Chand Bibi, lijabai (Shivaji's mother) Mirabai etc.

British Period

During British period many reformers such as Raja Ram Mohan Roy. Ishwar Chand Vidyusagar Jyotirao Phule fought for the upliftment of woman; consequently a number of legislations were enacted. For example in 1829 Lord William Bentinck declared practice of Sati and abetment of Sati as offence. In 1856 Widow Remarriage Act was passed. In 1870 the Female Infanticide Act was passed. The Child Marriage Restraint Act was passed in 1937. Besides many laws were passed on pattern of English law which did not discriminate on ground of sex e.g, IPC. Evidence Act. Contract ACI etc. Ranil.akshamibai led the Indian Rebellion or 1857. Begum Hazaratmahal, the co-ruler of Awadh also led revolt of 1857.

After Independence

After independence our Constitution has made a number of provisions for protecting the rights and status of Women. The Preamble of the Constitution provides to all citizens equality of status and of opportunity as well as justice- social, economic and political.Article 14 of the Constitution ensures equality before law to all persons within the territory of India, Article 15 prohibits discrimination on the ground of religion, race, caste, sex, place of birth or any of them.

Article 15(3) empowers the State to make special provisions for women and children. Thus educational institutions may be established by the State exclusively for women. Under Article 42 read with Article 15(3) women workers can be give special maternity relief. I Section 497 of I PC which punishes only man for adultery and exempts the woman from punishment, even though she may be equally guilty as an abettor is valid.

Under Article 38 obligation has been cast on State to promote the welfare of the people by securing a social order in which justice social economic and political be provided to all citizens (irrespective of sex).

In pursuance of Constitutional directive under Article 39(d) to provide equal pay for equal work for both men and women. Equal Remuneration Act has beenpassed in 1976. Under Article 51-A(e) [Fundamental Duties] duty has been cast on every citizen to renounce practices derogatory to the dignity or women. Besides many other laws have also been passed and progressively interpreted to prevent the exploitation of women, especially family related laws i.e. marriage, divorce, property, inheritance and adoption. These laws are helpful to develop women's personality and to raise her status in the society. The Dowry Prohibition Act, 1961. The Indecent Representation of Women (Prohibition) Act. 1986. The Commission of Sati (Prevention) Act, 1987, Pre-conception and Pre-Natal Diagnostic Techniques (Prevention of Sex Selection) Act, 1994, Section 304- B under IPC i.e. Dowry Death, Section 498-A IPC [Cruelty by husband or relatives of husband] and recently passed Protection of Women from Domestic Violence Act. 2005 are also special laws relating to women.

Despite the above provisions and many other laws made in favour of women, women in India are sti811 subjected to many disadvantages, disabilities and inequalities in our male dominated society. The following major areas of discrimination against women in India may be noted which are responsible for poverty of women also.

Violence against women-Woman Abuse

The term woman abuse refers to various forms of violence, abuse, mistreatment and neglect that woman experience in their intimate,kin or dependent relationships or in the society. Many terms are used to describe the abuse of women within relationships including wife abuse, wife assault, wife battering, spouse abuse and partner abuse. Any woman regardless of her age, race, ethnicity, education, cultural identity, socio-economic status, occupation, religion, sexual orientation, physical or mental abilities or personality-may experience abuse. A woman may be at risk of abuse at virtually any point in her life-from childhood to old age. In India the common violence against women are wile beating, harassment, torture, bride burning, slavery and exploitation, forced prostitution, sexual harassment, female foeticide etc.

Forms of Violence

Women are vulnerable to acts orviolence in the family. In the community and by the State. Hence we may divide violence against women into three forms:

1. **Violence in the family**
   Foeticide, infanticide, marital cruelty, dowry murders, incest relations and battering are forms of violence that women face in the family.
2. **Violence at the Community level:**
   At the Community level they face violence in the forms of rape, forced prostitution, sexual harassment, eve teasing, trafficking and sexual discrimination.
3. **Violence at State level**:
   Custodial violence and institutional deprivation arc types of violence that emerge at the level of the State.

1. Violence at Family level or Domestic Violence:
To quote Virfinia Woolf: on marriage, the weakest, the stupidest, the most insignificant man in the world receives a licence to rape and beat:' Domestic violence may be of many kinds e.g. Physical. Emotional or Psychological, Sexual, Economic, Spiritual and so on. It is generally denying the woman her rights in the family as an individual. Besides these Foeticide, infanticide, marital cruelty, dowry murders, incest relations and battering are forms of violence that women face in the family. The worst aspect of violence against women is that it receives social sanctity. Neighbours, authorities and even the police hesitate to intervene in cases of domestic violence because they feel it as a very private domain.

(i)Physical Abuse:
Physical abuse may include assaults involving beating. Burning, slapping, choking, kicking, pushing, biting or assault by a weapon. It may also include physical neglect through denial of food or medication, inappropriate personal or medical care, rough handling or confinement.

(ii) Emotional or Psychological Abuse:
Emotional or Psychological abuse may include constant yelling (shouting), screaming, name calling, insults, threats, humiliation or criticism, excessive jealousy or suspiciousness, threatening or harassing a woman (or her children. family members. friends or pets), isolating a woman from neighbours,friends or family, or depriving a woman of love and affection. For some women, the effects of emotional abuse may be worse than the consequences of physical violence.

(iii) Sexual Abuse:
Sexual abuse may include rape (Sexual assault),forcing a woman into sexual relationship against her will, unwanted sexual touching, sexual harassment, sexual exploitation, forcing a woman to participate in any unwanted, unsafe, degrading or offensive sexual activity. Forcing her to watch certain sexual acts without her consent also amounts to sexual abuse. Law in many societies; however, do notrecognise forced sex as rape if they are married to or voluntarily living with the attacker. Moreover, some countries have recognised marital rape as a criminal offence. Although generally strangers may perpetrate rape and sexual assault, evidence from many sources indicates that a high percentage of rapists are acquaintances, friends, relatives and those in positions of trust and power in the family. The practice of female genital mutilation (FGM) of girls has serious consequences for young adult women and that is also a kind of sexual abuse of women by family members,

(iv) Economic or Financial Abuse:
Economic 'or Financial abuse may include preventing a woman from achieving or maintaining financial independence, denying or controlling her access to financial resources or exploiting her financially.

(v) Spiritual Abuse:
Spiritual abuse may include preventing a woman from participating in spiritual or religious practices, ridiculing her beliefs or using spiritual beliefs to justify controlling her.

(vi)Female foeticide and infanticide:
Female children are killed even before they acquire the age of viability in mother's womb. The advancement of medical technology changed the fate of unborn child and posed threat to its life particularly to the life of female child in the form of foetus.Now the Pre Conception and Pre Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 takes care of this to some extent.

2. Violence at Community Level:
(i) Sexual Harassment at work Place:
Right of life means life with dignity. Gender equality includes protection from sexual harassment and right to work with dignity. The International Conventions and norms also support this view. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) defines Sexual Harassment as to include such unwelcome determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands whether by words or action. It further recommends: that the equality in employment can be seriously impaired when women are subjected to gender specific violence such as sexual harassment in the work place.

The Supreme Court in its historic judgment in the case of*Vishaka vs. State of Rajasthan*[2]held that sexual harassment of working woman amounts to violation of rights of gender equality and right to life and liberty, and also violation of right to practice any profession, occupation or trade. Victim is, therefore, entitled to remedy of Article 32. The Supreme Court in this case in exercise of powers under Article 32 laid down guidelines and norms to betreated as law declared under Article 141 applicable to both Public and Private Sectors. In the guidelines the Supreme Court has defined Sexual Harassment on the line of definition under CEDAW referred above and has cast certain duties on the employer or other responsible persons in work places and other institutions for prevention of sexual harassment, to initiate criminal proceedings or disciplinary action against the wrongdoer to provide complaint mechanism and to establish complaint committee. The Complaint Committee shouldbe headed by a woman and not less than half of its members should bewomen.

(ii) Trafficking in Women and Forced Prostitution:
Forcing women into prostitution is one of the most heinous forms of violence against them. Combined with this is kidnapping, abduction, seduction and rape. It is time and again reported in the wives. Notonly this, the special rapporteur of UN on violence

[2]AIR 1997 SC 3011.

against women during her investigation into the issue received reports of involvement in international trafficking by State officials and police.

(ii) Violence against women-domestic workers:
Domestic workers are vulnerable to violent assaults including physical abuse and rape by their employers. Migrant women are especially at risk as employers may withhold salaries, passports and personal documents. In many countriesdomesticworkers are not covered by labour laws. Wherelaws are there, workers may not be informed of their rights. Many of these crimes remain unreported due to fear and shame. Consequently very few cases get reported to the police where action could be initiated.

The Protection of Women from Domestic Violence Act, 2005
DomesticViolence in India is widely prevalent but has remained invisible in the public domain. Prior to this legislation where a woman was subjected to domestic violence, she could seek only criminal sanction under S. 498 A of IPC' (cruelty by her husband or his relatives), or under any otherprovisions of the IPC if it could constitute an offence under that section or the guilty could be punished under Section 304B (Dowry Death) of the IPC. Section 498 A punishes the husband or relatives of husband for acts of harassment or violence that would likely drive a woman to commit suicide or cause grave danger to her life, limb or health. Most of the officers felt that Section 498 A was misused by women complainants because their mental torture was not likely to drive them to suicide, Section 304B may be called only a post- mortem remedy to punish violence against a woman when the cause of her death can be shown to be related to dowry demands. There was no adequate remedy in Civil Law except to apply for a divorce and face the social stigma attached with it.

The United Nations Committee on Convention on Elimination of All Forms of DiscriminationAgainst Women (CEDAW) in its General Recommendation No. 19 of 1992 has recommended that State parties should act to protect women against violence of any kind specially that occurring within the family. National Commission of Women approached the Lawyer's collective in 1993 to draft legislation to close these loopholes.

The Vienna Accord of 1994and the Beijing Declaration and the Platform of Action 1995 acknowledged that Domestic Violence is a human right issue. Thus after years of work and with the combined efforts of the Lawyers Collective, other women's rights groups and input from government officials and keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution and to provide for a remedy under Civil Law to the victims of Domestic Violence the said Act has been enacted.This legislation is seen as a landmark step in improving the situation of women in India, broadening existing definitions of domestic violence to include not only physical but verbal,emotional, sexual and economic abuse and allowing women civil and or criminal recourse for violations of the Act.

Constitutionality of the Act:
In *Aruna Parmod Shah vs. Union of India*[3]the Delhi High Court dismissed the victim's mother-in-law's contention that the Act was unconstitutional because it did not provide a remedy for men as well as women and that holding relationships in the nature of marriage at par with marital relationships in Section 2(f) of the Act derogated the rights of legally wedded wives. The court held that the gender-specific nature of the Act was a reasonable classification in view of the Act's object and purpose, and thus it was constitutionally valid.

The Madras High Court also upheld the constitutionality of the Act in *Dennison Paulrajand others vs. U.O.I.*[4]holding that the Act was enacted as a special legislation for women consistent with Article 15(3) of the Indian Constitution.

Characteristic Features
Although the Act enables the wife or female partner to file a complaint against the husband or the male partner or any relative (male or female) of the husband or that of the male partner. It does not enable any female relative] of the husband or that of the male partner to file a complaint against the wife or the female partner or against relatives of the wife or female partner.

Aggrieved Person S. 2(a) –Means any women who is or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

Domestic relationship [S. 2(I)J means a relationship between two persons who live or have. at any point of time. lived together in shared household when they are related by consanguinity. marriage. or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Thus even those women who are sisters, Widows, Mothers or single woman living with the respondent (abuser) arc entitled to protection from domestic violence under this Act.

Respondent [So 2 (q) j - means any adult male person who is. or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act.

Provided that an aggrieved wile or female partner (i.e.) a female living in a relationship in nature of a marriage) may also file a complaint against a relative of the husband or the male partner. In *Smt. Saritavs Smt. Umrao*[5]. Rajasthan High Court held that complaints filed against relatives of a husband or malepartner included all relatives irrespective of gender, thus including abusive female in laws.

[3]2008 (102) DRJ 543.
[4]11(2009) DMC 252.
[5]2008 (I)WLN359(Raj).

Domestic Violence [So 2 (g) read with S. 3] - See in the Act. Section 3 defines the expression "domestic violence as including physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse and explains these terms also in the Section. The Act also provides for appointment of Protection Offices and registration of NGOs as Service Providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter etc. Aggrieved or affected woman can complaintoconcernedProtection Office, Service Provider.

Information to Protection Officer and exclusion of liability of informant [So 4]
The Act enables not only 10 the aggrieved person to file a complaint. Section 4 of the Act enables any person who has reason to believe that an act of domestic violence has been or is being or is likely to be committed may give information about it to the concerned Protection Officer. Further, Section 4 declares that no civil or criminal liability shall be incurred by any person who has given such information in faith.

Duties of Police Officer's, Service Providers and Magistrate: [S.5]
The Act imposes a duty under Section 5 on Police Officer. Protection Officer, Service Provider or Magistrate" who has received a complaint of domestic violence; or any incident of domestic violence is reported to hi III or even if' he is present at the place of an incident of domestic violence, to inform to the aggrieved person ofher rights and reliefs under the Act. i.e.

(i) Right to make an application [or obtaining relief by way of:
- (a) Protection Order: [S.18]
- (b) An order for monetary relief [S.20]
- (c) A residence order [S.19]
- (d) Custody order [S.21]
- (e) A compensation order I S.22]: or

More than one such order.
(ii) Availability of services of Service Providers
(iii) Availability of services of 'Protection Officers
(iv) Her right to free legal services under the legal Services Authorities Act. 1987
(v) Her right to file a complaint under section 498 A IPC wherever relevant.

Further giving this information does not relieve the Police officer of his duty to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence.

Duties of Shelter Homes (S.6)
If an aggrieved person or on her behalf a Protection Officer or a Service Provider requests the person in charge of a Shelter Home' to provide shelter to her such person in charge of the Shelter Home shall provide shelter to the aggrieved person in the Shelter Home.

Duties of Medical Facilities (S.7]
If an aggrieved person or on her behalf a Protection Officer or a Service Provider requests the person in charge of a medical facility to provide any medical aid to her. such person in charge of the medical facility shall provide medical aid to the aggrieved person. Appointment of Protection Officers (S.8] Section 8 empowers the State Govt. to appoint such number of Protection Officers in each district as it thinks necessary and define the area within which they will act. As far as possible Protection Officers shall be women having such qualifications and experience as may be prescribed. A number of duties have been given to Protection Officers u/s.9.

Service Providers (S.10)
Voluntary Associations registered under the Societies Registration Act 1860: or any company having objectives to protect rights and interests of women by providing legal aid, medical, financial or other assistance has to register itself with State Govt. as a Service Provider under the Act. Service Providers have been conferred a number of powers. Section 11, casts duty on the State Governments as well as Central Govt, to give wide publicity to the Act through media e.g. television. Radio, print media at regular intervals. Further officers of the Governments including police officers and members of judicial services are to be given periodic sensitization and awareness training on the issues addressed by the Act.

Procedure for obtaining orders or reliefs (Chapter IV Ss. 12- 29]
Application to Magistrate (S.12)
Aggrieved person Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under the Act. Application may be in the prescribed form or in the form of an application containing the particulars as nearly as possible given in the form.After receiving the form Magistrate shall fix the first date of hearing which ordinarily shall not he more than 3 days from the date of receipt of the application.' Duty has been cast on Magistrate to dispose of every application within 60 days from the date of first hearing.

In *Milan Kumar Singh and another vs. State or U.P*[6].the Allahabad High Court held that there is no bar to directly tiling a complaint with a Magistrate. And the use of the word 'or' in Section 12 (I) of the Act shows that it is the aggrieved person's choice if she wants to approach the Protection Officer first. The Court further explained that the Protection of Women from Domestic Violence Act. 2005 (PWDVA) is a social legislation with the purpose of helping the aggrieved person, and thus imposing strict procedural requirements would directly contradict its objective

Service of Notice (S. 13)
Notice of the date fixed u/s, 12 is to be given to the protection Officer who shall serve the notice to the respondent or any other person as directed by Magistrate within 2 days or

[6](2007) Cr. L. J. 4742.

within such further time as may be allowed by the Magistrate. A declaration of service of notice by the Protection Officer on prescribed form shall be sufficient proof of service of notice unless contrary is proved.

Counselling (S. 13)
Magistrate may direct the respondent and aggrieved person to go either singly or jointly as directed to a serviceprovider for counselling and fixed a date for further hearing within a period not exceeding two months.

Assistance of Welfare Expert (S.14)
Magistrate may take help of an} person involved in promoting family welfare (preferably a woman whether related or not with the aggrieved person) in discharging his functions under the ACT.

Proceedings to be held in camera (S.16)
If the Magistrate considers necessary or either party desires, proceedings may be conducted in camera.

Right to reside in a shared household" (S.17)
S. 17 confers a right on every woman in a domestic relationship to reside in the shared household whether or not she has any right, title or beneficial interest in the same and notwithstanding anything contained in any other law for the time being in force. Aggrieved person cannot be evicted from shared household by respondent except with the procedure established by law.

In *S.N. Batra vs. TarunaBatra*[7]the Supreme Court held that under the definition of "shared household" in Section 2 (s) of the Act. a wife could not claim residence or receive an injunction from dispossession of property where mother-in-law owned the house.

However, the Madras High Court in *P. Babu Venkates and others vs. Rani*[8]found that her husband transferred the house under his mother's name intending to defeat his wife's claim to reside there. And prior to his wife's dispossession, both parties resided jointly in the household. The Court also held that pending divorce proceedings didnot affect grants of relief under the Ad.

Protection Order (S.18)
After giving the aggrieved person and the respondent an opportunity of being heard, if the Magistrate is prima facie satisfied that domestic violence has taken place or is likely to take place, may pass a protection order prohibiting the respondent from:
(i) Committing any act of domestic violence
(ii) aiding or abetting in the commission of acts of' domestic violence

[7](2007) 3 S.C.C. 169.
[8]MANU/TN/0612/2008.

(iii) entering the place of employment of the aggrieved person or if aggrieved person is a child. its school or other place frequented by the aggrieved person
(iv) attempting to communicate in any form with aggrieved person whether oral, written, electronic or telephonic.
(v) alienating any asset, operating bank lockers or bank accounts held jointly by both parties or singly by respondent without leave ofthe Magistrate
(vi) causing violence to the dependents, relatives or an) person who gives assistance to the aggrieved person
(vii) committing any other act as specified in the Protection Order.

Residence Order (S.19)
On being satisfied that domestic violence has taken place the Magistrate may pass residence order:

1) restraining the respondent from dispossessing or disturbing the possession of the aggrieved person from the shared household whether or not the respondent has a legal or equitable interest in the shared household
2) directing the respondent to remove himself from the shared household
3) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides
4) Restraining the respondent from alienating or encumbering the shared household.
5) restraining the respondent from renouncing his rights in the shared household except with the leave of Magistrate: or
6) Directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same.

Monetary Relief (S.20)
The Magistrate may also direct the respondent to pay monetary relief to the aggrieved person or any of her children which may include losses suffered as a result of domestic violence. Medical expenses, maintenance etc. Magistrate may order lump sum payment or monthly payment of maintenance. Upon failure of the respondent to make payment Magistrate may direct the employer or debtor of the respondent to pay directly to the aggrieved person or deposit in court a portion of the wages or salaries or debt due or accrued to respondent.

Custody Order (S.21)
Magistrate may also grant temporary custody of any child or children to aggrieved person while hearing the application of the protection order.

Compensation Order (S.22)
Magistrate may also direct the respondent to pay compensation and damages for injuries. Torture and emotional distress suffered by aggrieved person due to acts of domestic violence committed by the respondent.

Power to grant Interim ex parte order [S.23]
S. 23 empower the Magistrate on being satisfied on affidavit to pass interim ex parte order under Ss. 18 to 21**.**
Court to give copies of order free of cost [S.24]
Copy of order passed by Magistrate is to be given free of cost to the parties to the application office in charge of police station and Service Provider of the area..

Duration and Alteration of orders [S.25]
Protection order remains in force till aggrieved person applies for discharge .If on application by aggrieved person or respondent Magistrate is satisfied that an alteration, modification or renovation of order is required due to changed circumstances, he may alter the order for reasons recorded.

Relief in other suits and legal proceeding [S.26]
Any relief available under Ss.[18 to 22]may also be sought in any legal proceeding before a Civil Court. Family Court or Criminal Court whether such proceeding before or after the commencement of this Act.

Appeal
May be made against the order of the magistrate within 30 days of the Court of sessionfrom the date of the order or service of the order to the party making appeal whichever is later.[9]

Penalty for breach of Protection order by respondent
Breach of protection is an offence punishable with imprisonment up to 1 year or fine up to 20,000/ or both. Offence is triable by the same Magistrate whose order is violated. Further the offence under Sec. 31 is cognizable and Non-cognizable.[10]

Reasons for not achieving the objectives of the Act:
Information's gathered from various HRLN offices across the country indicated serious problems in implementation of the Act. Numerous advocates pointed to the lack of training; of police officers and Magistrates regarding the Act's requirements and its purpose, as well as a lack of sensitivity training towards the issue of domestic violence. One female client in West Bangal spoke of the insensitivity she faced at the hands of officers who believed her abuser's stories that she was a prostitute. And dismissed her pleas for aid and told her she should be ashamed when she sought the officer's help.

This lack of training has led to:
(a) re-victirnization of women within the justice system either through police non - response to calls or help, sending women back home to their abusers by branding their victimization as mere domestic disputes.

[9] According to section 29 of Domestic Violence Act 2005.
[10] According to Section 31of Domestic Violence Act 2005.

(b) Magistrates allowing for numerous continuances cases, prolonging the court process and forcing victims to come to court to face their trauma time and again.
Police officers in various stations in West Bengal often showed a lack of awareness that the Act existed, one claiming. the Protection of Women from Domestic Violence Act. 2005 has not been implemented in the State.
Other problems cited by advocates and protection officers working to help women under the Act included issues with serving notice of hearings to abusers, often necessary in order to continue the process of granting protective orders as well as residency orders.

Further, very few NGO's have registered themselves ~IS service providers under the Act. The registered service providers as well as protection officers lack experience with domestic violence work

Very few protection officers are assigned in each district to handle the case load, and service providers provide poor services to those in need. An article published on June 20th, 2009 in the Times of India reported a Pune protectionofficers failure to conduct a detail inquiry ordered by the Magistrate regarding a woman's allegations of abuse by her husband. The officernoted that the incident took place out or her jurisdiction, but this explanation was not accepted by the judge. This bureaucratic way or handling domestic violence complaints illustrates the lack of understanding that untrained protection officers have regarding the urgency of domestic violence situations.

Simply giving a list of options to a domestic violence' victim from a pamphlet or script will not suffice. A conversation with the victim regarding pros and cons or her various options ill order to best protect her safety should take place. Advocates and Protection officers have noted additional inadequacies ofthe Act:

1) Its failure to mandate criminal penalties for abuse along with its civil measures.
2) Its failure to explicitly provide a maximum duration of appellate hearings which delays women's grant of relief.
3) The residency orders' failure to give women substantive property rights to the shared household.

Conclusion

Indian women have mastered anything and everything which a woman can dream of. But she still has to go a long way to achieve equal status in the minds of Indian men. As most of the cases of abuse go unnoticed or unreported. Domestic violence share the menacing element of being hidden crimes, frequently perpetrated by persons in a position of supposed trust or complicated by close relationships.

Domestic violence is one of the worst forms of violence against women. It cannot be controlled only by the help of laws. Justice Mansoor Ahmad Mir one rightly observed that violence against women is of serious concern and the judiciary can play a major role in delivering gender justice". Domestic violence is such form of violence which includes socio legal perspectives in its ambit and therefore there is an immense need to locate the

grievance redressal from those corners also. Author is of the view that to effectively tackle the problem of domestic violence govt. need to do more with regard to social awareness, good governance and education. Apart from social awareness, existing legal measure need to be implemented in its purest sense.

Child Labour and Human Rights: An Indian Perspective

Dr. S. K. Chaturvedi*

Abstract

Child rights are the human rights of children with particular attention to the right of special protection and care afforded to the young, including their right to association with both biological parents, human identity as well as the basic needs for food, universal state paid education, healthcare and criminal law, appropriate for the age and development of the child. The children are the supreme asset of any nation; they are the greatest gift of humanity and a very important segment of human society. But unfortunately child has been exploited and discriminated in every society. The exploitation of children persists an as worldwide phenonmenon in various forms in which exploitation of children labour is one of them. According to the Convention on the Rights of the child, Article 1 defines "the child" as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier". In Indian legal system, the child has been defined differently in the various laws pertaining to children. According to the Juvenile Justice (Care and Protection of Children) Act, 2000, child means a person up to 18 years of age. Whereas the Immoral Traffic Prevention Act, 1956 defines a '"minor" as a person who has completed the age of 16 years but not 18 years. According to the Child Labour (Prohibition and Regulation) Act, 1986, child is a person who has not completed the age of fourteen years. A child of such tender age is expected to play study and be carefree about his life. But children, by will or by force are employed to work in the harsh conditions and atmosphere which becomes a threat to their life.

Keywords: Child, Child rights, Child Labour, Human Rights

Introduction

The child labour is a global problem. It leads to underdevelopment incomplete mental and physical development, which in turn results in retarded growth of children. Children working as labourers have been found as the cheapest and most disciplined labour. They can be found working in homes doing household chores, in factories 9sometimes even in hazardous factories), fields, hotels, restaurants etc. Children are generally made to work under unhygienic conditions for long hours and the wages paid to them are generally very low[1]. Today children will be the leader of tomorrow who will tell the country's banner high and maintain the prestige of the nation[2]. Child rights are fundamental freedoms and the inherent rights of all human beings below the age of 18. These rights apply to every child, irrespective of the child's parent's/legal guardian's race, colour, sex, creed or other

Assistant Professor, Department of Law, H.N.B. Garhwal Central University, S.R.T. Campus, Tehri, Uttarakhand.

[1] Dr. Nuzahat Parveen Khan, *Nyaya Deep*, V. 10, Jan. 2009, p. 42.

[2] *Sheela Barse vs. Secretary Children's Legal Aid Society and others* AIR 1987 SC 756.

status.[3]

Today, traditionally prescribed interventions against child labour which were welfare based like providing a minimum age for work are being replaced by rights-based approach. Child labour is a condition from which the children have a right to be free and is not merely an option is which regulating standard must be devised. For a healthy and prosperous nation the holistic development of a child needs to be of great concern in their interest and in the interest of the country.[4]

Child Labour: Meaning

There is no such universally accepted definition of the term "child labour" as are being used by international organizations, trade unions, NGOS and other stake holders. The term child labour is at times used as a synonym for 'employed child'. If it is analyzed in this sense, it signifies any work done by a child for the gainful purpose. The international labour organization has defined child labour as work that deprives children of their childhood, their potential and their dignity and that is harmful to physical and mental development.[5]

UNICEF defines child labour differently. A child suggest UNICEF, is involved in child labour activities if between 5 to 11 years of age he or she did at least one hour of economic activities or at least 28 hours of domestic work in a week, and in case of children between 12 to 14 years of age, he or she did at least 14 hours of economic activities or at least 42 hours of economic activities and domestic work per week. Thus the term child labour refers to the children who are working not only in industrial sector but also in different economic activities which are detrimental to their mental, physical, social and educational development.

Child Labour in India: Causes

There are several causes of child labour in India in which poverty, illiteracy, employment is the main cause**.** Social evil involved in the employment of children are widespread illiteracy resulting in lack of development of child's personality, negligence and indifference of the society towards the question of child labour[6]. Many industries are engaging children for the development of industry. They are doing the same for economic growth. Sometimes children of a family follow their father's footstep. They start practicing family occupation as their main source of income. The family members utilize them for gainful purpose of the family. The economic problems involved in the employment of children are very sad. Most of the child workers belong to poor, landless and semi-landless families whose income is otherwise insufficient to keep the family

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[3] R. N. Singh, *Human Rights and social justice*, p. 298.
[4] Patil Shivraj V. (Judge, Supreme Court of India), children supreme asset of the nation, AIR 2005 Journal, 49.
[5]Dr. Hari Shankar Panda, *The Legal Analyst*, V.3, 2013, p 45.
[6]M. K. Pandia, *Child Labour in India*, 1979, p. 54.

alive. The children are therefore, made to work to supplement the family income.

The indifference of the successive government to provide adequate legislation to regular the growth of employment of children in India in a hazardous conditions not only in industries, but also in other economic activity, have failed to minimize. The causes for child labour include both the demand and the supply side while poverty and unavailability of good schools explain the child labour supply side. The growth of low paying informal economy rather than higher paying formal economy is amongst the causes of the demand side. Other scholars too suggest that inflexible labour market side of informal economy, inability of industries to scale up and lack of modern manufacturing technologies are macro-economic factors affecting demand and acceptability of child labour[7]. After analyzing the factors responsible for creation of child labour in India it can be inferred that various social, economic and cultural forces together contribute to growth of child labour in India. Utter poverty compels poor parents to send their children to labour market rather than to school. On the other hand, the children do not know the actual value of education.

Child Labor and Legislative measures:

In India, various legislative measures have been provided to stop the child labor nevertheless the problems stand over the country. Some important statutory provisions are as follows:

(a) The Factories Act of 1948: This Act prohibits the employment of children below the age of 14 years in any factory. The law also placed rules on who, when and how long can pre-adults aged 15–18 years be employed in any factory

(b) The Mines Act of 1952: Mining being one of the most dangerous occupations, which in the past has led to many major accidents taking life of children, is completely banned for them. This Act prohibits the employment of children below 18 years of age in a mine.

(c) The Child Labour (Prohibition and Regulation) Act of 1986: This Act prohibits the employment of children below the age of 14 years in hazardous occupations identified in a list by the law. The act also states that no child shall be employed or permitted to work in any of the occupations set forth in Part A or in the process set forth in Part B, except in the process of family based work or recognized school based activities. The list was expanded in 2006, and again in 2008.

(d) The Juvenile Justice (Care and Protection) of Children Act of 2000: This law made it a crime, punishable with a prison term, for anyone to procure or employ a child in any hazardous employment or in bondage. This act provides punishment to those who act in contravention to the previous acts by employing children to work.

[7]Child Labour, Widipedia.

(e) The Right of Children to Free and Compulsory Education Act of 2009: This Act has free and compulsory education to all children aged 6 to 14 years. This provision also mandated that 25 percent of seats in every private school must be allocated for children from disadvantaged groups and physically challenged children.

Other Legislative Provision

The National child labour policy (1987) set up national child projects in areas with high concentration of child labour in hazardous industries or occupations, to ensure that children are rescued from work and sent to bridge school which facilitates mainstreaming. It is now recognized that every child out of school is a potential child labour and most programs working against child labour tries to ensure that every child gets an education and that children do not work in situations where they are exploited and deprived of a future. Similarly, there are other programmers like National authority for elimination of child labour, 1994 (NAECL) and National resources center on child labour, 1993 (NRCCL). National human rights commission has played an important role in taking up cases of worst forms of child labour like bonded labour. In 1991 in a silk weaving village of Karnataka called Magdi it held an open hearing which greatly sensitised the industry and civil societies.

Constitutional Provision for its Protection:

The founding fathers of the Indian Constitution were well aware of the problem of child labour. Realizing its gravity, they had incorporated express provisions in the Constitution to prohibit child labour in hazardous employment. The India's commitment to the welfare of children is very much reflected by its constitution in the chapter on Fundamental Rights and Directive Principles of State Policy. Article 24 of the Constitution lays down that "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment." This provision is certainly meant for the protection of the interest of public health and safety of life of children.

In People's Union for Democratic Rights vs. Union of India[8], the Hon'ble Supreme Court held that the construction work is hazardous employment and therefore, under Art. 24, no child below the age of 14 years can be employed in the construction work even if construction industry is not specified in the schedule to the Employment of Children Act. 1938. Bhagwati, j. advised the state Government to take immediate steps for inclusion of construction work in the schedule to the Act, and to ensure that the Constitutional Mandate of Article 24 is not violated in any part of the Country. Article 15(3) is one of the two exceptions to the general rule laid down in Clause (1) and (2) of Art. 15. It prescribes that nothing in Art.15 shall prevent the State from making any special provision for women and children. Women and children require special treatment because of their very nature.

[8] A.I.R., 1983 SC,1473.

The Directive Principle of State Policy enjoins the state for taking proper care of the educational and economic interest of the children. Article 39 requires the state to direct its policy toward securing the following principles;
(e) To protect health and strength of workers and tender age of children and to ensure that they are not forced by economic necessity to enter a vocation unsuited to their age or strength.
(f) That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Clause (f) was modified by the Constitution (42nd Amendment) Act, 1976 with a view to emphasize the constructive role of the state with the regard to children. In *M. C. Mehta V. State of Tamilnadu*,[9] the Hon'ble Supreme Court held that in view of Article 39, the employment of children within the match factories directly connected with the manufacturing process of maches and fireworks cannot be allowed as it hazardous.

In an another important judgement in *M. C. Mehta vs. State of Tamil Nadu* [10], known as (child labour abolition case) the Hon'ble Supreme Court held that children below the age of 14 years cannot be employed in any hazardous industry or mines or other work. In this case the Hon'ble Suprme Court has issued directives for protection of child labour in India. Article 46, as a directive to the state in guiding its policies provides; 'The State shall promote with special care the educational and economic interest of the weaker section of the people… and shall protect them from social injustice and all forms of exploitation.'[11]

It may be submitted here that the Constitution of India provides under Article 24 that the children should not be subjected to any kind of exploitation and the law prohibits employment of child labour . It casts a duty on the state to provide free and compulsory education to them under Art. 41, yet a lot of children in India are working in the organized sector. Despite the express provisions made in the Constitution and various legislative enactment passed by Indian parliament as well as State Legislatures that prohibit employment of child labour throughout India, it has now become a major problem for the government and has remained an unresolved issue even after more than 68 years of independence.

Judicial Decisions
Judiciary in India has taken a proactive stand in eradication child labour. In the case of *M.C. Mehta vs. State of Tamil Nadu and Ors*[12]**,** this Court considered the causes for failure to implement the constitutional mandate vis-à-vis child labour. It was held that the State

[9] (1991)1, SCC, 283.
[10] A.I.R., 1997, SC, 699.
[11] Article 46, The Constitution of India, 1950.
[12] A.I.R., 1997, SC, 699.

Government should see that adult member of family of child labour gets a job. The labour inspector shall have to see that working hours of child are not more than four to six hours a day and it receives education at least for two hours each day. The entire cost of educational was to be education was to be borne by employer.

The same was reiterated in *Bandhua Mukti Morcha vs. Union of India*[13]. and direction were given to the Government to convene meeting of concerned ministers of State for purpose of formulating policies for elimination of employment of children below 14 years and for providing necessary education, nutrition and medical facilities. In case of *Peoples Union for Civil Liberties vs. Union of India*[14] children below 15 years forced to work as bonded labour was held to be violative of Article 21 and hence the children were to be compensated. The court further observed that such a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of such rights.

However, Human rights experts criticize the scheme of payment of compensation envisage in Child labour act and further adopted by the Judiciary with gusto. They say that monetary compensation is like washing away ones conscious which still believes that a child labour is sent to school he must be compensated for the amount which he might have got if he had worked instead. This only confuses the already divided opinion of the society today which still thinks that poor and needy children are better off working.

Further, in the case of *Secretary, District Beedi Workers Union vs. State T. N.*[15] the Apex Court held that tobacco manufacturing had indeed health hazards employment of child labour should be stopped either immediately or in a phased manner to be decided by the State Government, but within a period not exceeding three years of the date of the judgment. In *M.C Mehta vs. State of Tamilnadu*[16], the Supreme Court directed that the offending employer must be asked to pay compensation for every child employed in contravention of the provisions of the Child Labour (Prohibition and Regulation) Act, 1986. In *Bachpan Bacho Andolan vs.. Union of India*[17], the Supreme Court issued the many directions regarding children working in the Indian circuses that; (i) In order to implement the Fundamental Right of the children under Article 21-A it is imperative that the Central Government must issue suitable notification prohibiting the employment of children in circuses within two months from the date of the judgement (ii) The Union of India shall simultaneous raids in all the circuses to liberate the children and check the viololation of fundamental rights of the children.

The rescued children be kept in the Care and Protective- Homes till they attain the age of

[13] A.I.R. 1997, SC, 2218.
[14] AIR 2004SC 465.
[15]A.I.R.1993, SC, 404.
[16]. A.I.R. 1997, SC, 699.
[17](2011)5 SCC, 1.

18 years (iii) The Union of India shall talk to the parents of the children and in case they are willing to take their children back to their homes, they may be directed to do so after proper verification; (iv) The Union of India shall frame proper scheme of rehabilitation of rescued children from circuses; (v) The secretary of Ministry of Human Resources Development , Department of Women and Child Development shall file a comprehensive affidavit of compliance within ten weeks from the date of the judgement.

Conclusion & Suggestions

Child labour is basically a human right problem. In other words we can say that it is a complex problem which cannot be eliminated without first attacking it at the roots. Thus, poverty, unemployment, lack of social security schemes, illiteracy or lack of education and the attitude of society need to be tackled first before any progress can be made.. Every individual must understand how important it is for the children to grow and study, as they are the ones who will shape the future of the nation. Although parliament has passed many suitable legislations and policies to combat child labour nevertheless its implementation at gross root level is very much lacking. The age factor is still a big problem in child labour. The age of child is differing in much legislation like 14years, 16years and 18 year. The Right to education is for children below 14 years and Child labour is prohibited till age of 14 years.

This brings the question as to whether children of age 14-18 years are to be denied basic human rights and are to be left vulnerable. Parliament should enact a uniform comprehensive legislation for the welfare of the children on this issue..The executive should implement the statutory provision and the guidelines of the judiciary relating to the child welfare sincerely, honestly and with good spirit, so that the condition of the children of all classes and communities may be improved and they may becomes good citizens of the country, conscious of their legal, social and moral duties and responsibilities.

The Executives should also ensure that no child is employed in factories, mines or other hazardous works contrary to the constitutional mandate enshrined in Article 24 and strong action should be taken against the person who involved in child labour. It is stated that there is need of awareness programme time to time regarding to stop child labour, should be conducted from primary level. Lack of proper schooling is the root cause of the growth of child labour in India. Therefore, education is the most effective means that can save the children from exploitation.

Advocate's Strike: Right or Breach of Duty

Neha Sinha*
Stuti Binay Nanda**

Introduction

Strike is a temporary stoppage of work by a group of employees or persons in order to express their grievances or enforce their demands. It is neither an act of war against the industry nor against the employer. But it is a weapon to fight against the arbitrary and unjust policies of employer. As it is the weapon for the powerless against the powerful, it must be used as a last resort when no other option is available. It must not be used for demonstrating their strength or for blackmailing authority for achieving their object. But now a days "Strike" as a weapon is not being used generally by people for fulfilling reasonable demands or expressing genuine grievances but it is being used to show the strength for bringing authorities under pressure. For example, the conduct of advocates declaring boycott of courts on trivial issues such as non-filing of vacancies of judges in courts, disputes between advocates and police etc. shows that this weapon is being misused by the advocates which is most unfortunate[1]. The present paper highlights the rights and duties of the advocates and tries to ascertain whether they have a right to go on strike?

Various laws applicable to advocates state that the members of the Bar Association have no right to boycott the courts in view of the duties that have been vested in them which they are required to discharge in the best of the interests of their clients. It is claimed that the Right to Freedom of Association which is a fundamental right under the Constitution of India includes right to go on strike, but the courts do not treat it as an unrestricted right. The Advocates Act, 1961 itself provides the prohibition against strike by advocates but not in express sense, in implied sense. There are certain set of duties towards the court as well as towards the clients prescribed by Bar Council of India which proves that strike or boycotting of courts is anti-thesis to practice in the courts and is a professional misconduct.

The position of right to strike of advocates is different from the strike by employees. Advocacy is not a trade or business but it is a calling on a noble profession. It is a profession wherein devotion to duty constitutes the hallmark. Sincerity of performance

****Assistant Lecturer, Hidayatullah National Law University, Naya Raipur.***
*****Assistant Lecturer, Hidayatullah National Law University, Naya Raipur.***

[1] Available on www.slideshare.net/ankitapiyush/lawyers-strike-for-professional-ethics accessed on 05 May 2015 at 11: 30 AM.

and the earnestness of endeavor are the two wings that will bar aloft the advocates to the towers of success. Given these virtues, other qualifications will follow of their account. Reason why the legal profession is regarded as a noble one is the object behind it i.e. not to earn money but to help the individuals by restoring their rights through courts of law and thereby helping them in maintaining law and order in the society. An advocate being a privileged and erudite person needs to regulate his acts and conduct for they have a huge impact on society. Members of this profession are role models for the society and it is their duty to strive and secure justice for people. Merely acquiring the qualifications of technical competencies is not enough. Maintenance of the honor of the profession is also necessary and this could be done by the members by their exemplary conducts both inside and outside the court. It is their duty to maintain healthy relationship between the Bar and the Bench so as to uphold the credibility and reputation which is associated with this profession. It is a profession which is created by the State and the essence of the profession lies in three things:

- Organization of the members for the performance of their functions;
- Maintenance of certain standards, intellectuals and ethical for the dignity of the profession, and;
- Subordination of pecuniary gains to efficient service[2].

Every profession has its ethical code of conduct. An advocate who is learned in law has known professional conducts, prescribed under the Advocates Act, 1961. The Act talks about high standards of professional ethics, but has left with Bar Council of India to lay down these code of ethics. Professional ethics is a code of conduct, written or unwritten for regulating the behavior sof a practicing advocate towards himself, his clients, his adversary in law and towards the court. When a person becomes an advocate, his relation with men in general, is governed by the general rules of law but for governing his conduct as an advocate, special rules of professional ethics has been framed by Bar Council of India. The main object of the ethics of legal profession is not only to maintain the dignity of legal profession and the friendly relation between Bar and Bench, but also for the stable growth of a clean and efficient Bar in the country.[3] The rationale behind professional ethics of legal profession is that it is necessary for smooth conduct of advocates towards the court, his clients, his colleagues and his society as a whole.

Before the enforcement of the Advocates Act of 1961 the Legal Practitioners Act of 1879 was in application for regulation of the legal profession in India. Although there were provisions relating to rights and duties of the advocates in the Legal Practitioners Act, 1879 but with regard to professional and other misconduct on the part of advocates, there remained uncertainty. So to cope up with this uncertainty, the Advocates Act of 1961 has been enacted with a provision under Section 49 (1) (c) authorizing the Bar Council of

[2] Kailash Rai "Legal Ethics: Accountability for Lawyers and Bench-Bar Relations" Eleventh Edition, 2013, Published by Central Law Publications, Allahabad.

[3] S. P. Gupta "Professional Ethics, Accountancy for Lawyers: Bench- Bar Relations", 2009, Fourth Edition, Central Publications, Allahabad.

India to frame certain rules prescribing standards for professional ethics and etiquettes. Sec 35 and Section 36 of the Act makes provision of punishment for the violation of professional ethics. Thus, under the Advocates Act, 1961 the Bar Council of India has been given the responsibility not only to safeguard the rights, privileges and interest of advocates but also to lay down standards of professional conduct and etiquettes. They also deal and determine cases of misconduct against advocates.

The Bar Council of India by exercising its rule-making power under Section 49 of the Advocates Act, 1961 has framed rules governing the conduct of the advocates. Chapter II of Part IV of these rules deals with the 'Rules Governing the Advocates' which prescribes the standards of professional conduct and etiquettes for advocates. Section 1 and 2 of Chapter II of the rules lay down standards of professional conduct and etiquettes and duties to the client and to the court. Rule 12 provides that an advocate shall not withdraw from engagements once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client. Rule 15 provides that it shall be the duty of an advocate freely to uphold the interests of the clients by all fair and honorable means without regard to any unpleasant consequences to him or to any other. Rule 24 lies down that the advocate shall not do anything whereby he abuses or takes advantage of the confidence reposed upon him by his client. The rights and privileges of an advocate carry with them the corresponding duty not to abuse them. Therefore, when an advocates accepts a brief, it is his bounden duty to attend to his clients' interests with due intelligence and if he fails to do so, he is likely to be dealt with for neglect and also answerable to the client. The advocate owes a duty not only to his clients, but also to the court and is bound to co-operate with the court in the orderly administration of justice. The duties to the court and duties to the clients prescribed by the Bar Council of India go to prove that strike or boycotting of courts is antithesis to practice on the court and is a professional misconduct. An advocate being an officer of the court is bound to submit to its authority and cannot join in an action to boycott the court or a particular judge because of any grievance.[4]

The courts in various cases have held that the advocate being an officer of the court has no right to go on strike. As early as in 1922 a Special Bench of Calcutta High Court n *Emperor vs. Rajani Kanta*[5] *Bose* opined that an advocate being an officer of the court is bound to submit to its authority and therefore, cannot join any action to boycott the court or a particular judge because of any grievance - real or alleged, whether touching the court or of political or other character. The advocate accepting the vakalatnama cannot divest himself of his duties arising from such acceptance without leave of the court. If he desires to discharge himself from a case, he must give his client reasonable notice of his intention. It is not difficult to realize that serious uncertainties and inconveniences might arise in the conduct of judicial proceedings if the appointment of a pleader made in

[4] The Advocates Act of 1961.
[5] ILR 1922 Cal 515.

writing and lodged in the court where the case was to be tried could be revoked without the knowledge and sanction of the Court.

The Calcutta High Court again reiterated the same view in 1923 in *Tarini Mohan Barar case*[6].In that case, a decision to boycott the court was in issue. A resolution was passed by the Bar Association not to appear before the Fourth Subordinate Judge in view of the fact that insult inflicted on an advocate was an insult to the whole Bar. It was in consequence of the resolution that the advocates refused to appear before the Subordinate Judge. The High Court ruled:"The advocates have duties and obligations to their clients in respect of the suits and matters entrusted to them which were pending in the Court of the learned Subordinate Judge. There was further and equally important duty and obligation upon them viz. to cooperate with the Court in the ordinary and pure administration of justice. By the course which they have adopted, the advocates isolated and neglected their duty and obligation in both these respects... Such conduct cannot and will not be tolerated. In this case, if the advocates thought they had a just cause of complaint, they had two courses open to them either to make a representation to the learned District Judge or to the High Court. They took neither of these alternatives, but they adopted the high-handed and unjustifiable course of boycotting the learned Subordinate Judge in court".

Again in *Rajinder Singh vs. Union of India*[7], the question before the court was whether the advocates have a right to strike or not. Answering in negative, the court observed:"What legal sanction the Association of advocates has to give call to the advocates to go on strike is beyond our comprehension... The functioning of the Courts in the matter of administration of justice is not to be regulated or controlled by the Association of advocates, in the manner of giving calls to its members to go on strike and not to appear in Courts in their cases, which is not legal when such association of advocates have no arrangement for providing judicial work to its members for their livelihood, how such calls are given for strike by such associations. Further comments can only be given as and when action of any Association in imposing penalty on an advocate is challenged in any Court. If the position is examined from a different angle, the result would be alarming.

The primary function of the Court is to administer justice to and between the parties approaching Courts. The Courts would be failing in their duties in not performing such a function merely on the ground that the advocates choose to abstain from appearing in Courts. The Judges are supposed to train themselves to decide cases by studying the pleas and the law on the subject even if unaided either by the parties or their counsel. There is no legal impediment in the way of the Court not to administer justice when advocates abstain from appearing in Courts or they appear but refuse to assist the Court in the administration of justice. The Code of Civil Procedure, 1908 contains provisions for proceeding with cases where parties fail to appear."

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[6] AIR 1923 Cal 242.
[7] 1993 (2) SLR 450.

But before considering this question it is necessary to keep in mind the role of advocates in the administration of justice and also their duties and obligations as officers of this court. In the case of *Lt. Col. S. J. Choudhary vs. State (Delhi Administration)*[8]the High Court had directed that a criminal trial go on from day to day. Before this court it was urged that the Advocates were not willing to attend day to day as the trial was likely to be prolonged. It was held that it was the duty of every advocate who accepts a brief in a criminal trial to attend the trial day to day. It was held that the advocate would be committing breach of professional duties if he fails to so attend.

In *K. John Koshy & others vs. Dr. Tarakeshwar Prasad Shaw*[9], one of the question before the court was whether the court should refuse to hear a matter and pass an order when counsel for both the sides were absent because of a strike call by the Bar Association. The court held that the court could not refuse to hear the matter just on the ground that there is strike declared by the advocates as otherwise it would tantamount to the court becoming one of the party to the strike.

In the case of *Mahabir Prasad Singh vs. Jacks Aviation Pvt. Ltd*[10], an application was made to the trial court to suo moto transfer the case to some other Court as the Bar Association had passed a resolution to boycott that court. It was stated that the advocates could not thus appear before the court. The trial court rejected the application. In a revision petition, the High Court stayed the proceedings before the Trial Court. But the Supreme Court held that the High Court had committed grave error in entertaining the revision petition and passing an order of stay. Following the ratio laid down in *Lt. Col. S. J. Choudhary vs. State (Delhi Administration)*[11] the court held as follows: "if any counsel does not want to appear in a particular court, that too for justifiable reasons, professional decorum and etiquette require him to give up his engagement in that court so that the party can engage another counsel. But retaining the brief of his client and at the same time abstaining from appearing in that court, that too not on any particular day on account of some personal inconvenience of the counsel but as a permanent feature is unprofessional as also unbecoming of the status of an advocate. No court is obliged to adjourn a cause because of the strike call given by any association of advocates or a decision to boycott the courts either in general or any particular court. It is the solemn duty of every court to proceed with the judicial business during court hours. No court should yield to the pressure tactics or boycott calls or any kind of browbeating."

A new question came before the court in *B. L. Wadehra vs. State & others*[12], where it was asked whether a direction should be issued to the advocates to call off a strike. The Delhi High Court then considered various authorities of Supreme Court and concluded as

[8] (1984) 1 SCC 722.
[9] (1998) 8 SCC 624.
[10] (1999) 1 SCC 37.
[11] (1984) 1 SCC 722.
[12] AIR 2000 Delhi 266.

follows: "in the light of the above mentioned views expressed by the Supreme Court, advocates have no right to strike i.e. to abstain from appearing in court in cases in which they hold vakalat for the parties, even if it is in response to or in compliance with a decision of any association or body of advocates. In our view, in exercise of the protest, an advocate may refuse to accept new engagements and may even refuse to appear in a case in which he had already been engaged, if he has duly discharged from the case.

But so long as the advocate holds vakalat for his clients and has not been duly discharged, he has no right to abstain from appearing in court even on the ground of a strike called by the Bar Association or any other body of advocates. If he so abstains, he commits a professional misconduct, a breach of professional duty, a breach of contract and also a breach of trust and he will be liable to suffer all the consequences thereof."

The right to practice any profession or to carry on any occupation guaranteed by Article 19 (1) (g) may include the right to discontinue such profession or occupation but it will not include any right to abstain from appearing in court while holding a vakalat in the case. Similarly, the exercise of the right to protest by the advocates cannot be allowed to infract the litigant's fundamental right for speedy trial or to interfere with the administration of justice. It is below the dignity, honor and status of the members of the noble profession of law to organize and participate in strike. It is unprofessional and unethical to do so.

In view of the nobility and tradition of the legal profession, the status of the advocate as an officer of the court and the fiduciary character of the relationship between the advocate and his client and since strike interferes with the administration of justice and infringes the fundamental right of litigants for speedy trial of their cases, strike by advocates cannot be approved as an acceptable mode of protest, irrespective of the gravity of the provocation and the genuineness of the cause. Advocates should adopt other modes of protest which will not interrupt or disrupt court proceedings or adversely affect the interests of the litigant. Either in the name of a strike or otherwise, no advocate has any right to obstruct or prevent another advocate from discharging his professional duty of appearing in court. If any one does it, he commits a criminal offence and interferes with the administration of justice and commits contempt of court and he is liable to be proceeded against on all these counts.

Another important observation was made by Hon'ble R.P. Sethi, J. in R. D. Saxena v. Balram Prasad Sharma[13] on legal profession. A social duty is cast upon the legal profession to show the people beckon light by their conduct and actions. No effort should be made or allowed to be made by which a litigant could be deprived of his rights, statutory as well as constitutional. An advocate is expected at all times to conduct himself in a manner befitting his status as an officer. It is high time for the legal profession to join heads and evolve a code for themselves in addition to the mandate of the Advocates Act,

[13] (2000) 7 SCC 264.

rules made there under and the rules made by the various High Courts and the Supreme Court, for strengthening the belief of the common man in the institution of the judiciary in general and in their profession in particular. Creation of such a faith and confidence would not only strengthen the rule of law but also result in reaching excellence in the profession.

Thereafter, in the case of *Ramon Services Pvt. Ltd. vs. Subhash Kapoor*[14], the question before the court was whether a litigant should suffer a penalty because his advocate had boycotted the court pursuant to a strike call made by the Association of which the advocate was a member. In answer to this question it has been held that when an advocate engaged by a party is on strike there is no obligation on the part of the court to either wait or adjourn the case on that account. It was held that this court has time and again set out that an advocate has no right to stall court proceedings on the ground that they have decided to go on a strike.

In the landmark case of *Harish Uppal vs. Union of India*[15] the Supreme Court lashed on advocates for going on strike: "The advocates have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any, as required, can only be by giving press statements, T.V. interviews, carrying out-of-court premises banners or placards, wearing black or white or any color arm bands, peaceful protest marches outside and away from court premises; going on dharnas or relay fasts etc. the advocates holding vakalats on behalf of their clients cannot refuse to attend courts in pursuance to a call for strike or boycott. All advocates must boldly refuse to abide by any call for strike or boycott.

No advocates can be visited with any adverse consequences by the Bar Association or Bar Council and no threat of coercion of any nature including that of expulsion can be held out. No Bar Council or Bar Association can permit calling of a meeting for the purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored… Courts are under no obligation to adjourn matters because the advocates are on strike. On the contrary, it is the duty of all courts to go on with matters on their boards even in the absence of advocates. In other words, courts must not be privy to strikes or calls for boycotts. If an advocate, holding a vakalat of a client abstains from attending the court due to strike call, he shall be personally liable to pay costs which shall be in addition to damages which he might have to pay his client for losses suffered by him."

Conclusion

Advocates ought to know that at least as long as lawful redress is available to them, there is no justification for advocates to join in an illegal conspiracy to commit a gross criminal contempt of court, thereby striking at the heart of the liberty conferred on every person by

[14] (2001) 1 SCC 118.
[15] (2003) 2 SCC 45.

our Constitution. Strike is an attempt to interfere with the administration of justice. The principle is that those who have duties to discharge in a court of justice are protected by the law and are shielded by the law to discharge those duties; the advocates in return have duty to protect the courts. For, once conceded that advocates are above the law and the law courts, there can be no limit to advocates taking the law into their hands to paralyze the working of the courts. It is high time that the Supreme Court and the High Court make it clear beyond the doubt that they will not tolerate any interference from anybody or authority in the daily administration of justice. For in no other way can the Supreme Court and the High Court maintain the high position and exercise the great powers conferred by the Constitution and the law to do justice without fear or favor, affection or ill-will.

Impact of TRIPS Agreement upon Pharmaceutical Patent Protection in India: An Analysis of National Legal Policy

Yogendra Singh*
Dr. S.B. Misra**

Abstract

After the Uruguay round under the GATT in 1986 and in 1994 the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) established minimum universal standards in all areas of intellectual property. It is intended to implement these standards globally through a WTO enforcement mechanism but the Indian pharmaceutical industry has faced new challenges after the implementing of WTO-TRIPS Agreement since the mid-1990s. It was assumed that introduction of pharmaceutical product patents would have a negative impact upon the production and can no longer manufacture export life saving drugs whose patents are granted. Amendment in 2005 has been committed in patent act as TRIPS Agreement with the aimed to harmonizing protection of life saving drugs and other pharmaceutical products. The amendment accomplishes this motive of setting minimum standards for protection for product and process invention. The present article proposes a strategy for alleviating the potentially patent protection and access of life saving drugs.

Keywords: TRIPS Agreement, Patent Act, Pharmaceutical Patent, GATT & WTO.

Introduction

In March 2005, India amendment of the Patent Act, 1970 to introduced product patents for drugs, foods, and chemical products and the patent term was increased to twenty years under the TRIPS Agreement. The TRIPS Agreement incorporates the WTO Principles of non-discrimination and transparency and provides for the establishment of minimum standards of protection to creators of IP. TRIPS Agreement [1]contains provisions exclusively relating to patents. In addition to this the general provisions and basic principles of TRIPs applicable to all of IP are also relevant /applicable to patents. Article 7 of the agreement says that the protection and enforcement of intellectual property rights (IPRs) should contribute not only to technical innovation manner conducive to economic welfare, and to the balance of rights and obligation". Article 8 provides that WTO members may….adopt measures necessary to protect public health and nutrition, and to

Research Scholar, School of Law, IFTM University, Moradabad, U.P.
****Director, School of Law, IFTM University, Moradabad, U.P.***

[1] Articles 27 to 34 of the TRIPS Agreement.

promote the public interest in sectors of vital importance to their socio-economic and technological development.

Before enactment of the Patents Act, 1970, the Colonial patents and Designs Act, 1911 permitted foreign countries to block India's access to the latest antibiotics and to critical therapeutic discoveries. During 1947-1957, 90% of drugs and pharmaceutical patents in India were held by foreign citizen and less than 1% was commercially exploited in India[2]. The Patent Act, 1970 and the Drug Policy of 1978 provides the protection to develop generic drugs based on indigenous knowledge, which had little technological capability which worked on the basis of reverse engineering and process innovation, achieved self-sufficiency in technology, and has been strengthening export orientation on the tide of economic liberalisation since the early 1980s.

After Independence, the Indian government appointed committees: the Tek Chand Patents Enquiry Committee (1948-50) and the Ayyangar Committee (1959) in order to improve accessibility and affordability of essential drugs in India. These committees recommended amending the Designs and Patents Act of 1911, which recognised product patents for pharmaceuticals. The Designs and Patents Act of 1911 was replaced by the Patent Act of 1970[3]. Before the amendment in 2005, The Patent Act of 1970 recognised only process patents, and reduced the patent protection from sixteen years to seven years. Indian pharmaceutical companies in 70th and 80th century developed research and development programme (R&D) but the present intellectual property regime is not sufficient framework to protect R&D, so that the Indian Government has enacted the Drug Policy, 1978 to develop self-sufficiency mechanism of production of drugs and limited the share of foreign companies' contribution in the local market.

In 2005, as Doha Declaration on TRIPs Agreement objects third amendment of the Indian Patents Act takes place for the phamaceutical druges and essential medicines. In short the structure of the patent regime that the Agreement required WTO members to put in place includes the following elements-

1. Restatement of patentable subject matter.
2. Extending of the fields of activity under patent covers.
3. Nature of disclosure of the invention in the patent document.
4. Nature of exception that can be provided.
5. Duration of patent grant, and
6. Conditions governing working of the patent.

Indian Position - Pharmaceutical Sector

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[2] Malik. Parmod, Implications of TRIPs Agreement on India with special reference to Pharmaceutical Sector, Online International Interdisciplinary Research Journal, {Bi-Monthly}, ISSN2249-9598, Volume-III, Issue-VI, Nov-Dec2013.

[3] Anitha Ramannna, "Policy Implications of India's Patent Reforms," *Economic and Political Weekly*, vol.37, no. 21(2002), pp. 2065-2075.

The pharmaceutical industry in India is the world's third largest in the term of volume and 10th largest in value terms. According to Department of Pharmaceuticals, Ministry of Chemicals and Fertilizers the total turnover of India's pharmaceutical industry between 2008 and 2009 was 21.04 billion USD and India market is poised to grow to levels of US $ 50 by 2020 as per IMS. According to Indian Brand Equity Foundation, the Indian Pharmaceutical market is likely is to grow at a compound annual growth rate of 14-17 % in between 2012-16. India is now among the top five pharmaceutical emerging markets of the world. India is not only a chief exporter of drugs, but also the primary producer of drugs for its own population.[4] India is one of only two countries in the world where generic drug manufacturers control a larger share of the domestic pharmaceutical market than big MNCs.[5] A few indigenous firms are capable of both generic drug production and research and development, while many smaller companies specialize exclusively in reverse-engineering drugs from overseas.[6]

On the date of independence India had a strong patent system inherited from the British in the Patents and Design Act of 1911, which allowed product patent in the all fields of innovation (like TRIPS). This patent regime continued in operation till March, 1972, when the new Patent Act of 1970 came into force. Two high powered judicial enquiries were established under the chairmanship of Justice Bhakshi Tek Chandra and Justice Rajagopala Ayyangar for review the Patent Act, 1911. The main finding of the enquiries were –

1. The patent system was being exploited by foreigners for monopolistic control over the market and most of the goods and medicine were imported at extremely high prices,
2. In the case of pharmaceutical more then as 95 percent of the patents were held by foreigners and 90 percent were not being worked in the country.
3. That was the reason, that the price of medicines in India was highest in the world.
4. The findings of these two committees helped in generating a new patent regime in India and helped in prohibiting product patent in the field of food, agriculture and medicine under Indian Patents Act, 1970.[7]

Over the past 30 years Indian drag industry has emerged from all most non-existent to a world leader in manufacturing /production of generic drugs. But with the end of Uruguay round of negotiation and formation of WTO- TRIPS India has to change its patent law.

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[4] Lalitha, *supra* note 16. "Drugs produced in India satisfy 95 per cent of the domestic demand." *Id.* (citing *Indian Pharmaceutical Industry: Surging Globally*, Mumbai: EXIM Bank Occasional Paper No. 119, 2007).

[5] Lee, *supra* note 9, at 296. The only other nation where generic drug manufacturers predominate is Japan. *Id*.

[6] Indigenous firms such as Ranbaxy Laboratories Ltd., Cipla Ltd., and Dr. Reddy's Laboratories Ltd., are a few of the major players in the Indian pharmaceutical industry that are capable of both generic drug production and original research and development.

[7] Sec. 5 of the Patents Act, 1970.

Being the member of WTO, India has to implement the Obligations under TRIPs; the most controversial was product patent regime on the field of food, Drugs and agriculture. Now we will discuss India's Pharmaceutical Scenario pre and Post TRIPs.

Scenario Pre TRIPs

As we have discussed above with the changes brought by Patent Act of 1970, Indian drugs manufactures become experts in the field of reverse engineering and increased its supply of less expensive copies (sometimes 1/10 of brand drug) of the world's bestselling patent protected drugs.

The secret of this success is the Indian Patent law of 1970 that exempted 'food or medicine or drugs' from product patenting[8]. Since then, India has done without product patents for pharmaceuticals, with the exception of production processes that may be patented for seven years. In addition, the law allowed for compulsory license granted by the state[9], in the case of a patent holder's not granting voluntary licenses on fair conditions. India thus profited from a large section of well qualified experts who made good use of the new opportunities. More units larger in size and capacity set up in the 1970's and 1980's started producing drugs, which were primarily imported till then. Further recognition of only process patent , not the product patent (through Indian Patent ACT, 1970) allowed Indian companies to reproduce and market newly invented drugs in the Indian market through a different production process, typically within one or two years of its invention and at only a small fraction of the cost of patented drugs in developed countries. Share of multinationals in domestic markets for pharmaceuticals decreased from 85 percent in 1970 to 40 percent in 1999[10].

Afterwards, the Indian pharmaceutical industry has emerged from a import dependent industry to in the 1950's to having achieved word wide recognition as a low cost producers of high quality pharmaceutical product with an annual export turn over more than 1.5 billion USD. For a developing country with huge population like India, it was necessary to be independent in the health and medicine. This was the core objective of the patent regime of 1970's Act. In short these were the main factures of 1970's Act in relation to Pharmaceutical (which were also in under the attack of TRIPs Arguments) –

1. Patent protection is provided only to methods or processes of manufacture but not to the end–products of manufacturing processes.[11]
2. There is compulsory working and licensing of the patent in India.[12]

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[8] Sec. 5, Patent ACT, 1970 provides that in the case of invention claiming substance intended for use or capable of being used as food or as medicine or drugs ,or substances prepared or produced by chemical processes no patent will be granted for the substance themselves but only the methods or processes of manufacture would be patentable.

[9] Sec. 84 the Patents Act, 1970.

[10] KuldipKaur, "WTO Regime Pharmaceutical Industry and prices of Medicine in India – An Analysis Under TRIPs".

[11] Produced patent in all filled of Innovations.

3. There is provision that importation of an invented product into .India from abroad will not be considered as working of the patent in India.
4. Licenses of right automatically apply.
5. There is the burden of Proof on Patentee.

Scenario Post –TRIPs

As a signatory of the Uruguay round of GATT, which concluded in 1994, India was obliged to meet all provisions of the Trade Related Aspects of Intellectual Property Rights (TRIPs)[13]. A transition period was accorded to developing countries depending on their state of development. India availed itself of the complete term of this transition period i.e. 10 years, to set up an IPR system in compliance with TRIPS. The main elements of change in the Indian patent system are:

1. Enforcement of product patent protection in all branches of technology, including drugs.
2. 20 years of protection instead of 14 or 7 in the case of the Indian patent Act.
3. No discrimination between imported and domestic products.
4. Accommodate compulsory licensing.[14]

The most important amendment which had to be introduced by the amendment of 2005 in order to make the existing patent regime in India Trips compliant was the introduction of pharmaceutical product patent. The amendment of 2005 extends full TRIPs coverage to food, drugs and medicine.

However, since TRIPS is part of the WTO agreements, developing countries that want access to the global market through the WTO must accept the TRIPS agreement, and integrate its IPR standards into their national legislation. Specifically, the TRIPS agreement requires that countries grant patents on all inventions without discrimination provided the inventions are considered "new" and have "industrial applications". In addition, TRIPS requires that patents are granted for a period of 20 years, and allows for importation to suffice for proper "working of a patent" within the patenting country, which means that corporations no longer need to manufacture the patented product in every country in which they hold a patent.

The prime concern for health professionals lies with pharmaceutical patents, which may be granted separately for the process, or the method of manufacturing each specific drug, and for the product itself regardless of how it is produced. The countries that today own

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[12] C.L. for domestic use only not for excoriation (but after done declaration C.l. exportation also.)

[13] WTO, 1994. TRIPS: Agreement on trade-related aspects of intellectual property rights. *Annex 1C of the Marrakesh Agreement establishing the world Trade Organization, 15 April 1994.*

[14] The Compulsory Licensing provision: it is stipulated in the TRIPs agreement that in certain situations of national emergency, certain patents can be subject to compulsory licensing. This means that the owner of the patent has the obligation to propose licensing for this patent at a reasonable cost.

the majority of the world's pharmaceutical market, including the US, Japan, and Germany, did not grant product patents on pharmaceuticals until the 60's and early 70's when their industries had developed internationally competitive research and development capabilities. Although patents were always issued to protect the product production process, without patent restrictions on products, pharmaceutical companies were still able to use reverse engineering techniques on needed medicines to uncover their molecular structure and thus develop new ways to build the drugs that were needed. These compounds produced through alternate processes were then sold as "generic" versions of the original drug, and drove down the price of the original product through market competition. This generic production not only served to provide much needed medications, but it also greatly strengthened their pharmaceutical knowledge base and research capabilities.

Amendments of the Indian Patent Act under the TRIPS Regime

India's commitment to fully implement TRIPS agreement required three sets of amendments to the country's Patent Act while developing countries in general, were allowed to make their Patent Laws TRIPS compliant through an amendment that was to be introduced by January 1, 2000, countries like India which had process patent regime covering pharmaceutical and agricultural chemicals, would enjoy a longer transition period before they were required to introduce product patents from January 1, 2005.[15] The longer transition period, however, came with a set of conditions elaborated in Articles 70.8 and 70.9 of the TRIPS Agreement.

Article 70.8 of the TRIPS Agreement required India to provide "a means" by which product patent applications can be field from January 1, 1995 ("mailbox"). If the products figuring in these applications were granted a patent in any of the WHO member countries and the products had obtained marketing approval in any of the WTO Member countries, then, according to Article 70.9, five years exclusive marketing right (EMRs) had to be granted by India before the patent on the product was either granted or rejected in India. The first amendment[16] of the patent Act, 1970 introduced the requirements under the transitional arrangements through sec. 5(2), which allowed product patent application to be filled, while chapter IV A provided for the grant of EMRS. In addition it had provisions for CL.[17] and mailbox facilities[18] for pharmaceutical.

This amendment was notified in the Gazette of India in Jan 1, 2000 a second amendment[19] had to be introduced. This Act makes the patent law not only TRIPS compliance but also incorporates safeguards for protection of public interest, national

[15] Articles 65.2 and 65.4 of the TRIPS Agreement
[16] On 26 March 1999 as the Patent (Amendment) Act, 1999.
[17] Sec. 24C and sec 24 D, the patent Act, 1970, replaced by the patent (amendment) Act, 2005.
[18] Sec.5(2), Patent Act, 1970, Replaced by the Patents (Amendment) Act, 2005.
[19] This Amendment was Notified in the Gazette of India on 25 June 2002 as The Patent (Amendment) Act, 2002 Govt. of India (2002).

security, biodiversity, traditional knowledge etc. These are some of the important changes that have been made in the amendment Act, 2002.

1. The definition of the term "invention" has been modified in consonance with international practices and consistent with TRIPS Agreement.[20]
2. Inventions, which are harmful to environment, human animal and plants, cannot be patented. The patent can be opposed on the ground of traditional knowledge according to sec. 3.
3. The right of patentee has been aligned as per Article 28 of the TRIPS Agreement. (Section 104A).
4. A provision for reversal of burden of proof in case of infringement suit on process patent, in accordance withArticle 34 of the TRIPS Agreement, has been added.[21]
5. Uniform term of patent protection of 20 years for all categories of invention as per Article 33 of the TRIPS Agreement has been prescribed[22].
6. An application for a compulsory license can be made under sections 84 and 92. Under Section 84, three years after the grant of patent and under Section 92 any time after the grant of the patent with respect to patent notified by the central government.
7. The patent owners will have exclusive right to prevent others who do not have their consent, not only for making, using or selling the invented product or prices in India, but also importing from other countries[23].
8. The central government may use an invention or acquire an invention for the purposes of non- commercial use by payment of adequate compensation according to sec. 99 to 103.
9. A third amendment had to be introduced by 1 Jan, 2005 for the full implementations of TRIPS requirement product patent regime in areas, including pharmaceutical. Among the major issues included in the third amendment were provisions relating to opposition to the grant of patent and sec. 3(d). Which demand enhancement of the known efficacy of the known substance in the case of pharmaceutical patenting.

Pharmaceutical Substances and The 'Inventive Step'

For the patentability of pharmaceutical products, mere discovery of a new form of a known substance is not enhancement of the known efficiency is not patentable. According to the section 3 (d) of the patent act, products must differ significantly in properties with regard to efficacy. A new form of a substance is patentable only if it results in enhancement of the know efficacy as according to the definition of invention under the section 3 (d) of the Patent Act. The concept of novelty was recently defined by the House of Lords in Synthon BV v. Smithkline Beecham Plc.[24] There are two requirements, first, the matter relied upon as prior art must disclose the subject matter

[20] Sec. 2(1)(j), The Patents Act, 1970.
[21] Sec. 104A, The Patents Act, 1970.
[22] Sec. 53, The Patents Act, 1970.
[23] Sec. 48, The Patent Act, 1970
[24] [2005] UKHL 59; [2006] *RPC* 10.

which, if performed, would necessarily result in an infringement of the patent. Second, the said disclosure must have been enabling, that is to say that an ordinary skilled person would have been able to perform the invention if he attempted to do so by using the disclosed matter and common general knowledge.

The Patent (Amendment) Act, 2005 amend the definition of earlier 'non-obviousness' or 'inventive step' in prospect of the pharmaecutical products. The definition now reads: 'inventive step' means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to the person skilled in the art.46. The U.S. Supreme Court, in Graham v. John Deere Co[25], laid down a four pronged test (Graham test) which laid out the basic standards for determining *obviousness*.[26] The following are the determinants:

- The scope and content of the prior art.
- The structural similarity between the prior art and the claimed invention.
- Indication of non-obviousness and commercial success.
- The level of ordinary skill in the pertinent art.

The Patent (Amendment) Act, 2005, introduced a definition of "pharmaceutical substance" of the Patents Act, 1970[27]. The Patents Act, define as the Pharmaceutical substance means "any new entity involving one or more inventive steps". But the real objective of the definition was not fulfilling the scope of the requirement of patenting of pharmaceutical products, and the existing definition opens the new door for frivolous claims for patentability of pharmaceutical products.

Conclusion and Suggestions

The Pharmaceutical Patent system has witnessed considerable changes in Patent Act, 1970 after the establishment of TRIPs Agreement and recently India has changed Intellectual Property Laws to meet the requirement of International IP regime i.e. TRIPS Agreement. Indian pharmaceutical Industry is in state of transition and the demand stronger patent protection on all functional areas of the Industry. Although India had made the most from the flexibilities provided by TRIPs Agreement, yet in near future the

[25] 383 U.S. 1, 17-18 (1966).

[26] The US Supreme Court in the famous case of KSR International Co. v. Teleflex Inc., et al 127 S. Ct. 1727 (2007), analysed the test of obviousness and held that "In determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls. What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under §103 of US Patent law. One of the ways in which a patent's subject matter can be proved obvious is by noting that there existed at the time of invention a known problem for which there was an obvious solution encompassed by the patent's claims. The proper question to have asked was whether a pedal designer of ordinary skill, facing the wide range of needs created by developments in the field of endeavor, would have seen a benefit to upgrading [a prior art patent] with a sensor."

[27] Under Section 2(t a) of the Patents Act, 1970.

actual impact of TRIPs agreements will be seen with the abuse of monopoly in life saving drugs by high pricing, IMDs and concepts of ever greening of the patents. By introducing sec.3 (d) in this context, India tries to safeguard its patenting system from these abuses. Patent protection and accessibility of life savings drugs will promoted as:

1. The market structure and prices.
2. The growth of the Indian generic companies, particularly SMEs.
3. Provides some suggestions for improvements.

The Patents (Amendment) Act, 2005 has provided the important qualification that some secondary patents cannot be granted "unless they differ significantly in properties with regards to efficacy". But what is "significant" in terms of efficacy is a matter of interpretation. The patentees can claim even a minor innovation as significant. The most recommendation to ensuring a competitive market structure and affordable prices which helping the growth of Indian generic companies and protect the fundamental rights of the people and Indian government should ensure that implementation of product patent does not affect accessibility and affordability of medicines to people.

Rampant Corruption in Police System: Need for Legal and Judicial Reforms for the protection of Constitutional Rights in India

Payal Jain*

Abstract

At present, corruption exists in many ranks, form and has reached an alarming stage where some practices are not even considered deviant. This research paper describes some usual forms of corruption whichcontinued unchanged for more than a 100 years.The corruption in our country not only poses a grave danger to the concept of constitutional governance, but also threatens the police system in India. The magnitude of corruption in our public life is incompatible with the concept of socialist, secular democratic republic. It cannot be disputed that where corruption begins all right ends. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in our preamble vision. Police commit crime for personal gain, they violates the individuals' constitutional rights for their own benefits. Corruption involves profit or another type of material benefit gained illegally as a consequence of the officer's authority. In order to curb corruption in public offices, police system, it has become imperative to prosecute those who involved in corruption. This research paper is a humble effort to visit the background of police system, find out whether the police system is responsible for rampant corruption, it violates the rights of the people or itself is a victim of corruptionand what the solution/ remedies are available to overcome from this prolong problem.

Keywords: Police, Governance, Constitutional Rights, Corruption, Judicial Reforms

Introduction

It is needless to say that Corruption has now already become an accepted phenomenon in Indian Society. It is the Constitutional obligation of the state to provide professional, impartial and efficient Police service for safeguarding the life, livelihood and dignity of the citizens[1]. Now the role of the Police is the misuse of police authority for personal gain and misuse of personal attainment includes extortion and bribery. Corruption in police department poses a great obstacle in for efficiently and effective working of the police. Its roots and ramification exist in the society itself.

Corruption in police system is a major violation of Constitutional Rights of people. It denies the basic rights of citizens. The enforcement agencies are constituted especially for the protection of constitutional rights but are being denied by the prevailing corruption.

Research Scholar, Faculty of Law, University of Delhi, Delhi.

[1]Upma Gautam, "Corruption and its Impact on Good Governance and Rule of Law: Challenge for Indian Judiciary, 1 *CIG, NLU, Delhi* 175 (2015).

Every time for the enforcement of constitutional rights, the individual has to knock the doors of the Supreme Court or High Court through the system of either Writ or PIL, which takes money and time of the people. Even these rights are guaranteed in Constitution of India but the individuals are not fortunate enough to get them easily. There is always a violation of their rights sometimes by some public authority like police officers or sometimes by politicians. The right to self-defense is under a threat with more and more cases of custodial crimes, wrongful prosecution. The fundamental right i.e. Right to life granted under Article 21 of the Constitution is also being denied. Cases of fake encounters, rising death toll in the prisons, and unnecessary delay in investigation makes one feel insecure and vulnerable.

Police Corruption is a form of police misconduct in which law enforcement officers seek personal gain, such as money or career advancement, through the abuse of power, for example by accepting bribes in exchange for not pursuing, or selectively pursuing, an investigation or arrest. Besides best police forces in the world, there are many other police forces known for inhuman behavior, deep-rooted corruption and other evil activities. They involved in such criminal activities that hurt the society and endangered its citizens. Many policemen are underpaid and want to make extra money, they turn to corruption – but their selfish acts have caused a large amount of damage on countries that desperately need help.

Research Objectives

The specific objective of the research is to explore:

- How the constitutional rights of individual getting affected by corruption in police system.
- The public's views on how serious they considered police corruption.
- What are legal and judicial reforms have taken to eliminate the corruption.
- Whether these reforms have been implemented, if yes, then upto what extent?

Research Methodology

Corruption has become a big agenda, it has been made clear thought against corruption involving the strengthening of democratisation processes, protect the constitutional rights of the people. In this research, it will be analysed themost important democratic check and balances has a significant deterrent effect of police corruption on the Constitutional rights of individual.A range of social grades are included in the research and across the research a range of attitudes to the police are included to ensure that the research covered those with more positive, more neutral and more negative attitudes.

Review of Literature

In recent years, government, NGOs and international organizations have taken many initiatives to fight with police corruption. Despite their potential, there is much public discussions about the corruption in India. Indeed, corruption as an important concept in governance-related studies hardly features until the early1990s. The body of theoretical

and empirical research that objectively addresses the problem of Corruption has grown considerably in last two decades. The literature on the subject, prime facie indicate that police corruption has become one of the leading reasons of violation of constitutional rights. Fighting Systemic Corruption: Social Foundations for Institutional, Sharon Eicher book on Corruption on International Business, various National and International articles and books on corruption by Dr. C. Raj Kumar (2003-2011), Reports of UNDP organization, Global Corruption Reports by Transparency International. Several academicians have written books on corruption but seldom search on violation of Constitutional Rights due to corruption in police system. NdivaKofele-Kale has tried to raise this issue by campaigning for a right to a corruption-free society. India's Fight against Corruption by J.P.Mittal, Crime, Corruption and Development by D. Narasimha Reddy. In this research paper some findings of the articles, Journals, conference proceedings and newspaper are incorporated.

The transparency international, CVC, CBI, CIC, local NGOs, have developed a methodological approach integrating within one empirical framework the various components identified so far for understanding and combating corruption. This research is aimed at making an original contribution to literature on violating of constitutional rights due to police corruption.

Meaning and Nature of Corruption

"Corruption is the illegal use of legitimate authority. Any behavior that abuses and crosses the parameters of one's power can be classified as corruption. Corruption applied to a police system, personal accounts of officers, perjuring to protect a corrupt officer, falsifying police reports, planting drugs to frame citizens, and a host of other misconduct that violates the oath of protecting the constitutional rights of the people[2]".

Corruption is a worldwide disease, which is polluting the every department in society. No one has untouched with the corruption. Police Department is also a victim as well as cause of corruption. Instead of eliminating, corruption is soaring day by day. We all, the government, politicians, executives, judiciary, police, business persons are responsible for promoting corruption. Corruption has been prevailing from the time immemorial. Though corruption has no physical structure but it seems to be one million times bigger than the Everest, and deeper than the deepest oceans. It has emerged in our DNA and is flowing within us, in our blood and veins. We all love it and nurture it.

Corruption in India is a problem that has serious implications for both protecting the rule of law and ensuring access to justice. Corruption is pervasive in the system of governance in India, undermining the effectiveness of all institutions of governance. There is no denying the fact that corruption is world widespread diseases and global phenomenon. It is adversely affecting the whole society and all aspects of their life- social, spiritual,

[2] Stuart A. White, "Controlling Police Corruption", Poverty & Prejudice: Paradoxes of U.S. Drug Policies June 4, 1999.

political, economic, educational, and moral. It is our responsibility to make our country free of corruption. It is shameful for us, forgot to eradicate it, even we failed to minimize the corruption. We all are the victim of it one way or the other. Plethoras of the laws are unable to tackle this issue.

Brief History of Corruption in Police

In India, the police organization was established after the Indian Mutiny in 1857 to curb dissent and serve the interest of foreign rulers. The police force was structured in order to reflect the system of feudal values prevalent in society, thereby making the task of maintaining and defending the establishing easy[3]. Those officers occupying lower post were referred to as "inferior officers". The problem of corruption taking place from the year 1930s when the Britishers' were ruling the India. Followed from that the Special Police Establishment undertook to prosecute the government servant. By virtue of that in the year of 1947, on the eve of independence, the Government of India passed the Prevention of Corruption Act. It took a massive regime transition to initiate official drives for anti-corruption at that time.

On the streets too, independence helped to generate citizens' movements in the late 1940s to protest against corrupt local rationing or police officers. The vernacular and English newspapers, previously muzzled by the British, were replete with corruption scandals, especially those linked to black marketers, but there was something more profound happening in early post-colonial India, just as there is today. The larger discussions of 'corruption' reached to the roots of what Indians thought about the state, and their own sense of national belonging or alienation. Britain's supposedly 'rational' system of revenue might thereby discipline the essentially corrupt societal interactions of India. The son of James – the philosopher John Stuart Mill – was influential on British administrative thinking about corruption as 'custom'[4].

India has been independent more than 69 years but the police system is still governed by the Police Act, 1861. In 1952, following its first General Election, India became the world's largest democracy. But its political system still rested (as it does today) on a structure of power inherited from the Raj, principally in its administrative and police cadres. The 1950 Constitution was based to a great extent on the colonial constitution passed in 1935[5]

Effect of Police Corruption on Constitutional Rights

The responsibility of the police as enforcing the Rule of Law; assisting the Judiciary in the dispensation of justice and to protect the internal security of the country. Police system has been considered as a "Spine of the Rule of Law".

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[3]Arvind Verma, "Cultural Roots of Police Corruption in India", 22 Policing: An International Journal of Police Strategies & Management 264.
[4]*Ibid.*
[5]Corruption- "A brief History of Corruption in India"*US Today News*, July 3, 2013.

As per the report of National Crime Record Bureau[6], crimes are increasing every year because of corrupted police system. There is a lot of crime around us and criminals are doing their work without any fear. If police becomes serious then there will be control over corruption to the extent of nearly, say about 60-70%. They should perform their duties honestly. The day all the officers will be serious towards their profession, we may expect a corruption-free environment but the reality is opposite. Even though the government spends over 67% of the Home Ministry's budget on the police, still there has been no noticeable improvement in the behavioral and attitudinal pattern of police personnel. Apart from allocating 67% of the budget on police, Rs. 800 crores is being spent on modernization of the police forces of states for last three years. Yet there is no improvement in the conduct of the police personnel of all ranks[7].

Police Department themselves establish codes of conduct, train new recruits, investigate, discipline officers, cooperate with civilian complaint review boards which are intended to provide independent evaluative and remedial advice. Typical forms of corruption include bribery, extortion, receiving or fencing stolen goods, and selling drugs. This also refers to patterns of misconduct within a given police department or special unit, particularly where offenses are repeated with the acquiescence of superiors or through other ongoing failure to correct them. Police misconduct and corruption are abuses of police authority. This refers to a wide range of criminal, civil and procedural violations. "Criminal" refers to police who violate state laws; "unconstitutional" refers to police who violate a citizen's civil rights; and Misconduct is "procedural" when it refers to police who violate police department rules and regulations; Common forms of misconduct are excessive use of physical or deadly force, discriminatory arrest, physical or verbal harassment, and selective enforcement of the law.

The Fundamental Rights are being protected by a law enforcing agency, but when its protecting agency itself is corrupted then how they can protect the Fundamental Rights given under Article 20 & 21 of the Constitution of India. Cases of fake encounters, custodial crimes, illicit use of weapon, rising death toll in the prisons, unnecessary delay in investigation and false prosecution makes one fell insecure and vulnerable[8].

A common misconception amongst countries is what is corrupt and what is legal. Laws are defined by values, as are ethical norms, but two are not equivalent. Until recently, it was legal in many countries to use foreign-paid bribes as tax deductions. It was legal, but it was unethical and corrupt. Paying a bribe was a crime only in so much if it violated a law in the country in question[9].

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[6]Available athttp://www.ncrb.gov.in (Last visited on September 7th, 2015).
[7]Arshirka Singh, PUCL Bulletin 2007 available at http:www.pucl.org, (Last visited on August 7th, 2015).
[8]*Ibid.*
[9] Sharon Eicher, *Corruption in International Business* 2 (Ashgate Pvt. Ltd., England, 2012).

In 2014[10] India ranked 85th out of 175 countries in Transparency International Corruption Perception Index compared to its Bhutan (30th), Sri Lanka (85th), China (100th), and Bangladesh (145th). In 2013, Transparency International[11] surveyed that corruption was rampant in nearly 50% of the 177 countries ranked in their widely known index-Transparency International. In Corruption Perception Index India ranked 94th and score 36 in corruption in the year 2013, means corruption score is below 50, very high rate of corruption. The Corruption Perceptions Index 2013 serves as a reminder that the abuse of power, secret dealings and bribery continue to ravage societies around the world.

Public View's on Police Corruption

Corruption in police department in which a police officials and staffs are involved takes graft or bribe is crime, illegal and unethical. Police corruption is an institutional disease that is often difficult to detect and to control. Corruption affects not only the two parties involved in a scandal (usually a public official and an individual or business seeking to bribe the official), but can also have devastating effects on the public at large[12]. The configuration of the corrupt transaction may adopt several forms with different outcomes for the intervening parts, this makes corruption a complex concept. Although it is present in all countries in some way, corruption is most pervasive throughout the developing world.

The opposite of honest is corruption. If every police officer of the country becomes honest, then the country will surely grow by leaps and bounds. Honesty leads to growth, development and progress in all aspects of life, but this is not in practice in real life. The relationship between corruption and the economic development has led to the growing belief that the extent and persistence of public corruption is the greatest obstacle to achieve steady growth in the developing world.

In several cases police officials compelled the family of a man who had committed suicide to pay a bribe for the release of his body, in another case a police officer was penalized for extorting money from a trader by threatening to implicate him in a murder case. Such incidents make it like a commercial transaction. The general public loose trust in the police department by such incidents and are lead to believe that everything can be done if one is in position to talk in terms of money or power with the police officials. Safeguards against police misconduct exist throughout the law.

Indian police weekly collects bribes known as *hafta*, from traders and kiosk owners so that these petty vendors may carry out their activities. The police have been known to resort to violence when collecting these *haftas*. In 1996, a fruit vendor in Delhi was

[10]*Available at:* http://www.transparency.org/cpi2013/results (Last visited on August 21, 2014).
[11]*Ibid.*
[12] Varese, F, "Pervasive corruption, Economic crime in Russia", *Kluwer Law International* pp. 99-111 (2000).

beaten to death by two policeman because he failed to pay *hafta*[13]. Common man of India today is under no illusion about the moral standards of the policeman. They draw an instant and outright connection between corruption and Police Department[14].

Police corruption are divided in two parts:

a) Internal b) External

(i) Internal Corruption includes illegal acts and agreements within a police department by more than one of the officers

(ii) the external corruption is the illegal acts and agreements with the public by one or more officers in the police department[15].

The cost of the police corruption is quite high. First, a corrupt act is a crime.

Secondly, a police corruption detracts from the integrity of the police and tarnishes the public image of law enforcement. Third, Corruption protects other criminal activity such as drug dealing and prostitution. Protected criminal activities are often lucrative sources of income for organized crimes[16]. Corruption is the work of a few, dishonest, immoral police officers. Unenforceable laws governing moral standards promote corruption because they provide criminal organization with a financial interest in undermining law enforcement. Narcotic corruption is an inevitable consequence of drug enforcement. Providers of these illegal goods and services use part of their profits to bribe the police in order to ensure the continuation of criminal enterprises.

Sometimes the police officers are manipulated by the political leaders. The police officers appointments, transfers, reward and punishment are misused by them for their own selfish purpose at the cost of public interest. The political leaders appoint wrong person for the top jobs, so that they can carry out the dictates and wishes of their political master of their own survival.

As per the survey done by the International Global Corruption Barometer findings are based on 1,14,000 people interviewed in 107 countries between September 2012 to March 2013 among the institutions that were most affected by corruption were Political parties and then Police department reigned supreme. 86% of respondents thought that all political parties in India were corrupt, while 75% percent thought that Police department was corrupt.[17]

Despite an attempt to eliminate corruption by ways like increased salaries, upgraded training, incentives for education, and developing policies that focus directly on factors

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[13]Michael J.Trebilcock and Ronald J. Daniels, "Rule of Law Reform & Development" EE *Publishing Ltd*. 138 (2008).

[14]Jon S.T. Quah, "Curbing corruption in Asian Countries: An Impossible Dream?" *Emerald Group Publishing Ltd*. 78 (2011).

[15]*Ibid.*

[16]Available at: http://www.cliffsnotes.com(Last visited on September 11, 2014).

[17]Transparency International, *available at*:http://transparency.org (Last visited on April 30, 2015).

leading to corruption, it still exists. The cost of the police corruption is quite high. First, a corrupt act is a crime. Secondly, a police corruption detracts from the integrity of the police and tarnishes the public image of law enforcement. Third, Corruption protects other criminal activity such as drug dealing and prostitution. Protected criminal activities are often lucrative sources of income for organized crimes[18]. Corruption is the work of a few, dishonest, immoral police officers. Unenforceable laws governing moral standards promote corruption because they provide criminal organization with a financial interest in undermining law enforcement. Narcotic corruption is an inevitable consequence of drug enforcement. Providers of these illegal goods and services use part of their profits to bribe the police in order to ensure the continuation of criminal enterprises.

Causes and factors affecting the development of corrupt practices are as under[19]
The main cause is the police officials have ceased to act as professionals and are politicized to a great extent. They are manipulated by political leaders, who misused the power of appointments and transfers to patronize weak or corrupt officers for their own selfish purposes at the cost of the public interest. These leaders appoint wrong persons for the top jobs as they are willing to carry out the dictates and wishes of their political masters of their own survival. The main areas of their interferences are appointments, transfers, rewards and punishments.

(1) **Discretion-**The exercise of discretion is argued to have both legitimate and illegitimate bases.
(2) **Low managerial visibility-** A police officer's actions are often low in visibility as far as line management is concerned.
(3) **Low public visibility-** Much of what police officers do is not witnessed by members of the public.
(4) **Peer group secrecy-** 'Police culture' is characterised by a high degree of internal solidarity and secrecy.
(5) **Managerial secrecy-** Police managers have generally worked themselves up from the 'beat' and share many of the values held by those they manage.
(6) **Status problems-** Police officers are sometimes said to be poorly paid relative to their powers.
(7) **Low Salaries-** Low pay package also one of the main factor of corruption in police department.

Association with Police officers inevitably come into contact with a wide lawbreakers/contact variety of people who have an interest in police not doing with temptation what they have a duty to do. Such people may have access to considerable resources.

[18]http://www.cliffsnotes.com (Last visited on September 11, 2014).
[19]Tim Newburn, "Understanding and preventing police corruption: lessons from the literature" *RDS* 17 (1999).

In Police recruitment in state of Uttar Pradesh thousands of constables were recruited. Later on, it was discovered that there had been a large scale corruption in recruitment involving 13 officers of the ranks of IG and DIG. Thousands of constables were removed from services. They knocked the door of the Court, many had to be taken back in service. Action being taken against officers through a departmental enquiry, which may take years to finalize it[20]. (Amar ujala (Hindi) dated 5th January, 2010).

Policeman who are supposed to protect the people are robbing the public. There is so much corruption and lawlessness in the country that even the judges appear to be afraid of the criminals and finding it difficult to award punishment to them[21] because the higher authorities or politicians supporting the corrupt officials.

The police are shooting the innocent citizens in the name of encounter of hardcore criminals.As per the National Human Rights Commission 2560 police encounters reported between 1993 to 2009, 1224 were founds to be fake encounters, police duty is to protect the citizens and their rights but the police uses the general public to protect their own personal rights and benefits, so the people afraid to go to the police station because police official gives the threat to the public to implicate in a false case. They misuse their powers without any fear of law, government, rules and regulations[22].
There is a provision of compulsory registration of all FIR, but the Police say that it would create more problems than it would solve. It might be misused, leading to substantial harassment of law abiding and innocent citizens. Despite an attempt to eliminate corruption by ways like increased salaries, upgraded training, incentive for education, and developing policies that focus directly on factors leading to corruption, is still exist.

Renowned cases of Corrupt Police Officers
Some of the latest cases of police officials where it shows the dereliction of duty:

PriyadarshiniMattoo's Murder Case: Priyadarshini, a law student of Delhi University was allegedly raped and murdered at her flat in 1996 by Santosh Singh, son of an IPS officer. The trial judge and the High Court agreed that under the influence of the Santosh's father J P Singh had manipulated the probe in the initial stages to help the accused. The Delhi High Court criticized the Delhi police "for absolute dereliction of duty". Terming the police failure to protect the life of a citizen of the state "atrocious", the bench remarked: "You are the root cause of all this. Had action been taken during that time, the girl (Mattoo) would have been alive. Several instances of negligence on the part of the police officials were noted by the High Court[23].

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[20]J.P.Mittal, *India's Fight against Corruption* 33 (Atlantic Publishers New Delhi, 2012).
[21]*Ibid.*
[22]*Ibid.*
[23] The Indian Express, September 28, 2006*available at* http://www. Indianexpress.com (Last Visited on August 12, 2014).

The police officer who was the Investigating Officer of the case did not record the statement of the key witness, Kuppuswamy, the neighbor of the victim, who saw the accused outside victim's flat on the day of the murder. His statement was only recorded after the initial investigations were over.

The Investigation Officer also kept evidence like samples of blood and semen collected from the scene of occurrence for four days before handing it to the hospital. Police officials ignored several complaints made by the victim during 1994-1996 against Santosh Singh for stalking and harassing her. CBI was charged for not following an 'official procedure' in the DNA tests and for keeping away the fingerprint report from the court[24].

The judgment of the Trial Court in 1999 acquitting the accused on the basis of lack of evidence was criticized by the High Court which gave its final verdict in October, sentencing the accused to death penalty by the efforts of general public.

Shivani Bhatnagar's Murder Case: Shivani Bhatnagar, a journalist for the Indian Express was found murdered in her flat in East Delhi on 23rd January, 1999. Her murder became a scandal that reached into the top levels of Indian politics. A top ranking officer of the Indian Police Service Ravi Kant Sharma was charged with the murder by the Delhi Police, who investigated the case. R K Sharma and his wife Madhu, have alleged that Bhatnagar's murder was planned by Pramod Mahajan who was alleged to have been the father of Bhatnagar's child. It took the police more than 3 years to make the first arrest in the case. The delay in nabbing the accused, the apparent absence of a clear motive in the crime, and the lack of transparency in the case raised several questions.

As the investigation progressed there were constant whispers that the cops were dragging their feet on the case due to involvement of a senior BJP politician. An ACP of the Delhi Police's Crime Branch was arrested on charges of corruption by derailing the investigations in the case[25].

(NitishKatara's Murder Case: Nitish Katara, a 25-year-old business executive in Delhi, was murdered on February 17, 2002, by Vikas Yadav, the son of influential politician DP Yadav. the cost of the Katara murder trial by taking into account various heads of expenditure such as 'investigation', 'police protection provided to witnesses', 'jail lodging of accused', etc. In the 12-year trial of Vishal, Vikas and Sukhdev Yadav, Rs. 46.71 lakh was spent to employ a special public prosecutor in the trial and High Courts. The report said two proceedings in the lower court— Sukhdev Yadav had a separate trial-that took place over 377 hearings cost Rs. 21 lakh. The proceedings in the Delhi High Court cost an average of Rs. 5 lakh per month.

[24] Hindustan Times, October 18, 2006 (Last Visited on August 12, 2014).
[25] The Indian Express, August 13, 2006 available at http://www.indianexpress.com (Last Visited on August 1, 2014).

Lodging the under trials from 2003-2014 and transporting them to and from the court cost Rs. 76 lakh. The high expenditure could be attributed to wastage and replicated work due to "mindless and unscientific planning in all the wings of the criminal justice system," the report goes on to say. The organs of the justice system are "highly chaotic in their functioning and are immensely overburdened"[26].

Some Important Role of Police in Preventing the Corruption

Only 25% police officials are honestas per the survey of International Global Corruption Parameter, which able to prosecute the corrupted people. They are serving the nation honestly and help the society, government, and people through corrupt the wrongdoers but this ratio is not sufficient to eliminate the corruption wholly.

There are several famous cases in which police officials diligently investigated the cases through the agency of CBI and CVC. They play a major role in investigate or prosecute the white collar crimes like bribe, graft, black money, drug trafficking, smuggling and corruption. CBI plays a major role in arresting corrupt official whether private or public and taking a serious action against them.

Various scams are done by the politicians where CBI or police played an important role to investigate the case and prosecute the offender e.g. 2G scam, Choppergate scam, Commonwealth games, Railgate, Colgate, Satyam Case, Telgi stamp paper case, Adarsh society, Hawala scam,where the police has played an important role also.

The Police Act- A Critique Legislation

The Police Act of 1861 has remained unchanged over 145 years and it is the testament to the unreformed nature of the Indian Police force. Over the years the powerful institutions of law and order have been bent to conform to executive's will and convenience. The lack of any effective accountability mechanisms and periodic review of performance is causing the police to lose confidence of the public and another problem of widespread corruption and indiscipline towards law and procedures are eroding the faith of people in the police. For reform the government had set up a Soli Sorabjee committee to suggest police reforms and they came up with a draft bill which was never passed by the Parliament. Even, the Justice J.S.Verma committee also suggested some police reforms. There is a need to replace the Police Act, 1861 with strong legislation that reflects the democratic nature of India's polity and the changing times. The Act is weak in almost all the parameters that must govern democratic police legislation. The task of improving the existing situation cannot be left to the police department alone. Political authorities and the Union Home Ministry have to step in for stopping the situation from deteriorating further and also for its betterment.

Recommendations for controlling Police Corruption

[26] Hindustan Times, September 28, 2006*available at*http://www.hindustantimes.com (Last Visited on August 18, 2014).

Need for Legal and JudicialReforms in Police System

A public interest litigation filed by the former Director General of Border Security Force, Prakash Singh, was one of the first initiatives taken up in the direction to clean up the corruption in the country's police force. He believed that India required a police force with a different working philosophy. He said that, after thirty-five years of experience he got an insight into the politicization, corruption, and criminalization of the force[27]. A committee to draft an Act for making the working of the police department transparent and accountable was constituted on 20th September 2005. It is called The Police Act Drafting Committee (PADC). Former Attorney General Soli Sorabjee, ex-BSF Chief Ajai Raj Sharma, former Delhi Police Commissioner, the Director-General of the Bureau of Police Research and Development, and some other prominent names from the police force are associated with it. The committee is working towards formulating provisions to deal with issues of terrorism, human rights, crimes against women, and weaker sections of society, and the latest investigation methods[28].

Keeping in mind the recommendations to be given by the above Committee, the Supreme Court has set the deadline for the Central and State government to implement these reforms so as to keep country's police administration above political interference and corruption. These reforms will mainly include[29]:

a) A minimum tenure for DGP's and other senior officers. b) Setting up of State security commissions. c) Separation of investigation from law and order, and d) Establishment of a police panel to decide transfers and promotions.

Efforts for curbing this widespread social evil, called corruption have to come from both the police and the civil society. Society members should be educated about the negative effects of corruption within the police force and its long term disadvantages. For controlling corruption the police department requires an organization lead by people of strong character and who have good leadership qualities. The departmental goal should be well defined and should be pursued earnestly.

Anti-Corruption Agencies and Courts

The Directorate General of Income Tax Investigation, CVC CBI all deals with anti-corruption initiatives. Certain states such as Andhra Pradesh and Karnataka have their own anti-corruption agencies and courts. Andhra Pradesh anti-corruption Bureau has launched a large scale investigation in the cash for bail scam. CBI Court Judge was arrested on 19th June 2012 for taking a bribe to grant bail to former Karnataka Minister

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[27] The Indian Express, September 25, 2006*available at*http://www.indianexpress.com (Last Visited on August 19, 2014).

[28] The Hindu, September 24, 2006*available at*http://www.hindu.com (Last Visited on August 21, 2014).

[29] TI, India, "India Corruption Study 2005 to Improve Governance", 9 *CMS* 12-13 (2005)

Reddy, who was allegedly amassing assets disproportionate to his known source of income[30].

Till date, only eleven states have enacted fresh Police Acts to replace the old legislation and two states have amended their earlier laws on the subject to accommodate the new directives of the Court[31].The UT of Chandigarh has chosen to adopt the Punjab Police Act. Six states have completed the drafting of new police legislations or tabled bills in the assembly[32]. Two states are currently in the process of drafting the new police Act[33]

In April, 2010 Delhi came up with a Draft Delhi Police (Amendment Bill). The piecemeal amendments completely disturbed the internal logic of the Principal Delhi Police Act of 1978 and in every way thwarted the directives of the Apex Court. In October 2010 after much civil society uproar the Ministry of Home Affairs decided to abandon the idea of an amending legislation and introduced the Draft Delhi Police Bill, 2010. The Draft Bill is much along the lines of the Draft Model Police Bill but unfortunately sans the safeguards that were present in the model bill.

However, the complete lack of transparency, community consultation or civil society input in this process by most states. State Governments therefore need to publicize their initiative to redraft police legislation. This will ensure that the legislation adequately reflects the needs and aspirations of the people in relation to the police service they want. This can be done by various means including[34]:

- Inviting public and civil society participation in drafting committees
- Inviting public submissions on the type of police service communities would want
- Inviting input from police at all levels about the type of service they want to be part of.
- Ensuring that draft that go before the state assemblies and Parliament is in the public domain and made available for comment under proactive disclosure provisions in section 4(1)(c) of the Right to Information Act.

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[30]'Andhra cash or bail scam Suspended judge questioned', Times of India (June 19, 2012)

[31] States of Assam, Bihar, Chattisgarh, Haryana, Himachal Pradesh, Punjab, Rajasthan, Sikkim, Tripura, Uttarakhand & Meghalaya have passed new police legislations. Kerala and Gujarat have passed Amendment Acts.

[32] Goa, Kerala and Tamil Nadu have tabled their drafts in the assembly. Arunachal Pradesh, Andhra Pradesh, Delhi and West Bengal have their drafts ready, though some are not in the public domain.

[33] Orissa and Uttar Pradesh have set up committees for drafting new legislations but have not produced a draft.

[34] Commonwealth Human Rights Initiative (CHRI) Seven Steps to Police Reform, available at http://www.humanrightsinitiative.org, September 12, 2010.

Conclusion

In today's situation there is an urgent need to address basic issues like improving the working conditions of the police persons, inhumanly long working hours, the inadequate police-population ratio, a pay structure which is not proportional to the work allocated and, the disproportionately low budget for meeting the day to day expenses. Need to reform police act as well as increase their accountability, pay packages, basic amenities and responsibility towards the people will help to reduce the corruption. All these are some major factors which are responsible for contributing to the image of the Police Force as insensitive and a corrupt organization.

Communities are the main beneficiaries of good policing and the main victims of bad policing-community and civil society participation in the process is essential if the police are going to be efficient, effective and accountable.

As long as a majority of citizens are willing to go along with corrupt police officers, mainly for the reason to obtain favors, there is no way in which corruption can be curbed. For making the picture cleaner and corruption free for the future generation, it is necessary to put in efforts now.

Role of Bar in Accelerating Justice

Devika Rana*

"For there is but one essential justice which cements society, and one law which establishes this justice. This law is right reason, which is the true rule of all commandments and prohibitions. Whoever neglects this law, whether written or unwritten, is necessarily unjust and wicked,"
……..opined Marcus Tullius Cicero

Introduction

It's obvious that the people would have a legitimate expectation from the Courts. However, their discontents refuse to die down when it comes to learn that justice is either denied or delayed for a no good reason. The plot of dissatisfaction thickens at a time when the justice-seekers keep staring at the walls of Courts in expectation of justice.

The Courts before whom the litigation is presented often deny the charges that they mostly washing its hands off in not taking appropriate measures for finalizing the cases on time. Although Courts show inclination of taking actions, the lacunas—be it from the part of advocates, justice seekers or the entire legal system—resting from years lead us to nowhere. Then the question comes: When the Indian society would succeed to knock the boundaries resting upon judicial complexities?

The Bar, which is supposed to be an umbrella organization of advocates, should come at the forefront at a time when there seems no end to long list of complaints against the desperate judiciary. In a bid to accelerate justice, the Bar could play a vital role and, it's beyond any iota of doubt that they would succeed an inch to end the current deadlock though it's not an easy task which could be finished over a cup of tea.

"Lawyers play a significant role in the advancement of justice. It canbe said that the lawyers play the role of pro-pounders in the justicedelivery system. Having specialized in the legal field they champion the cause of victims of fundamental and legal rights; protect the civil andhuman rights of citizens; prevents the State from acting arbitrarily. In anutshell, there is heavy load on the shoulders of the lawyers to protectthe democratic system of governance. These functions of lawyers helpin strengthening the independence of judiciary. It can be said thatstronger is the Bar, stronger is the Bench and together they can up-holdthe rule of law and democracy."[1]

* ***Assistant Professor, Siddhartha Law College, Dehradun, Uttarakhand.***

It's unequivocally believed that an active and vibrant bar has potential to give a blow to any form of injustice—whether it is deep-seated or superficial. The claim gets momentum when we knit our eyebrows in an exaggerated effort at remembering those days when the advocates leaded the movements carried during pre-independence era against British.

Advocates have been aalways royal and elite class in the history of India. To name just a few, Jawahar Lal Nehru, MK Gandhi, Bal GangadharTilak, LalaLajpat Rai, Dr BR Ambedkar, and Sardar Vallabh Bhai Patel were at the forefront of national movement against Britishers in India during the pre-independence period. They were the promising freedom fighters who belonged to the legal fraternity. Moreover, Dr. B.R. Ambedkar, who stressed on the need of establishing the cause of downtrodden sections of society, played a leading role in framing of our Constitution. In order to quicken the pulse of freedom movement, the then lawyers joined the stage of protests and stood neck-to-neck with the ordinary mass. They gave up their practice and they paid a price, as many of them were sent to jail

So it is evident that a vibrant Bar has potential to peel off any form of injustice. The Bar Council of India was established by Parliament under the Advocates Act, 1961. The following statutory functions u/s 7 cover the Bar Council's regulatory and representative mandate for the legal profession and legal education in India:

1. To lay down standards of professional conduct and etiquette for advocates.
2. To lay down procedure to be followed by its disciplinary committee and the disciplinary committees of each State Bar Council.
3. To safeguard the rights, privileges and interests of advocates.
4. To promote and support law reform.
5. To deal with and dispose of any matter which may be referred to it by a State Bar Council.
6. To promote legal education and to lay down standards of legal education. This is done in consultation with the Universities in India imparting legal education and the State Bar Councils.
7. To recognize Universities whose degree in law shall be a qualification for enrolment as an advocate? The Bar Council of India visits and inspects Universities, or directs the State Bar Councils to visit and inspect Universities for this purpose.
8. To conduct seminars and talks on legal topics by eminent jurists and publish journals and papers of legal interest.
9. To organize legal aid to the poor.
10. To recognize on a reciprocal basis, the foreign qualifications in law obtained outside India for the purpose of admission as an advocate in India.
11. To manage and invest the funds of the Bar Council.

[1]Available on http://ghconline.gov.in/Document/Article-1.pdf accessed on Jan 13, 2016 at 09:42 am.

12. To provide for the election of its members who shall run the Bar Councils."[2]

Its inherent that we humansare very demanding and we keep lots of expectation and desires. Some of them are fulfilled while long list of desires finds a safe space in below the carpet. In the quest of fulfilling our expectations, sometimes we lose balance by giving an air to over expectation. However, it would be a debacle of justice to claim that we people are shrouded with expectations that are unjust. The Oxford dictionary describes the meaning of just as anything "based on or behaving according to what is morally right and fair."[3]So, though the justice-seekers have kept expectations with the legal system, their desires could not be said unjust if we correlate their overt and covert feelings with the dictionary meaning of just.

There are many anomalies, including judicial complexities that give credence to the charge that a just society is yet to be fully irrigated on Indian soil. However, the Indian society is full of civilization. A civilized society or country has a well-developed system of government, culture, and way of life and that treats the people who live there fairly."[4] Moreover, fairness has a strong reliance over just, reasonable and logical. And justice is "The fair and proper administration of laws."[5]

While taking the concepts of justice into account, a vivid picture comes in our mind that a legal system should be created which waters a just society. The legal pundits and jurists have time and again asserted that the ultimate goal of law is to create an egalitarian society resting upon the frontier of reasoned and lawful actions. The relevancy of claim attains momentum when we acknowledge the reading of much-admired jurist Mr. LJM Cooray, who has authored the scholarly book of "The Rule of Law", where he stated concept of justice in three facets.[6]

1. Interpersonal adjudication

The concept of justice is based upon the rights and duties of the individual person. The liberal concept of justice is an interpersonal one — resolution of conflicts betweenvarious individuals. Individuals can suffer wrong. Individuals can be protected, punished and granted restitution. Justice is very much an interpersonal thing. It consists in upholding that which is right and due as between various persons. Social justice which involves society and groups is a concept which is directly antagonistic to theactual liberal idea. It

[2]Available on http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/ accessed on Jan 13, 2016 at 06:12 pm.

[3] Available on http://www.oxforddictionaries.com/definition/english/just accessed on Jan 13, 2016 at 06: 22 am.

[4] Available on http://dictionary.cambridge.org/dictionary/english/civilized accessed on Jan 13, 2016 at 06: 22am.

[5]Black Law Dictionary, 5th reprint edition 2002.

[6]Available on http://www.ourcivilisation.com/cooray/btof/chap182.htm, accessed on Jan 13, 2016 at 04:42 pm.

is a concept which is non achievable and nebulous. Its proponents increase state power to affect it, with counterproductive results.

2. Law based on standards and fault

The second facet of the liberal concept of justice is that a person should not be punished except for fault he/ she commits (intentional, reckless or negligent wrong doing, strict liability applying in exceptional circumstances). The idea of fault is the golden thread that most of the times runs through the fabric of the legal order. The Magna Carta contains one of its early manifestations. But the common law relating to crimes, civil obligations and property rights are characterized by the notion that fault underlies punishment. A system of sanctions based on fault presupposes known and pre-existing standards of conduct which bind the community.

3. Due process

The third and one of the important features of the liberal concept of justice is the weight on procedures. The liberal does not believe in the likelihood of achieving equality, democracy, justice, and the public good and other ideals through legislative and prescriptive action. Such a task is too complex for the human imagination, execution and conception. An importance on procedure is one of the fundamentals of the rule of law. Procedures provide that before judicial, legislative or executive decisions are taken, a series of checks and balances are in place to militate against the possibility that the decisions will not be hasty, ill-conceived or based on corruption, desire, eccentricity or ideology.

Like this, the preamble of our Constitution has projected to secure social, economic and political justice to all the citizen of India while maintaining that justice will be sabotaged when ignored the true spirits of liberty, equality and fraternity.

“Justice, Social, Economic and Political” is the spirit and vision of ourConstitution as adopted by us which WE, THE PEOPLE OF INDIA havesolemnly given to ourselves on 26th November 1949. It is the duty of theState to secure a social order in which the legal system of the nationpromotes justice on a basis of equal opportunity and in particular ensures thatopportunities for securing justice are not denied to any citizen by reason ofeconomic or other disabilities. Access to prompt and quality justice is the keyfor realizing this vision.[7]

Role of Lawyers[8]

“The role of lawyers is very important in justice delivery system. The commitment of these professionals can change the whole scenario. Unfortunately, they are also responsible for delay due to varied reasons.

[7] lawmin.nic.in/doj/justice/National_Legal_Mission-7NOV2009.pdf

[8] Available on http://www.lawyersclubindia.com/articles/An-All-year-justice-delivery-system-6136 accessed on Jan 15, 2016 at 10:32 am.

1) Lawyers are not precise; they indulge in lengthy oral arguments just to impress their clients.
2) Lawyers are known to take adjournments on frivolous grounds. The reasons range from death of the distant relative to family celebrations. With every adjournment the process becomes costly for the court and for the litigants; but the Lawyers get paid for their time and appearance. More often than not, lawyers are busy in another court. They have taken up more cases than they can handle, hence, adjournments are frequently sought.
3) It is also true that lawyers do not prepare their cases. A better preparation of the brief is bound to increase the efficiency of the system.
4) It is seen that lawyers often resort to strikes. The reasons could be any - it ranges from misbehavior with their colleague both inside court and outside the court to implementation of some enactment. The strike by lawyers against the decision of the government to enforce an amendment in the Civil Procedure Code is an example. This was very unfortunate because the main objective behind these amendments was to curtail delays in disposal of cases."

Despite the fact that there have been certain drawbacks in the working of the lawyers, the lawyers have played a very pivotal role in delivering justice.
"Every Advocate shall in the practice of the profession of law bear in mind that any one genuinely in need of a lawyer is entitled to legal assistance even though he cannot pay for it fully or adequately and that within the limits of an Advocate's economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an Advocate owes to society."[9]

To be more specific the justice delivery system comprises of a triangle system where the parties, lawyers and the Courts play a pivotal role.

1. **The parties-** when we say the parties we refer to those, either the one whose right has been infringed or the one who has violated any of the legal obligation or breached his duty imposed by the law. In a civil case the parties contest with each other on private rights and obligations. Whereas in a criminal matter the offender is prosecuted by the State itself.
2. **The lawyers-**the second angle are the lawyers or the Advocates. They are the one who either represent the aggrieved party in the court or on the other hand defends the on whom the accusation is leveled.
3. **The Courts-**where the parties contest with each other and are represented by the lawyers, the court is that forum at which the parties have approached to avail the remedies provided by the law. As these courts are established to administer justice to the litigants.

The Constitution of India is commonly referred to as the lawyer's paradise. Specially a country like India which has been lagging behind in literacy, including legal literacy, the

[9] Rule 46 of Bar Council if India Rules in part-VI.

role of lawyers become very important in imparting justice to the litigants as well as general public.

In India the Bar Council of India is the highest body for regulating the Advocates. It not only regulates the professional conduct of the Advocates, but also arranges a helping hand for enhancing the educational aspect of the lawyers.

"The Bar Council of India is a statutory body created by Parliament to regulate and represent the Indian bar. We perform the regulatory function by prescribing standards of professional conduct and etiquette and by exercising disciplinary jurisdiction over the bar. We also set standards for legal education and grants recognition to Universities whose degree in law will serve as qualification for enrolment as an advocate.In addition; we perform certain representative functions by protecting the rights, privileges and interests of advocates and through the creation of funds for providing financial assistance to organize welfare schemes for them.[10]"

At a time when the democratic norms were captivated by the authoritarians, the lawyers played a tremendous role by standing as a bulwark against them. If we trace the history, lawyers were put behind the bars simply because they challenged the authoritarian rule and wished to act as a deterrent against them, so as to nurture the democracy preceded by liberalism.

Considering that administration of Justice is a central function of advocates, it is incumbent upon them to play a purposeful role in implementation of various legal aid schemes provided under the Legal Services Authorities Act, 1987. The advocates, as a class and senior Advocates in particular have a solemn duty to ensure justice to all citizens and particularly to poor and marginalized sections of the society and they should rise up to meet the challenge effectively and successfully. The consequences of failure of legal aid schemes are too serious to be ignored. There is no doubt that legal community in India will rise to the occasion and meet the challenge successfully and effectively. Justice to poor alone is the lasting guarantee of continued existence of Rule of Law and democracy in the country.[11]

With the increasing pendency of litigation alternative modes of resolving disputes are been evolved. One such is prominent mode is the concept of Lok Adalat. In this mode the parties resolve their dispute in an amicable manner. In promoting this institution of alternative dispute redressal, it owes much to the Advocates. As they have been pioneers in accelerating justice through alternative dispute mechanism.

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[10]*Ibid.*

[11]Available on http://www.legalserviceindia.com/article/l396-Role-Of-Advocates-In-Implementation-of-Legal-Aid-Schemes.html, accessed on Jan 14, 2016 at 10:42 am.

Judicial Interpretation

The Supreme Court of India in the case of *Hussainara Khatoon (IV) vs. Home Secretary, State of Bihar*[12] held that "under Article 21 is impaired where procedural law does not provide speedy trial of accused; does not provide for his pre-trial release on bail on his personal bond, when he is indigent and there is no substantial risk of his absconding; if an under-trial prisoner is kept in jail for a period longer than the maximum term of imprisonment which could have been awarded on his conviction and if he is not offered free legal aid, where he is too poor to engage a lawyer, provided the lawyer engaged by the State is not objected to by the accused.

Where the petitioner succeeds in establishing his case, the Court would grant him any relief which is necessary to afford proper justice, or to prevent manifest injustice regardless of technicalities such as to issue directions to the Government and other appropriate authorities, as may be necessary, to secure to a prisoner his constitutional rights.

The Supreme Court (per Bhagwati J.) (at 107, para 10) held that the state cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to improving speedy trial." Showing satisfaction with eminent of Supreme Court of India Justice P.N. Bhagwati, Justice Warren Burger asserted that "The notion – that ordinary people want black-robed judges, well dressed lawyers, and fine paneled courtrooms as the setting to resolve their disputes, is not correct. People with legal problems, like people with pain, want relief and they want it as quickly and inexpensively," Justice Warran Burger.[13]

The Supreme Court of India also stated that "We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with legal system have always been on the wrong side of the law. They have always come across 'law for the poor' rather than 'law of the poor'."[14]

It is accepted on all hands that the core function of the legal profession is to encourage the administration of justice. The walls of every society get an added value when it comes to appear that justice is neither delayed nor denied. The civilized society comes victorious in

[12](1980) 1 SCC 98.
[13]Former Chief Justice of the American Supreme Court.
[14]*Husssainara Kathoon vs. Home Secretary, State of Bihar*, AIR 1979 SC 1369.

achieving all the goals by ensuring maintenance of "Rule of Law." and, it'sbeyond any iota of doubt, the lawyers plays a significant role in it.
Further the Supreme Court of India in *Kishore Chand vs. State of Himachal Pradesh*[15]stated that"Though Article 39-A of the Constitution provides fundamental rights to equal justice and free legal aid and though the State provides amicus curiae to defend the indigent accused, he would be meted out with unequal defense if, as is common knowledge the youngster from the Bar who has either a little experience or no experience is assigned to defend him. It is high time that senior counsel practicing in the Court concerned, volunteer to defend such indigent accused as a part of their professional duty.

In The case of *Nandini Sathpathy vs. P L Dani*[16] the Supreme Court of India asserted the importance of the presence of a Advocate of the person in custody, underlining the importance of lawyers in paving the path of justice and held that: "The right to consult an advocate of this choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Art. 22 (1) is that it is fundamental to the rule of law that the serviceof a lawyer shall be available for consultation to any accused person tinder circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice. Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Art. 20(3), is an assurance of awareness and observance ofthe right to silence. Art. 20(3) and Art. 22(1) may in away be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined."

In an endeavor to accelerate justice, the highest Court of land in India has made various remarkable pronouncements in a bid to let the Indian society make a deliberate and conscious departure from those attempts which play a role in miscarriage of justice.

Conclusion
From the above discussion one thing becomes clear that a fearless, vibrant and alert Bar have potentials to thwart the authoritative rules and they play a momentous role to envisage an independent and strong judiciary. It has been broadly accepted that the independent judiciary is the pillar of any form of democratic set up and it's the Bar on which entire independent judiciary rests upon. Noted, the Bar is regarded as the "Mother of the Bench" and the "bright mirror of the Judicial Officers". The Bar (advocate) collects facts and make the judicial officers acquaintance with the cases. So, they are not only the persons representing the clients but also a deemed to be the officers of the court in accelerating justice.

[15]AIR 1990 SC 2140.
[16] AIR 1978 SC 1025.

The advocates play acontributory role in establishing and materializing the rights of persons. They appear for others in the courtroom, fight for the justice and is expected to advocate for a cause. Legal profession is based on service to mankind. It is neither a business nor a profession as it has a strong reliance on ethical norms, which may lack in business. The business is carried with a view to ensure financial gains by any means, whereas people jump in legal profession to earn but by placing themselves within the attire of ethical norms. The members of the Bar as an Advocate render the services to the people by helping the court to reach to a conclusion so as to ensure: none's rights have been violated.

It also helps the court for reasonable, adequate and efficacious remedy in the case of violation or infringement of any right. It is accepted on all hands that the core function of the legal profession is to encourage the direction of justice. The walls of every society get an added value when it comes to appear that justice is neither been delayed nor denied. The civilized societies come victorious in achieving all the goals by ensuring maintenance of "Rule of Law"and, it'sbeyond any iota of doubt, the lawyers play a vital role in it achieving this.

Constitutional Democracy in India

Anju Pandey*

Introduction

Democracy may be a word familiar to most, but it is a concept still misunderstood and misused at a time when dictators, single-party regimes, and military coup leaders alike assert popular support by claiming the mantle of democracy. Yet the power of the democratic idea has prevailed through a long and turbulent history, and democratic government, despite continuing challenges, continues to evolve and flourish throughout the world. Democracy, which derives from the Greek word 'demos', or 'people', is defined, basically as government in which the supreme power is vested in the people. In some forms, democracy can be exercised directly by the people; in large societies, it is by the people through their elected agents. Or, in the memorable phrase of President Abraham Lincoln, '*democracy is government of the people, by the people, and for the people'*[1].

"No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time[2]"

This famous quote attributed to the former British prime minister Sir Winston Churchill (1874-1965) focuses right on the weak spot of democracy: There is no such thing as the "perfect form of government" on earth, but any other form of government produces even less desirable results than democracy. Until today, no other form of government has been invented that could regulate public affairs better than democracy[3].

The highest aim of a society, as Ambedkar believed, was the "growth of personality" according to him, Society's duty was to enable each individual "to assume any role he is capable of assuming provided it is socially desirable". For Ambedkar, democracy was the political form best suited to bringing about the kind of just society he envisioned. But governments required people to take on different social roles, he argued, which tended "to

Research Scholar, Public Policy Law and Governance, Central University of Rajasthan.

[1] Majid Behrouzi; *Democracy* As the Political Empowerment of the *People*, p.5 available at http://books.google.co.in.

[2] Available on www.democracy-building.info accessed on 13/02/2014 at 14:33 pm.

[3] Available on http://www.democracy-building.info/definition-democracy.html accessed on 13/02/2014 at 12:30 pm.

develop the personality of the few at the cost of the many", something that was antithetical to democracy throughout his writings, he sought to establish how democracy might look in India. It would have to look quite different than in the West, he insisted, because the very nature of Indian society went against the individual – it was a society constituted by its communities.[4]

Democracy - Key Elements

Democracy is more than just a set of specific government institutions; it rests upon a well - understood group of values, attitudes, and practices - all of which may take different forms and expressions among cultures and societies around the world. Democracies rest upon fundamental principles, not uniform practices[5]. In order to deserve the label *modern democracy*, a country needs to fulfil some basic requirements - and they need not only be written down in its constitution but must be kept up in everyday life by politicians and authorities: Guarantee of basic Human Rights to every individual person, the state and its authorities as well as any social groups (especially religious institutions). Democracy is government, in which power and civic responsibility are exercised by all adult citizens, directly, or through their freely elected representatives. Democracy rests upon the principles of majority rule and individual rights. Democracies guard against all-powerful central governments and decentralize government to regional and local levels, understanding that all levels of government must be as accessible and responsive to the people as possible.

Democracies understand that one of their prime functions is to protect such basic human rights as freedom of speech and religion; the right to equal protection under law; and the opportunity to organize and participate fully in the political, economic, and cultural life of society. Democracies conduct regular free and fair elections open to citizens of voting age. Citizens in a democracy have not only rights, but also the responsibility to participate in the political system that, in turn, protects their rights and freedoms. Democratic societies are committed to the values of tolerance, cooperation, and compromise. For the founding father of Indian constitution, democracy did not mean merely political democracy or the people's right to cast their vote periodically to elect the representatives. Representative democracy means principle agent relationship.[6]

Separation of Power between the institutions of the state i.e. Executive, Legislative and Judiciary, this is very essential element because until and unless powers are decentralise democracy cannot be formed. Freedom of opinion, speech, press and mass media, all these freedoms work as means or tools in the hands of the common people. And empower

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[4] Shabnum. Tejani, *The Necessary Conditions for Democracy R Ambedkar on Nationalism, Minorities and Pakistan*; Economic & Political Weekly, December 14, 2013 Vol. xlviii no 50.

[5] Available on iipdigital.usembassy.gov/st/.../06/20080623194736eaifas0.658703.html. accessed on 11/02/2014 at 14:30 pm.

[6] Dennis C. Mueller; *Constitutional Democracy*, p. 17, available at http://books.google.co.in/ accessed on 13/02/2014 at 15:05 pm.

them to exercise their democratic power and avail their social, economic and political rights effectively. Religious liberty, this is the very essential element for the proper functioning of the democracy, particularly for a country like India, which is multi religious. So that the people have religious liberty till it not cause harm to the others liberty and if it cause harm to others, than it cannot be unchecked merely on the ground of religious freedom and then after the role of the state comes into picture to bring equilibrium and resolve conflict as per the democratic values. General and equal right to vote (one person, one vote), without any discrimination is a pre condition for the democracy.

Good Governance (focus on public interest and absence of corruption), in my opinion it should be the goal of the democracy so in that's way it gives direction to working of the democracy. Rule of law, which means each and every one whatever position it holds is equal in the eye of law, equality is a very essential element without it the confidence of the people in the functioning of the government is not possible at all. Independent judiciary, independency of the judiciary is very essential especially in a system where it works as a guardian of the constitution. But in the working of the democracy harmony between several principles is needed or we can say a balance is required[7]. If we try to find out these basic key elements in our constitution, than definitely we could find all or more than that but the big problem before our constitutional democracy, these idea of constitutional democracy is still not reflected in the life of the people. All these elements are sine qua non for the functioning of the democracy.

Constitutional democracy

Constitutional democracy can be defined as a system of government in which political authority, 'the power of government' is defined, limited, and distributed by a body of fundamental law called "the Constitution" and the electorate, 'the general voting populace within the political society' has effective means of controlling the elected representatives in the government and holding them accountable responsible, or answerable for their decisions and actions while in public office. [8]

According to this definition there are two basic ingredient for constitutional democracy, constitutional ingredient and democratic ingredient. The *constitutional* ingredient of modern constitutional democracy is called "*constitutionalism*," or "*constitutional government*." Or a '*limited government*" This ingredient relates to how political authority is defined, limited, and distributed by law. Under constitutionalism, the Constitution, the basic law of the political community, defines and limits the power of government and determines the degree and manner of distribution of political authority among the major organs or parts of the government.

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[7] Peter H. Russell, David M. O'Brien, *Judicial Independence in the Age of Democracy: Critical Perspectives,* p 21available at http://books.google.co.in.

[8] Available on http://www.proconservative.net/cunapolsci201parttwoa.shtml accessed on 12/02/2014 at 16:14 pm.

The *democratic* ingredient of modern constitutional democracy is *representative democracy* and relates to who holds and exercises political authority, how political authority is acquired and retained, and the significance of the latter as regards popular control and public accountability of those persons who hold and exercise political authority. In a representative democracy, political authority 'the power to make and enforce authoritative, binding decisions for and in the name of the entire political community' is held and exercised by the voter's elected representatives in the government and by officers appointed or succeeding to their positions of authority in accordance with the laws of the community, political authority is acquired and retained either directly or indirectly as the result of victory in free and competitive elections, and the voting citizenry, through participation in free and competitive elections held periodically, can effectively control their elected representatives and hold them responsible for the consequences of their exercise of governmental power as well as for the manner in which and the purposes for which they exercise that power[9].

In simple word constitutional democracy means, a democracy according to the constitution or in other word a democracy which is bound by rule and law. In our democratic legal framework there is detailed provision to run the democracy and particularly the enactment and incorporation of right to information act 2005, make the democratic ingredient of constitutional democracy much more effective and efficient. NOTA, is a step ahead in the line to give real democratic power in the hands of the common people.

If anyone tries to locate, basic elements of constitutional democracy as discussed above in Indian Constitution. Our constitution provided the proper check and balance and put limitations on democratic authorities by laws. But when we evaluate these basic norms of Constitutional democracy in day to day life, then picture comes is different to some extent. And this difference in law and practice is not because of weak constitutional provision but social, economic and political condition of Indian society. These are- social structure of a country, religious hierarchies, caste hierarchies within a religion, divided on the ground of backward and forward communities, a country whose citizen still living in a extreme poverty and illiteracy, are they in a position to elect their representative freely without any influence and further, are they really in a position to make the elected representative accountable and responsible for the exercise of their power.

Constitutional democracy is not a rule but a living principle, a principle which grows, evolves, modified and develops with the passage of time to make it suitable for generations to come. As a nation we were a British colony and now we stand ourselves as a world largest democracy which is really a thing to praise. We should not forget that, we are still in a transforming stage so there is a need to remove impurities and incorporate

[9] Available on http://www.proconservative.net/cunapolsci201parttwoa.shtml accessed on 13/02/2014 at 10:10 am.

the ideal principle to make our constitutional democracy much more much more responsive and people centric, by deliberative and collective effort of all.

Democracy as envisaged by our constitution maker:

By the word 'democratic', the makers of our constitution envisaged not only political but also social and economic democracy. For Dr. B.R. Ambedkar, social and economic democracy was the real aim and ultimate goal of the constitution. Jawahar Lal Nehru had observed that democracy of his conception was only a means to an end. The end was the good life for the individual which must include a certain satisfaction of the essential economic needs. It also means working for a certain measure of equality of opportunity in the economic sphere. He further felt that political structure would weaken and disintegrate, if social economic problems like abject poverty and gross inequalities are not tackled and removed[10]. In the words of Mahatma Gandhi, Intolerance is itself a form of violence and an obstacle to the growth of a true democratic spirit.

In a democracy, the central figure is the individuality and dignity of the individual. His or her personal liberty, fundamental rights and his or her cherished freedoms must find a preferred place in the constitution and must be preserved inalienable rights of citizens must be respected. Democracy concerns itself with the common man. In a sense, the most important "government official" in a constitutional democracy is each citizen. Unless all citizens take the trouble to understand their rights and responsibilities, and act accordingly, this most advanced form of "government by the best" will not work well, and runs the risk of failure. Truly, the worst enemy of democracy is incompetent varieties that fail, and then lead people to give up on democracy without ever having tried a competent variety. With this in mind, we might ponder the following attempt to define a constitutional democracy:

A constitutional democracy is a government under law in which coalition and majority rule is balanced by minority and individual rights, and in which most rights are balanced by responsibilities — including the responsibility of each citizen to study the history of constitutional government in order to illuminate it in ways that no definition ever can … and in order, thereby, to allow it to evolve further in light of ancient wisdoms and the needs of our evolving global civilization[11].

The rights of children and the infirm, for example, do not require their contemporaneous "reciprocal responsibilities" to understand the origins of those rights. We accord such rights based on a broader sense of reciprocity: For example, if as children we "had" such rights, or if as adults we now wish we had had them, then as adults we must concurrently secure those rights for succeeding generations; and, to secure them, we must strive (among other endeavours) to *understand them. Constitutional democracy requires that, at*

[10] Rao.B. Shiva, *Framing of India's Constitution; Select Document*, Volume 2; Delhi; (1967); p.78.

[11] Available on http://www.jurlandia.org/coreva4.htm#FOUR accessed on 13/02/2014 at 11:20 am.

any given time, an "informed consensus" of responsible adults will secure constitutional democracy as an "intellectual endeavour" which they care, at least minimally, to understand.[12]

As a member of parliament Jaswant Singh told to an American audience several years ago, India should judge not by its gross domestic product, but by a domestic contentment index. Representative government and constitutional democracy are firmly established. Democratic breezes are blowing everywhere, as proved, if disconcertingly to some, by the resulting turmoil and the million mutinies. Public dissatisfaction with the current state of affairs are an affirmation of democracies spread, not a denial of it. Politics even then rough and tumble are played within the bounds of the constitution. Thus, democracy is dynamic in character and responsive to changing demands of the civilization. Democracy must not be thought of as a completed pattern of society, or government, or of economic system. Democracy implies that all three powers of the government executive, legislature and judiciary should be separate, yet mutually interdependent there shall be check and control on their power. Democracy is also a way of life and it must maintain human dignity, equality and rule of law.[13]

Democracy either reflected only will of majority or governance by all: sometimes principle of democracy has been criticise on the ground that it merely take into its consideration the majorities opinion or suppressed the minority will. In this regard Rousseau opinion on democracy is relevant, the conflict between slashing individual interests, on the one hand, and the common good of the polity, on the other, could be resolved through pursuit of democratic self-government. In Rousseau's conception, however, democracy is not mere majority rule with the inevitable consequence that political minorities are compelled to obey laws imposed against their will. Instead, democracy requires implementation of the general will through the efforts of the entire citizenry, working to overcome the disparate demands arising from the realm of clashing private interests in order to embrace as their own what is good for society as a whole.[14]

Majority Rule and Minority Rights

All democracies are systems in which citizens freely make political decisions by majority rule. In the words of American essayist E.B. White, Democracy is the recurrent suspicion that more than half the people are right more than half the time[15]. But majority rule, by itself, is not automatically democratic. The eminent jurist Jhon Rawls said so while attempting to deal with equal democracy. The principle of equal liberty is succeeded by the principle of participation, which posits an equal liberty of participation by the member

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[12] Available on http://www.jurlandia.org/coreva4.htm#FOUR accessed on 13/02/2014 at 11:35 am.
[13] Baruah Dr. Aparijita, *Preamble of the Constitution of India, an Insight and comparison With Other Constitutions*, Deep and Deep Publications (2007), New Delhi. p 40.
[14] Rousseau, Jean-Jacques; the Social Contract; Charles Frankel ed., (1947), pp. 14–18.
[15] http://en.thinkexist.com/quotation/democracy_is_the_recurrent_suspicion_that_more/158080.html

of the society. In the context of constitutional government, this principle becomes the majoritarian principle that is in turn limited by constitutional devices designed to protect minorities.[16] According to john Stuart mills, it is within the context of this form of government of representative democracy that Mill envisions the growth and development of liberty. In the past, liberty meant primarily protection from tyranny. Over time, the meaning of liberty changed along with the role of rulers, who came to be seen as servants of the people rather than masters. This evolution brought about a new problem: the tyranny of the majority, in which a democratic majority forces its will on the minority.[17]

No one, for example, would call a system fair or just that permitted 51 percent of the population to oppress the remaining 49 percent in the name of the majority. In a democratic society, majority rule must be coupled with guarantees of individual human rights that, in turn, serve to protect the rights of minorities and dissenters- whether ethnic, religious, or simply the losers in political debate. The rights of minorities do not depend upon the good will of the majority and cannot be eliminated by majority vote. The rights of minorities are protected because democratic laws and institutions protect the rights of all citizens. Minorities need to trust the government to protect their rights and safety. Once this is accomplished, such groups can participate in, and contribute to their country s democratic institutions. The principle of majority rule and minority rights characterizes all modern democracies, no matter how varied in history, culture, population, and economy. In a democracy, Democracies rest upon the principle that government exists to serve the people. In other words, the people are citizens of the democratic state, not its subjects. Because the state protects the rights of its citizens, they, in turn, give the state their loyalty.

Under an authoritarian system, by contrast, the state demands loyalty and service from its people without any reciprocal obligation to secure their consent for its actions. This relationship of citizen and state is fundamental to democracy. In the words of the U.S. Declaration of Independence, written by Thomas Jefferson in 1776: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments is instituted among men, deriving their just powers from the consent of the governed."[18]

More specifically, in democracies, these fundamental or inalienable rights include freedom of speech and expression, freedom of religion and conscience, freedom of assembly, and the right to equal protection before law. Freedom of speech and

[16] F. Rosen, *Classical Utilitarianism from Hume to Mill,* p238.available at http://books.google.co.in/

[17] Available on http://www.sparknotes.com/philosophy/mill/section3.rhtml accessed on 13/02/2014 at 18:45 pm.

[18] Thomas Jefferson, *Declaration of Independence*, available at http://books.google.co.in/

expression, especially about political and social issues, is the lifeblood of any democracy. Democratic governments do not control the content of most written and verbal speech. Thus democracies are usually filled with many voices expressing different or even contrary ideas and opinions. Democracies tend to be noisy.

Democracy depends upon a literate, knowledgeable citizenry whose access to information enables it to participate as fully as possible in the public life of society and to criticize unwise or oppressive government officials or policies. Citizens and their elected representatives recognize that democracy depends upon the widest possible access to uncensored ideas, data, and opinions. For a free people to govern themselves, they must be free to express themselves - openly, publicly, and repeatedly - in speech and in writing. Freedom of speech is a fundamental right, but it is not absolute, and cannot be used to incite to violence. Democracies generally require a high degree of threat to justify banning speech or gatherings that may incite violence, untruthfully harm the reputation of others, or overthrow a constitutional government. Many democracies ban speech that promotes racism or ethnic hatred. The challenge for all democracies, however, is one of balance: to defend freedom of speech and assembly while countering speech that truly encourages violence, intimidation, or subversion of democratic institutions. If we talk about India in this regard hate speech is remains a very burning issue especially before and after election.

Conclusion

Constitution and Indian democracy both have withstood the test of time. Indian model of democracy is capable enough to sustain the different diversities and culture without any big conflict. Constitution of India gives to this model of democracy consistency. Constitutional democracy is a democracy, which work and flourish within the bounds of the constitutional limit. As the former prime minister of England, Anthony Eden, said about Indian Constitution- “It is the most magnificent Magna Carta of socio-economic transformation.” Constitutional democracy is having its own significance and all the potential to achieve social revolution and empowerment of all.

Law Relating to Film Censorship: A Critical study of C.B.F.C. Functioning

Dr. Pradeep Kumar*

In old days men had the rack. Now they have the press. That is an improvement certainly. But still it is very bad, and wrong, and demoralising. Somebody was it Burke-called Journalism the fourth estate. That was true at the time, no doubt. But at the present moment it really is the only estate. It has eaten up the over three. The Lords Temporal say nothing, the Lords Spiritual have nothing to say, and the House of Commons has nothing to say it. We are dominated by journalism In America the president reigns for four years and journalism Governs, forever and ever.

……Oscar Wilde[1]

Introduction

India has the largest film industry in the word, making over 900 feature films and larger number of short films every year. At a rough estimate, a total of about 15 million people see films in India every day, either at its over 13,000 cinema houses or on the video cassette recorder or on the cable system. Thus, every two months, an audience as large as India's entire population flocks to its cinema houses. There is a huge investment in films and lakhs of people earn their livelihood from it. With such a large enterprise, it is natural that film-makers have to do their utmost to make the product which will fetch the best returns. In India, cinema entered in July 1896. The first screening happened at Watson Hotel, Bombay by Lumeire Brothers. During the screening of the first ever movie in India, The cinematograph Act 1909 of England was initialized. The act consists of strict requirement of safety in the theatres as the film is made from the highly flammable cellulose nitrate base which is combined with limelight illumination.[2]

Later, the first ever Indian film, Raja Harishchandra was produced in 1913 by Dadasaheb Phalke. Then, the Indian Cinematograph Act was passed in 1920. The censor boards were placed under the police chief of Madras, Bombay, Calcutta, Lahore and Rangoon. After the Independence, the autonym of regional censors was abolished and they were all brought under Censor Board, Quartered in Bombay. When the Censor Board was established, it implemented the Cinematograph Act of 1952. The certification rules were

Assistant Professor, Faculty of Law, Banaras Hindu University, Varanasi.

[1] *The Soul of Man*, 1891 [Cited in Madhvi Goradia, *Facets of Media Law* 308 (Eastern Book Company, Lucknow, 2010)].

[2] Available on cbfcindia.gov.in/CbfcWeb/fckeditor/editor/images/.../file/.../Film_censorship.pdf accessed on 21 September, 2016 at 15:39 P.M.

revised again in 1983 and then the Censor Board became Central Board of Film Certification (CBFC).

The Constitution does not specifically speak about any medium of communication. The jurisprudence that has developed through case laws in this respect has encompassed the press, motion pictures, advertisements etc. within its fold. So far censorship of films in India is concerned, the power of legislation is vested with the Parliament under Entry 6076 of the Union List (or List I) of the Schedule VII of the Constitution. The States are also empowered to make laws on cinemas under Entry 3378 of the Sate List (or List II) but subject to the provision of the central legislation. The prime legislation in this respect is the Cinematograph Act, 1952, No. 37 of 1952, (hereinafter 1952 Act) and the Cinematograph (Certification) Rules, 1983, Gen. S.R. 381(E) (hereinafter Rules).

The 1952 Act was enacted to provide for the certification of cinematograph films for exhibition and for regulating their exhibition. The brief scheme of the statute is as follows. It empowers the Central Government to constitute a Censor Board consisting of members, numbering between 12 and 25, for the purpose of sanctioning films for public exhibition. After examination of a film, the Board either sanctions the film for restricted or unrestricted public exhibition; or directs to carry out necessary modifications; or refuse to sanction the film for public exhibition. Section 5- B (1) provides the grounds for the restriction for public exhibition which is in consonance with Article 19(2) of the Constitution. Section 5-B (2) empowers the Central Government to devise necessary guidelines in this regard.[3] The party concerned is given an opportunity to represent his views on the subject before the Board arrives at its decision on censorship. Earlier the appeals from the orders of the Board were preferred before the Central Government. Subsequently, in 1974 by an amendment[4] to the Act the appellate jurisdiction of the Central Government was transferred to an independent Film Certification Appellate Tribunal (FCAT). Such tribunal is competent to hear appeals from the Board.[5] It shall consist of a Chairman and maximum of 4 other members. The Chairman shall be a retired or qualified to become a Judge of a High Court. Other members, in the opinion of the Central Government, shall be qualified to judge the effect of films on the public.[6] However, the Cinematograph (Amendment) Act, 1981, No. 49 of 1981, substantially amended the Act to diminish the powers of the FCAT.[7]

The Central Government is now vested with revisional powers under Section 6(1), even of its own motion, to call for the record of any proceeding before the Board or FCAT in

[3] The guidelines were revised in the year 1991. See generally Central Board of Film Certification Guidelines, http://www.cbfcindia.tn.nic.in/guidelinespage1.htm.
[4] The Cinematograph (Amendment) Act, 1974, No. 27, Acts of Parliament, 1974.
[5] 1952 Act sec. 5-C.
[6] 1952 Act sec. 5-D.
[7] M.P. Jain & S.N. Jain, Principles of Administrative Law, Wadhwa and Company, Nagpur, 2007, pp.428-29.

relation to any film at any stage, except a matter of appeal pending before the FCAT, to give necessary order and the Board must dispose it off in conformity with such order. The second proviso to this section enabled the Government not to disclose any fact in this respect which it considers to be against public interest. Penalties are also prescribed for contravention of the requirements of the Act. Under Part III of the 1952 Act, which deals with licensing for exhibition, section 13 empowers the Central Government or the Local Authority to suspend exhibition of a film in a Union Territory, as a whole or part of it, or a district of a State, as the case may be, where it may likely to cause breach of peace. The 1952 Act also provides for the establishment of Advisory panels by the Central Government at regional offices consisting of persons qualified to judge the effect of the films on the public.

The Central Board of Film Certification, the regulatory film body of India, regularly orders directors to remove anything it deems offensive, including sex, nudity, violence or subjects considered politically subversive. According to the Supreme Court of India, Film censorship becomes necessary because a film motivates thought and action and assures a high degree of attention and retention as compared to the printed word. The combination of act and speech, sight and sound in semi darkness of the theatre with elimination of all distracting ideas will have a strong impact on the minds of the viewers and can affect emotions. Therefore, it has as much potential for evil as it has for good and has an equal potential to instill or cultivate violent or bad behaviour. It cannot be equated with other modes of communication. Censorship by prior restraint is, therefore, not only desirable but also necessary.

Objective of the Paper

The objective of this study is to inspire, motivate, cultivate inquisitiveness, shape the opinion and enlighten the laws Law Relating to Film Censorship a critical study of C.B.F.C. Functioning. The overall content will consist of milestones at the national and international levels, critical analysis of the current situation. In view of all above facts, the followings are the major objectives:

1) to define the conceptual framework of Film Censorship;
2) Analyze the various provisions of Law Relating to Film Censorship: A critical study of CBFC Functioning;
3) to study a historical development of Film Censorship;
4) to analyze observation and guidelines of the Apex/ Supreme Court, High Courts and Board of Film Certification;
5) to examine working condition of Board of Film Certification;
6) to analyze the film, freedom of speech and expression and Censorship;
7) to suggest remedial measures.

Hypothesis

CBFC has failed to achieve the objectives behind its creation owing undue political interferences in its functioning as witnessed in lot of cases. There is an immense need to reframe the laws and policies governing film censorship in India.

Research Methodology

The study has been carried out in a very objective and systematic manner. All the primary as well as secondary documentary sources have been utilized to make the study advanced, orderly and methodical. Various reports, articles, judicial decisions of international, national, Constitutional norms, newspapers reports and national measures have been taken as important research tools. The hypothesis has been evaluated based on actual practice of provisions of Acts and statutes, judgments of Apex/ Supreme Court, High Courts. A critical analysis has been made to evaluate the recent incident and Board of film Certification in the context of Pre-Censorship of films. The aim of the present study is to consider the problems of Law Relating to Film Censorship a critical study of CBFC Functioning.

Definitions of Censorship

The term 'censorship' comes from The Latin, censere to give as one's opinion, to assess. The Roman censors were magistrates who took the census count and served as assessors and inspectors of morals and conduct.

In contrast to that straightforward definition from Roman times, contemporary usage offers no agreed-upon definition of the term or when to use it. Indeed, even whether the word itself applies to a given controversy in the arts is often vigorously contested. Censorship and free speech are often see as being two side of same coin, censorship often define as "*the suppression of free speech*". Censorship is the act of changing a massage, including the change of deletion between the sender and the receiver.

Censorship is the suppression of speech, public communication or other information which may be considered objectionable, harmful, sensitive, politically incorrect or inconvenient as determined by governments, media outlets, authorities or other groups or institutions. According to the Cinematograph Act, 1952[8] apart from including provisions relating to Constitution and functioning of the CBFC or the Central Board of Film Certification then called the Central Board of Film Censors, also lays down the guidelines to be followed by certifying films. Initially, there were only two categories of certificate – "U" means unrestricted public exhibition and "A" means restricted to adult audiences, but two other categories were added in June, 1983 – "UA" means unrestricted public exhibition subject to parental guidance for children below the age of twelve and "S" means restricted to specialized audiences such as doctors. The 1952 Act has been amended to bring uptodate and the last amendments were in 1981 to 1984.

[8] Act 37 of the Cinematograph Act, 1952.

According to Encarta Encyclopedia
Censorship: supervision and control of the information and ideas circulated within a society. In modern times, censorship refers to the examination of media including books, periodicals, plays, motion pictures, and television and radio programs for the purpose of altering or suppressing parts thought to be offensive. The offensive material may be considered immoral or obscene, heretical or blasphemous, seditious or treasonable, or injurious to the national security.

According to Merriam Webster's Collegiate Dictionary
Censorship: The institution, system or practice of censoring; the actions or practices of censors; esp : censorial control exercised repressively.

Central Board of Film Certification
The CBFC or the Central Board of Film Certification known till June 1st, 1983 as the Central Board of Film Censors was set up in Mumbai, initially with regional offices at Mumbai, Chennai and Calcutta. At present there are nine such offices based at Mumbai, Chennai, Calcutta, Bangalore, Hyderabad, Thiruvananthapuram, Delhi, Cuttack and Guwahati.

Film Certification Appellate Tribunal
Then there is a Film Certification Appellate Tribunal (FCAT) which has been constituted under section 5D of the 1952 Act for hearing appeals against any order of the CBFC. This tribunal is based in New Delhi. The Certification rules also apply to foreign films imported into India, dubbed films and video films. In the case of dubbed films, the CBFC does not have any fresh censorship for the visual in general cases. The certification does not apply to films made specifically for Doorsdarshan, since Doordarshan programmes have been exempted from the censorship provisions and Doordarshan has its own system of examining such films.

Laws relating to Pre-Censorship of Films
In general, censorship in India, which involves the suppression of speech or other public communication, raises issues of freedom of speech, which is nominally protected by the Indian constitution. The Constitution of India guarantees freedom of expression but places certain restrictions on content, with a view towards maintaining communal and religious harmony, given the history of communal tension in the nation. According to the Information Technology Rules 2011, objectionable content includes anything that "threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states or public order". Analysts from Reporters without Borders rank India 131st in the world in terms in their Press Freedom Index, falling from 80th just 11 years earlier. In 2011, the report Freedom in the World by Freedom House gave India a political rights rating of 2, and a civil liberties rating of 3, earning it the designation of free.

The Central Board of Film Certification (often referred to as the Censor Board) is a statutory censorship and classification body under the Ministry of Information and Broadcasting, Government of India. It is tasked with "regulating the public exhibition of films under the provisions of the Cinematograph Act 1952. It assigns certifications to films, television shows, television ads, and publications for exhibition, sale or hire in India. Central Board of Film Certification is a statutory body under Ministry of Information and Broadcasting, regulating the public exhibition of films under the provisions of the Cinematograph Act 1952.

Films can be publicly exhibited in India only after they have been certified by the Central Board of Film Certification. The Board consists of non-official members and a Chairman (all of whom are appointed by Central Government) and functions with headquarters at Mumbai. It has nine Regional offices, one each at Mumbai, Kolkata, Chennai, Bangalore, Thiruvananthapuram, Hyderabad, New Delhi, Cuttack and Guwahati. The Regional Offices are assisted in the examination of films by Advisory Panels. The members of the panels are nominated by Central Government by drawing people from different walks of life for a period of 2 years.

The Certification process is in accordance with The Cinematograph Act, 1952, The Cinematograph (certification) Rules, 1983, and the guidelines issued by the Central government u/s 5 (B) At present films are certified under 4 categories:

U	Unrestricted Public Exhibition	UA	Unrestricted Public Exhibition - but with a word of caution that Parental discretion required for children below 12 years
A	Restricted to adults	S	Restricted to any special class of persons

The Central Board of Film Certification, the regulatory film body of India, regularly orders directors to remove anything it deems offensive, including sex, nudity, violence or subjects considered politically subversive.

Film censorship becomes necessary because a film motivates thought and action and assures a high degree of attention and retention as compared to the printed word. The combination of act and speech, sight and sound in semi darkness of the theatre with elimination of all distracting ideas will have a strong impact on the minds of the viewers and can affect emotions. Therefore, it has as much potential for evil as it has for good and has an equal potential to instill or cultivate violent or bad behaviour. It cannot be equated with other modes of communication. Censorship by prior restraint is, therefore, not only desirable but also necessary.

Unlike the US film industry or many other advanced film industries, the Indian film industry comes under the purview of a statutory framework governing public exhibition and broadcasting of films, commonly known as Censorship. A lot of litigation takes place in India in relation to certification of films for public exhibition and commission of statutory offences due to exhibition of a cinematographic film. This chapter deals with the statutory framework and attempts to highlight important issues which arise in its connection.

The exhibition of films is governed by the Cinematograph Act, 1952 (Cinematograph Act) and Cinematograph Rules, 1983 (Cinematograph Rules). The statutory body which is assigned the task to certify films for exhibition is called the Central Board of Film Certification, colloquially known as the Censor Board. The broadcast of films on television, including broadcast of film songs, film promos, film trailers, music video and music albums is governed by the Programme and Advertising Code[9] (PAC) prescribed under the Cable Television Network Rules, 1994.

Cinematograph Films

A cinematographic film is defined as any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording.[10] It includes within its scope feature films as well as documentaries.

In order to determine whether a film is fit for exhibition in India, all cinematographic films require certification by the CBFC, based on the censorship grades[11] set out under the Cinematograph Act. The CBFC, upon examination of the application for film certification, may sanction the film under any of the following categories, or may not sanction the film at all. Refusal to sanction implies that the film cannot be publicly exhibited.

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[9] Available on http://mib.nic.in/writereaddata/html_en_ files/content_reg/PAC.pdf (last accessed 07.10.2011). On 7th October, 2011, the Central Cabinet has approved new up linking/down linking guidelines which will make permission/registration to broadcast TV channels subject to strict compliance with PAC. The permission/ registration for up linking/down linking of channels will be revoked if it is found that the TV channel has violated the PAC on more than 5 instances.

[10] S. 2(f) of the Copyright Act, 1957. The Cinematograph Act and Cinematograph Rules do not define Cinematographic Films *per se*. However, the definition under the Copyright Act, 1957 has been accepted to apply for the purposes of Cinematograph Act and Rules in *M/S Super Cassettes Industries vs Board Of Film Certification & Ors, [2010 Del HC,* unreported].

[11] In a bid to amend the existing provisions of the Cinematograph Act, the Government, in late 2009, prepared a draft Cinematograph Bill of 2010 (Bill). Specifically, the Bill proposed changes to the certification system for films where it suggested different slabs of rating for various age groups of film viewers. The Bill, however, is yet to see the light of day and it remains to be seen if the Government will implement its plan to bring about a Cinematograph (Amendment) Act.

If the CBFC considers certain portions of the film to exhibit obscenity, it may require the applicant to remove those objectionable portions before granting the certification. If the applicant believes he is aggrieved with the directions of the CBFC, he may choose to file an appeal with the Appellate Tribunal constituted under the provisions of Section 5D of the Cinematograph Act.

Grounds on which Certificate has been refused

Section 5 B of the Cinematograph Act lays down principles for guidance in certifying films. These principles are negative in nature, meaning that a certificate for public exhibition will be granted only if the cinematograph film does not violate any of the principles stated therein. More often than not, certification is graded or refused or granted pending excision of certain scenes based upon non-violation of these principles by the film. These principles are: if the film or any part of it is against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence.

The inverse of such a requirement is that once a cinematographic film is provided with a certificate for public exhibition, it is deemed to have satisfied all the requirements stated above. Such an inference is forceful since a closer scrutiny of the above principles would disclose that they are verbatim reproductions of exceptions to the fundamental right of freedom of speech and expression. Thus, a film certified for public exhibition is also deemed to not offend the aforesaid exceptions in anyway, meaning any litigation before a Constitutional Court on the ground of reasonable restriction on freedom of speech and expression is automatically undermined.

Certification is required for Private Exhibition of Cinematograph Films

The Cinematograph Act provides for certification for public exhibition of films. Thus, an obvious question is whether a certificate from CBFC will be required for purely private viewership. The Delhi High Court has opined in the affirmative, stating a certificate for public exhibition will be required.[12] In that case, the petitioner was in the business of selling religious VCDs and DVDs with a disclaimer that it was meant for private viewing only. The Delhi High Court dismissed the petition, making CBFC certification approval mandatory for any type of viewership.

Validity of Ban by State Authority Post CBFC Certification

There are numerous instances when a State Government or a local body has denied exhibition of a cinematographic film even though it had been certified by CBFC as being fit for exhibition. In 2006, the Government of Tamil Nadu imposed a ban on exhibition of the movie Da Vinci Code, after it had been granted CBFC certification, on the ground of

[12] *M/S Super Cassettes Industries vs Board Of Film Certification & Ors,* [2010 Del HC, unreported]

maintenance of public order.[13] Recently, the States of Punjab, Andhra Pradesh and Uttar Pradesh imposed a ban on the exhibition of the movie Aarakshan, despite CBFC certification having been issued to it.[14]

The Supreme Court has come down heavily on such bans, and quashed them after terming it as 'pre- censorship'[15] The highest Court of the country is very clear that once an expert body (CBFC) has found a film to be fit to be screened all over the country, the State Government does not have the power to organize another round of pre-censorship.[16]

Broad Legal Principles Governing Censorship

The issue of censorship of cinematographic films first came up before the Supreme Court in 1969.[17] Over the years, the Supreme Court and various High Courts have dealt with several cases relating to censorship of cinematographic films. In March of 2011, the Delhi High Court summarized and described broad legal principles governing censorship.[18] They have been reproduced below.

- Obscenity must be judged from standards of reasonable, strong minded, firm and courageous men[19] If challenged, the burden is on the petitioner (Government) to prove obscenity.[20]
- The film has to be viewed as a whole before adjudging whether a particular scene or visual offends any of the guidelines.[21]
- To determine whether a film endangers public order, the film must have proximate and direct nexus to endangering public order.[22]
- The courts do not ordinarily interfere with the decision of CBFC regarding certification unless found completely unreasonable.[23]

Statutory Offences Connected with Public Exhibition or Broadcast of Films Obscenity

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[13] Sony Pictures v. State of Tamil Nadu, (2006) 3 M.L.J. 289
[14] *Prakash Jha Productions & Anr vs Union Of India,* (2011) 8 SCC 372
[15] Para 22 of *Prakash Jha Productions & Anr vs. Union Of India,* (2011) 8 SCC 372
[16] Para 23 of *Prakash Jha Productions & Anr vs. Union Of India,* (2011) 8 SCC 372
[17] *K. A. Abbas vs. Union of India,* (1970 (2) SCC 780
[18] Shrishti School of Art, Design and Technology vs. Chairman, CBFC W.P. (C) 6806 of 2010
[19] Observations of Justice Vivian Bose in *Bhagwati Charan Shukla vs. Provincial Government,* AIR 1947 Nag 1. Approved by Supreme Court in *Ramesh v. Union of India,* AIR 1988 SC 775, and cited with approval by Delhi High Court in Shrishti School of Art, Design and Technology vs. Chairman, CBFC W.P. (C) 6806 of 2010
[20] *Life Insurance Corporation of India vs. Prof. Manubhai D. Shah,* (1992) 3 SCC 637
[21] *Director General, Directorate General of Doordarshan vs. Anand Patwardhan,* AIR 2006 SC 3346
[22] *Rangarajan vs. P. Jagjivan Ram,* 1989 SCC (2) 574
[23] Bobby Art International vs. Om Pal Singh Hoon, 1996 4 SCC 1

The Indian Penal Code, 1860 (IPC) and the IT Act penalize certain actions which may constitute commission of offence in connection with the exhibition or broadcast of films. Specifically, the IPC penalizes production, circulation as well as consumption of obscene material.[24] Similarly, transmission or publication of obscene material in electronic form is punishable under the IT Act.[25] What is obscene is defined under the IPC to mean any object which is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effects of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

Interestingly, persons connected with the exhibition of a film cannot be charged for commission of an offence of obscenity if the film has been certified by CBFC as fit for exhibition to public or a class of public. This was held by the Supreme Court in *Rajkapoor vs Laxman Gavai*.[26] A survey of decided cases would indicate that criminal prosecution has not just been instituted for public exhibition of a movie, but also for publishing advertisement of cinematographic films in newspapers[27] as well hosting it on the internet.[28]

Is it a crime to show case a controversial movie which has CBFC certification? This was precisely the question before the Supreme Court in *Rajkapoor vs Laxman Gavai*.[29] In this case, the producers, actor, photographer, exhibitor and distributor of a feature film called Satyam Shivam Sundaram were issued a notice under S. 292 of the IPC alleging obscenity and indecency. The accused moved the High Court claiming abuse of judicial process. One of the main contentions of the accused petitioners was that no prosecution could be legally sustained in the circumstances of the case, the film having been duly certified for public show by the CBFC.

The High Court did not conclusively answer the contention, but decided in favor of the respondent (complainant) on the ground that the complaint was neither frivolous nor vexatious and therefore could not be quashed. On appeal, the Supreme Court adjudicated on the contention and held that if the CBFC, acting within its jurisdiction and on an application made and pursued in good faith, sanctions the public exhibition, the producer and connected agencies do enter the statutory harbor. That is, if the CBFC has permitted screening of movie to a certain class, screening a feature film in pursuance of this permission will not expose the producers and others to criminal proceeding on grounds of obscenity.

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[24] S. 292 of Indian Penal Code, 1860.
[25] S. 67 of The Information Technology Act, 2000.
[26] 1980 SCR (2) 512.
[27] *O.P. Lamba And Ors. vs Tarun Mehta And Ors*., 1988 Cri.L.J. 610.
[28] In *Avnish Bajaj vs. State decided by Delhi High* Court on 29/5/2008.
[29] 1980 SCR (2) 512.

The provisions under IPC[30] lay down that a person defames another if he, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person.

The Patna High Court dealt with a case wherein the cast, crew and producers of a feature film were accused of defamation of lawyers as a class.[31] In this case, the Court had the opportunity to decide whether certification by CBFC is a defense to the offense of defamation. The Court held that mere certification was not a complete defense, but it created a presumption in favor of the accused that they did not have the knowledge or reasons to believe that their act would harm the reputation of the aggrieved persons. If the presumption is not rebutted, the charge of defamation is not made out. This must be contrasted with the offense of obscenity, where once certification by CBFC has been granted, no charge can be held against the accused and therefore, no criminal proceedings can be initiated.

The offences of obscenity and defamation are ones which affect the public at large, and therefore have greater chances of being litigated. Other offences are primarily offences against the State, namely imputations, assertions prejudicial to national-integration[32], sedition[33] etc. It is difficult to imagine that such a charge could be made against people connected with the film because the CBFC, being a government institution, will filter out any objectionable content. However, if it is assumed that such a charge may come to be levied, the accused can always take the defense of action taken in good faith, believing it to be justified by law.[34] Such a defense was permitted by the Court in the context of obscenity.[35] Based on this, it could also be construed that defenses for charges in other actions (such as imputations, assertions prejudicial to national integration etc.) may also be upheld by the Court.[36]

PAC, Self- Regulation Guidelines and Broadcast of Films

The regulation over the content aired via television is done by the Cable Network Television Rules, 1994 (Cable Rules) and Self-Regulatory Guidelines prescribed by the Indian Broadcasting Foundation (IBF Guidelines).

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[30] S. 499 of the Indian Penal Code, 1860.

[31] *Asha Parekh and Ors. vs. The State of Bihar*, 1977 Cri. L J 21.

[32] S. 153 B of the Indian Penal Code, 1860.

[33] S. 124A of the Indian Penal Code, 1860.

[34] S. 79 of IPC states that Nothing is an offence which is done by any person who is justified by law, or who reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

[35] *Rajkapoor vs. Laxman Gavai*, 1980 SCR (2) 512.

[36] *Rajkapoor vs. Laxman Gavai* described under section on Censorship for understanding of the jurisprudence related to action taken in good faith.

In the context of broadcast of cinematographic films and related media, the Programme and Advertising Code (PAC) issued under the Cable Rules lays down, in effect, the same principles as are applicable to the public exhibition of cinematographic films under the Cinematograph Act. It also prescribes that all films, film songs, film promos, film trailers, music videos, music albums and their promos, whether produced in India or abroad, will not be carried through cable service unless it has been certified by the CBFC as suitable for unrestricted public exhibition in India. The medium of carriage of content has been extended to include the satellite television service platform as well.[37]

In July 2011, the Indian Broadcasting Foundation has introduced the IBF Guidelines for general entertainment television channels with a view to regulate the content aired on television. As the name suggests, these Guidelines are only self-regulatory in nature and have been implemented by the television channels in consultation with the Ministry of Information & Broadcasting. The IBF Guidelines stipulate a programme classification system and categorize all programmes aired on television channels in two categories:

Generally Accessible 'G' Programmes – suitable for unrestricted viewing by all viewers and/or under parental guidance; and Restricted Access 'R' Programmes – which may not be suitable for children and young viewers. The 'G' category programmes are permitted to be aired at any time of the day, while the 'R' category programmes (aimed at adult audiences) can be aired between a time slot of 11 p.m. to 5 a.m. only.

The IBF Guidelines prescribe that any person who operates a television channel in India and provides broadcast content services is required to obtain prior certification (based on the two categories specified above) from the CBFC for, inter-alia, all films (including foreign films, music videos, albums, trailers, promos, songs). The broadcast service provider is permitted to air the films on television or radio only after obtaining the requisite certification.

The IBF Guidelines also provide for a programme classification system. Under the system, programmes are required to be categorized under various themes such as crime and violence; sex, obscenity and nudity; horror and occult; drugs, smoking, tobacco, solvents and alcohol; religion and community; and harm and offence. For instance, in terms of programmes that may have obscene content, separate criteria have been laid out for the content that may be construed as falling under the 'G' category and the 'R' category of programmes.

The general thought behind this is that apart from films that may be exhibited in cinemas and on television, controversial scenes in programmes appearing on television should also be regulated, specifically in light of certain television shows that were aired during prime time slots and stirred up controversy.

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[37] *Pratibha Naitthani vs. Union of India (UOI) and Ors*, unreported judgment dated August 23, 2006.

Any person who is aggrieved by any content appearing on television is entitled to file a complaint before the Broadcast Content Complaints Council (BCCC), which has been constituted by the broadcasters under the guidelines 2005. In December of 2005, as a result of a public interest litigation writ petition filed by one Pratibha Naitthani, the High Court of Bombay restricted cable television operators and multi service operators from screening films with adult content on cable television unless such films were certified for unrestricted public exhibition by the Central Board of Film Certification. By virtue of another order passed in the same case, the application of the ban was extended to foreign broadcasters and DTH service providers as well. The IBF Guidelines, on the other hand, have set out that adult content may be permitted to be aired on television only between 11 pm to 5 am. This has been done with a view to regulate the content and to ensure such content is aimed at adult audiences only.

The Cinematograph Act, 1952

The Cinematograph Act, 1952 has been passed to make provisions for certification of cinematographs films for exhibition and for regulating exhibition by means by cinematographs.[38]Under the Act there is provision for constitution of a Board called the board of film certification by the Central Government.[39] The function of the board will be to sanction the films for public exhibition. The board may after examining the film with the help of advisory panels at regional centers either sanction the film for unrestricted public exhibition, or may sanction the film for public exhibition restricted to adults only, or it may sanction the film for public exhibition restricted to members of any profession or any class of persons keeping into account the nature, content and theme of the film. The board can also direct the applicant to carry out such excisions or modification in the film as it thinks necessary before sanctioning the film for public exhibition. The board can even refuse to sanction the film for public exhibition. If Central Board of Film Certification (CBFC) refuses to sanction a film for exhibition then such film cannot see the light of the day. It is a serious blow to the freedom of speech and expression but there are certain safeguards also in the Act to minimise the misuse of the Act.

While examining the film the CBFC can refuse to certify a film on the grounds enumerated under Section 5 B (1) of the Act.[40] Further under Section 5 B(2) of the Act,

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[38] In *Samnat Video Parlour* v. *State of Haryana*, AIR 1993 SC 2328. "Cinematograph" includes VCR/VCP/TV projector as the said equipments achieve/serve the same purpose as the traditional media for exhibition of moving pictures. It must be so interpreted to take into account new and subsequent scientific developments in the field as it cannot be confined to traditional interpretation of such apparatus or simply compartmentalized. Hence, license is necessary to carry on business of running a video parlor.

[39] The Cinematograph Act, 1952, Sec. 3.

[40] The Cinematrograph Act, 1952, Section 5 B (1) a film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the authority competent of grant the certificate the film or any part of it is against the interest of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or

the Central Government is empowered to issue such directions as it think fit to guide the authority competent to grant certificate. Consequently the Central Government issued following guiding principles.[41]

The objective of film certification will be to ensure that: The medium of film remains responsible and sensitive to the values and standards of society; Artistic expression and creative freedom are not unduly curbed. Certification is responsive to social changes. The medium of film provides clean and healthy entertainment. In pursuance of the above objectives, the board of film certification shall ensure that: scenes showing involvement of children in violence as victims or as perpetrators or as forced witness to violence, or showing Guidelines for certification of films for public exhibition, 1991. Children as being subjected to any form of child abuse be deleted; human sensibilities are not offended by vulgarity, obscenity or depravity; scenes degrading or denigrating women in any manner are not presented. Visuals or words contemptuous of social, religions or other groups are not presented. Visuals or words involving defamation of an individual or a body of individual on contempt of court are not presented.

The board of film certification shall ensure that the film: is judged in the entirety from the point of view of its overall impact; and is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the morality of the audience.

Central Board of Film Certification

Popularly known as the Censor Board, is a Government's regulatory body. It is controlled by Ministry of Information and Broadcasting. It reviews, rates and censors movies, television shows, television advertisement and promotional material. It regulates the public exhibition of films in India under the provisions of the Cinematograph Act, 1952. The Honourable Supreme Court in *K.A. Abbas* v. *Union of India*[42] observed "Film censorship becomes necessary because a film motivates thought and action and assures a high degree of attention and retention as compared to the printed word. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have strong impact on the minds of viewers and can effect emotions. Therefore it has as much potential for evil as it has for good and has an equal potential to instill or cultivate violent or good behaviour. It cannot be equated with other modes of communication. Censorship by prior restraint, is therefore, not only desirable but also necessary."

Analytical aspect regarding the Cinematograph Act, 1952 : Section 7-F of the Act provides for bar of legal proceedings against the Central Government, tribunal, the board,

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involves defamation or contempt of court or is likely to incite the commission of any offence.

[41] S.O. 836(E) of Government of India, Ministry of Information and Broadcasting, on 6th Dec., 1991.

[42] (1970) 2.

advisory panel or any officer or member of the above mentioned bodies in respect of anything which is done in good faith or intended to be done in good faith under the Act. Taking the benefit of this provision the authorities may misuse and harass the film producers.

Similarly Section 13 of the Act empowers Central Government of local authority to suspend the exhibition of a certified film without giving opportunity of being heard to the aggrieved party and from that date the film shall be deemed to be uncertified film. It is gross violation of principles of natural justice.

'S' certificate misused

Smart film distributors have quickly moved in to exploit the new classification of S certificate'which was introduced in 1983 under the cinematograph (certification) Rules, 1983. Under this certificate a movie has been passed for strictly restricted showing to a specialised audience such as doctors, engineers, architects, scientists and academics. Some films are imported from East block,

America and European markets some alter distributors saw an opportunity to import out-and-out blue films. With the alleged connivance of certain bigwigs in the Ministry of Information and Broadcasting and Central Censor Board Bombay, these films were brought in under S Certificate and sold to highest bidders.[43]

The Cinematograph Act, 1952 completely missed out one thing, the obscenity contained in the *lyrics of film songs.* Filmmakers desperate to compete with opening sky which did not brook censorship, tried to compensate with sound, what they were not allowed to do through visuals. Sound here, meaning song lyrics, which they hoped, would be overlooked by the members of CBFC.

CBFC – What purpose does it serve?

The only job of the glorified members of the CBFC is to attend a general body meeting, may be once year. Although the Act stipulates quarterly meetings but due to shortage of funds, it is not taken seriously. The chairman, mostly a busy bollywood personalities, hardly sets time for such silly jobs. The chairman is always asked to sign on dotted lines by the Regional officer at Mumbai, who is an Indian Information Service (IIS) Cadre officer accountable to the ministry. The I & B ministry appoints an advisory panel from a cross section of the society. The Advisory panel members play a very curious role while watching film as members of the Examining Committee. Election Commission also includes the Regional officer who is convener of the committee and it is his words which go as the unanimous view of Election Commission. He dictates the comments to be entered in the relevant form and the Election Commission members write down as such. There is no individual application of mind. If there is a difference among the Election

[43] *Available at:* www.cscsarchive.org *(Visited* on June 27, 2012).

Commission members, the decision has to be referred to the chairman and it may take weeks or months which a producer cannot put up with. Now the question is what is the great contribution of the hallowed members of the CBFC to quality of cinema?

If we cannot eschew hatred, at least let us eschew group hatred. May we see that we could have been born as each other.[44] In a Landmark American judgment, the expression 'hate speech' was described by Justice Murphy as : fighting words – those which by their very utterance inflict injury or tend to incite an immediate breach of peace. It has been observed that such utterances are not essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit may be derived from them is clearly outweighed by the social interest in order and morality.[45]

Hate speech does not find place in Article 19 (2) of the Constitution and therefore does not constitute a specific exception to the freedom of speech and expression under Article 19(1)(a). It would have to be read with Article 19(2) under other specified exceptions such as 'sovereignty and integrity of India', 'security of the state', 'incitement to an offence' and 'defamation'. Provided that no film or film song or film promo or film trailer or music video or music albums or their promos, whether produced in India or abroad, shall be carried through cable service unless it has been certified by the Central Board of Film Cetification (CBFC)) as suitable for unrestricted public exhibition in India.

Role of Judiciary to regulate Pre-Censorship of Films

Over the years, the Supreme Court and the High Courts through various judgments have contributed immensely in safeguarding the rights of the people of India. Right of free speech and expression through motion pictures, is no exception. In this section, some of the important judgments related to films and documentaries, including few telecasted as television serials, are critically examined to assess the impact of the judiciary.

In *Brij Bhushan vs. State of Delhi*[46] case the Supreme Court held that imposition of pre-censorship on publication is violate of freedom of speech and expression unless justified under clause (2) of Article 19 of the Indian Constitution. For the first time before the Supreme Court the constitutionality of censorship under the 1952 Act along with the Rules framed under it was challenged in the case of *K.A. Abbas vs. Union of India*.[47] The Supreme Court upheld the constitutionality within the ambit of Article 19(2) of the Constitution and added that films have to be treated separately from other forms of art and expression because a motion picture is “able to stir up emotions more deeply than any other product of art”. At the same time it cautioned that it should be “in the interests of society”. “If the regulations venture into something which goes beyond this legitimate opening to restrictions, they can be questioned on the ground that a legitimate power is

[44] Vikram Seth, Two Lives (Harper Collins Publishers, India Ltd., 2005).
[45] Per Murphy, J. in *Chaplisky vs. New Hampshire*, 315 US 568 (1942).
[46] AIR 1950 SC129.
[47] A.I.R. 1971 S.C. 481.

being abused."

Probably, the most important case regarding the problem dealt herein is the case of *S. Rangarajan vs. P. Jagjivan Ram*. In the instant case, the decision of the Madras High Court which revoked the 'U-Certificate' issued to a Tamil film called 'Ore Oru Gramathile' (In One Village), was challenged through an appeal before the Supreme Court. In the meantime, the film had already won National Award. The film criticized the reservation policy in jobs as such policy is based on caste and was unfair to the Brahmins. It was argued through the film that economic backwardness and not the case should be the criterion. The High Court had held that the reaction to the film in Tamil Nadu is bound to be volatile considering the fact that a large number of people in Tamil Nadu have suffered for centuries.

There is no separate censorship required for television serials or films as they are telecasted only if they are certified by the Board. An incident came up concerning a television serial 'Tamas' (Darkness) which depicted the Hindu-Muslim and Sikh-Muslim tension before the partition of India. Appeal was preferred before the Supreme Court against the judgment of Bombay High Court (which allowed the screening of the serial) in *Ramesh vs. Union of India* to restrain the screening of the serial as it was violative of Section 5B of the 1952 Act. It was alleged by the petitioner that the screening of the serial on Doordarshan (the State television network) would be against public order and it was likely to incite the people to indulge in the commission of the offences. The Supreme Court affirmed the High Court decision and dismissed the petition. Commenting on the reaction of the average men, the Court held that the average person would learn from the mistakes of the past and perhaps not commit those mistakes again. They concurred with the High Court that Illiterates are not devoid of common sense and awareness in proper light is a first step towards that realization". Incidentally, the serial was given 'U' certificate by the Board.

In *Sree Raghavendra Films vs. Government of Andhra Pradesh*, the exhibition of the film 'Bombay' in its Telugu (the official language in the State of Andhra Pradesh) version was suspended in exercise of the powers under Sec.8(1) of the A.P. Cinemas Regulation Act,1955, despite being certified by the Censor Board for unrestricted exhibition. The suspension was imposed citing the cause that it may hurt sentiments of certain communities. The Court discovered that the authorities who passed the impugned order did not even watch the movie! Hence, the Court quashed the order as being arbitrary and not based on proper material.

In another case, Doordarshan refused to telecast a documentary film on the Bhopal Gas Disaster titled 'Beyond Genocide', in spite of the fact that the film won Golden Lotus award, being the best non-feature film of 1987 and was granted 'U' certificate by the Censor Board. The matter came before the Supreme Court in the case of *Life Insurance Corporation of India vs. Prof. Manubhai D. Shah*. The reasons cited by Doordarshan were inter alia, the political parties had been raising various questions concerning the

tragedy, and the claims for compensation by victims were sub judice. Upholding the freedom of speech and rejecting the abovementioned arguments, the Court held merely because it is critical of the State Government is no reason to deny selection and publication of the film. So also pendency of claims for compensation does not render the topic sub-judice so as to shut out the entire film from the community."

Award winning documentary film, 'In Memory of Friends' by Anand Patwardhan about the violence and terrorism in Punjab, though granted 'U' certificate by the Censor Board, was rejected by Doordarshan reasoning that if such documentary is shown to people, it would create communal hatred and may lead to further violence. The Bombay High Court quashed the order emphasizing: "Everyone has a fundamental right to form his own opinion on any issue or general concern. He can form and inform by any legitimate means."

In case of 'War and Peace', Patwardhan appealed before the FCAT against the decision of the Board. The FCAT viewed the film and directed issuance of 'U' Certificate, provided that Patwardhan carried out two cuts and one addition as per its order. He challenged the order before the Bombay High Court. In its conclusion, the High Court was very candid to hold that the cuts recommended by FCAT were merely to harass the petitioner. Regarding addition, the Court observed that it must be left to the discretion of the filmmaker.

As already acquainted with the fact that many of the movies on Gujarat riots ran into controversy with the Censor Board, they required the Court's assistance to see the light of the day. Allowing the film, 'Aakrosh', the Bombay High Court aptly reasoned that riots were a part of history by then and hence:

When the hour of conflict is over it may be necessary to understand and analyze the reason for strife. We should not forget that the present state of things is the consequence of the past; and it is natural to inquire as to the sources of the good we enjoy or for the evils we suffer. In another case, while overruling the FCAT's order to censor the movie, 'Chand Bujh Gaya', the Bombay High Court in *F.A. Picture International vs. Central Board of Film Certification opined*: "Censorship in a free society can be tolerated within the narrowest possible confines and strictly within the limits which are contemplated in a constitutional order."

It strongly criticized the role of the concerned authorities: The view of the censor does no credit to the maturity of a democratic society by making an assumption that people would be led to disharmony by a free and open display of a cinematographic theme. The certifying authority and the Tribunal were palpably in error in rejecting the film on the ground that it had characters which bear a resemblance to real life personalities. The constitutional protection under Article 19(1) (a) that a film maker enjoys is not conditioned on the premise that he must depict something which is not true to life. The choice is entirely his.

In Da Vinci controversy as well, the Supreme Court rejected the writ petition by the All India Christians Welfare Association seeking a ban on the movie on the ground that it hurt the religious sentiments of Christians. In all those cases of Da Vinci, it was alleged that the film violated inter alia, Article 25 of the Constitution with respect to the Christian community. Particularly in the case of Tamil Nadu, the Madras High Court was of the opinion that for a harmonious interpretation of Articles 25 and 19, it is clear from a reading of those provisions that the rights under Article 25 are subject to the other provisions of Part III; which means they are subject to Article 19(1). It was also not clear before the court how the exhibition of the film will interfere with anyone's freedom of conscience or the right to profess, practice and propagate a particular religion. Moreover, the Court expressed that under no circumstances 'blasphemy' is a ground under Article 19(2). The reasoning makes greater sense when no empirical evidence across the world has also proved the right to freedom of religion is better served, or protected with or through blasphemy laws.

Another interesting aspect of this phenomenon is that irrespective of the effect of the movies, there is often a call for a total ban without exploring any other possibilities. The Supreme Court in *State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat* stated that a total prohibition under Article 19(2) to (6) must also satisfy the test that a lesser alternative would be inadequate.

In *Ministry of I & B vs. Cricket Association of Bengal*, case it was held by the Supreme Court that freedom of speech and expression includes "right to acquire information and to disseminate it to public at large". Hence, Article 19(1) (a) also includes the right of viewers. Further, in *Indian Express Newspapers (Bombay) Pvt. Ltd. vs. Union of India*, it was held by the Supreme Court that the people have a right to be informed of the developments that take place in a democratic process.

In the case of *Union of India vs. K.M. Shankarappa*, the Supreme Court disapproved of the Government retaining powers by enacting Section 6(1) of the 1952 Act and declared it ultra vires the Constitution. It held that the Government has chosen to establish a quasi-judicial body which has been given the powers, inter alia, to decide the effect of the film on the public. Once a quasi-judicial body like the Appellate Tribunal FCAT, consisting of a retired Judge of a High Court or a person qualified to be a Judge of a High Court and other experts in the field, gives its decision that decision would be final and binding so far as the executive and the Government is concerned. The executive has to obey judicial orders. Thus, Section 6(1) is a travesty of the rule of law which is one of the basic structures of the Constitution. The Executive cannot sit in an appeal or review or revise a judicial order. It emphasized that the only way to nullify the Court order would be through appropriate legislation. Otherwise, "the Government may apply to the Tribunal itself for a review, if circumstances so warrant. But the Government would be bound by

the ultimate decision of the Tribunal."
In *Ranjit D. Udeshi vs. State of Maharashtra*[48] case the appellant was prosecuted along with the other partners of a bookstall which was found to be in possession (for the purposes of sale) of the unexpurgated edition of the book, *Lady Chatterley's Lover*. The partners were charged under Section 292, Indian Penal Code (IPC) for certain obscene passages in the book. During the trial, the accused (1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

In *Samaresh Bose and Another vs. Amal Mitra and Another*[49] case the court said that although, in some places in the book there may have been an exhibition of bad taste, it was up to readers of experience and maturity to draw the necessary inference. The court said that it was not sufficient to bring home to adolescents any suggestion that was depraving or lascivious. "We have to bear in mind that the author has written this novel which came to be published in the Sarodiya Desh for all classes of readers and it cannot be right to insist that the standard should always be for the writer to see that the adolescent may not be brought into contact with sex. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and have to read books which are purely religious".

In *K. A. Abbas vs. Union Of India and Another*[50] case the Court, relying on the Khosla Committee Report, 1968[2] and precedents from Indian, American and British case law, said that pre-censorship was valid (in the context) and an exception to the right to freedom of speech and expression had been provided under Article 19(2). The Court said that pre-censorship was necessary as the medium of film had to be treated differently from other forms of art and expression. "The art of the cameraman, with trick photography, vistavision and three dimensional representation thrown in, has made the cinema picture more true to life than even the theatre or, indeed, any other form of representative art."

It said that the general principles that applied to exceptions to Article 19 (1) (a) applied to the censorship of film, and that there was nothing vague about the wording of the Censorship Act. "We are quite clear that expressions like 'seduction,' 'immoral traffic in women,' 'soliciting, prostitution or procuration (sic),' 'indelicate sexual situation' and scenes suggestive of immorality,' 'traffic and use of drugs,' 'class hatred,' 'blackmail associated with immorality' are within the understanding of the average man and more so

[48] AIR 1965 SC 881.
[49] AIR 1986 SC 967, (1985) 4 SCC 289.
[50] AIR 1971 SC 481.

of persons who are likely to be the panel for purposes of censorship. Any more definiteness is not only not expected but is not possible."

In *Raj Kapoor and Others vs. State and Others*[51] case While a certificate issued by the Censor Board is of relevance, it does not preclude the court from deciding if a film is obscene or not. Justice Krishna Iyer: "An act of recognition of moral worthiness by a statutory agency is not opinion evidence but an instance or transaction where the fact in issue has been asserted, recognized or affirmed. The Court will examine the film and judge whether its public policy, in the given time and clime, so breaches public morals or depraves basic decency as to offend the penal provisions.

Iyer went on to state, "Art, morals and laws, aesthetics are sensitive subjects where jurisprudence meets other social sciences and never goes alone to bark and bite because state-made strait-jacket is inhibitive prescription for a free country unless enlightened society actively participates in the administration of justice to aesthetics." He observed, "The world's greatest paintings, sculptures, songs, and dances, India's lustrous heritage, the Konarks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and state moralists prescribe paradigms and prescribe heterodoxies."

In *Bobby Art International & Others. vs. Om Pal Singh Hoon & Others*[52] Case the Court observed that a film that illustrates the consequences of a social evil necessarily must show that social evil. "We find that the (High Court) judgment does not take due notice of the theme of the film and the fact that it condemns rape and degradation of violence upon women by showing their effect upon a village child, transforming her to a cruel dacoit obsessed with wreaking vengeance upon a society that has caused her so much psychological and physical hurt, and that the scenes of nudity and rape and use of expletives, so far as the Tribunal had permitted them, were in aid of the theme and intended not to arouse prurient or lascivious thoughts but revulsions against the perpetrators and pity for the victim."

In *Pratibha Naitthani vs. Union of India*[53] case the Court held that the adult viewer's right to view films with adult content is not taken away by Clause (o) of Rule 6(1). "Such a viewer can always view Adult certified films in cinema halls. He can also view such films on his private TV set by means of DVD, VCD or such other mode for which no restriction exists in law." The Court held that the restriction upon cable operators and cable service providers that no programme should be transmitted that is not suitable for unrestricted public exhibition did not violate their right to carry on trade and business. The Court further held that only films sanctioned by the CBFC, under the Cinematograph Act and Rules, as suitable for "unrestricted public exhibition" could be telecast or transmitted on Cable

[51] AIR 1980 SC 258.
[52] 1996 AIR (SC) 1846.
[53] AIR 2006 (Bom) 259.

In *Ajay Goswami vs. Union of India & Others*[54] The Court held that in view of the availability of sufficient safeguards in terms of various laws, rules, regulations and norms to protect society in general and children in particular from obscene and prurient contents, the petitioner's writ was not maintainable. It stated that any steps to ban publication of certain news pieces or pictures would fetter the independence of the free press, which is one of the hallmarks of our democratic setup.

The Court examined the test of obscenity very carefully through existing Indian case law and case law from other jurisdictions. It held that an imposition of a blanket ban on the publication of certain photographs and news items, etc., would lead to a situation where the newspaper will be publishing material catering only to children and adolescents, thereby depriving adults of their share of entertainment of a kind permissible under accepted norms of decency in any society.

The court also held that a culture of 'responsible reading' should be inculcated among the readers of any news article: "No news item should be viewed or read in isolation. It is necessary that publication must be judged as a whole and news items, advertisements or passages should not be read without the accompanying message that is purported to be conveyed to the public. Also, members of the public and readers should not look for meanings in a picture or written article which are not conceived to be conveyed through the picture or the news item."

In *Director General, Directorate General of Doordarshan & Others vs. Anand Patwardhan and Another*[55] The Court observed that the documentary was given two awards at the 42nd National Film Festival in 1995, conducted by the Ministry of Information and Broadcasting, Government of India, after being adjudged best investigative film and best film on social issues. It was, therefore, highly irrational and incorrect to say that such a film promotes violence, that its production quality was unsatisfactory and that it had no specific message to convey. The Court also held that a documentary couldn't be denied exhibition on Doordarshan simply on account of its "A" or "UA" certification.

In *R. Basu vs. National Capital Territory of Delhi and Another*[56] case The High Court held that for the two films without censor certificates the petitioners could not claim immunity from Section 292 IPC. For the other two films, also, the Court said that, since the petitioners had not produced CBFC certificates, they could not claim immunity from prosecution.

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[54] AIR2007SC493
[55] 1996(8)SCC433.
[56] 2007CriLJ4245.

In *Mahesh Bhatt vs. Union of India*,[57] The Delhi High Court struck down the rules under the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, which sought to impose a blanket ban on the depiction of smoking in films. The court upheld the right of the film-maker and the artist to use his medium to project life in all its hues, its foibles included. Following the test in *K.A. Abbas vs. Union of India*,[58] the court held that the depiction of social evils as severe as rape, prostitution and the like cannot be censored. What has to be seen is how the theme is handled by the film-maker. The effect of rules was also to create unfair discrimination between the print and electronic media. Thus, falling foul of Article 14 in addition to Article 19(1)(a).

Some Illustration Related to Controversy Films

In India have zealously guarded the freedom of speech and expression and have shown optimum judicial activism. They have refused to scrap any movie without any compelling reason for restriction and which are not based on vague or unreasonable apprehensions.

Kissa Kursi Ka film Controversy

Kissa Kursi Ka was a controversial film that revolved around a corrupt and evil politician. The spoof is based on ’emergency’ and ‘Sanjay Gandhi’. The film was banned by the Indian Government (congress) and all prints were confiscated.

Water film Controversy

Water is a 2005 Canadian film written and directed by Deepa Mehta, with screenplay by Anurag Kashyap. It is set in 1938 and explores the lives of widows at an ashram in Varanasi, India. The film has provoked far more than that. In January 2000 Ms. Mehta was forced to shut down production of "Water" in Varanasi, one of India's holy cities on the banks of the Ganges, after Hindu nationalists protested that the film was anti-Hindu.

Fanna Film Controversy

In case of ‘Fanna’, the Supreme Court actually diluted its own precedent enunciated in the Rangarajan case where it obligated the State to take necessary preventive measures pro-actively against any untoward incident that might take place with screening of any such movies.

Bandit Queen Film Controversy

Though it was inspired from real life events and whole of the movies was a true depiction of the painful life of Phoolan Devi. The movie was acclaimed all over the world but the gang rape scene along with some other scenes and content created controversies.

The Da Vinci Code Film Controversy

[57] (2009) 156 DLT 725.
[58] (1970) 2 SCC 780.

A practical instance may help to understand the implication clearer as to whose interests is the protesters advocating for. 'The Da Vinci Code' was banned in 7 States – the result was over 200 million Indians in those States were deprived from viewing the movie. The total Christian population in the country is 2.3%, whereas the States that banned the movie has varied percentage of Christian residents.

Black Friday Film Controversy

Black Friday is based on a true life event of '93 Bombay blasts. The film revolves around the intense events and happening of the blasts. It was not released in Indian theaters for two years as, on the eve of its release, a petition seeking a stay was filed by the people named in the film, the alleged perpetrators of the crime.

Gadar – Ek Prem Katha' Film Controversy

Despite the fact, it banned films on Gujarat massacre, it approved films like 'Gadar – Ek Prem Katha' (Revolution –A Love Story), which consists of highly provocative dialogues directed against the Muslims. At least the former pieces have basis in real facts but the latter was a product of wild imagination.

PK Film Controversy

The controversy around the Hindu director Rajkumar Hirani's movie "PK." The Vishwa Hindu Parishad (VHP) wants it banned, and its members, along with those charming chaps from the Bajrang Dal, have taken to tearing up the film's posters and halting screenings. The reason? According to VHP spokesman Vinod Bansal, "PK" "keeps making fun of Hinduism." Members of the All India Muslim Personal Law Board have also demanded that the Censor Board remove some scenes in the interest of maintaining "communal harmony."

MSG Film Controversy

The Punjab government decided to ban with immediate effect the screening of the controversial film "MSG: The Messenger of God" in view of reports of tension in several parts of the state and outside over trailers of the movie which stars Gurmeet Ram Rahim Singh, the chief of religious sect Dera Sacha Sauda. Sikh organisations and the Dera Sachcha Sauda have been at loggerheads ever since Gurmeet Ram Rahim, the chief of the sect, appeared in attire similar to that of Guru Gobind Singh, the tenth Sikh guru, in 2007 triggering a major controversy.

Madras Café Controversy

Madras Cafe is set against the backdrop of Sri Lankan civil war and also represents the assassination of former Indian Prime Minister Rajiv Gandhi which happened in 1991. The movie came under the scanner after Tamil activists alleged that it depicts the LTTE cadres in a negative manner. The film was not released in Tamil Nadu due to security concerns.

Udta Punjab

Udata Punjab is drug critical of controversial drug-theme films. A bench of judges S. C. Dharmadhakari and Shalni Phansalkar Joshi observed that Udta Punjab did not prima facie appears to glorify drug abuse one of the main contentions of the censer board seeking several cuts to the film. The High Court was critical of the CBFC's direction to delete any reference to Punjab, saying the crux of the film will be lost. Nine members of the Central Board of Film Certification watched the film and "unanimously" cleared it after the proposed 13 cuts. The Bombay High Court directed the Central Board of Film Certification (CBFC) to issue an 'A' certificate to the movie Udta Punjab (Punjab on a High) with the deletion of one scene and a modified disclaimer.

Conclusion

In the interest of the society, censorship by prior restraint is necessitated. Supreme Court has rightly cautioned and established that balance should be made between right to freedom of speech and expression and special interest of the film makers.[59] However, the censorship authorities should act taking into the overall impact of the move on the viewers and on the society. Movies are one of the major forms of entertainment. There are different kinds of movies viz. comedy, romantic, horror, thriller, action, drama, animated, fantasy etc. There are many dimensions to the making of a movie. Technically, all movies are created by following certain elements. From our discussion above, one thing is clear that censorship of films has been very debatable in Indian societal context. However, it has been felt that censorship has also been used as a tool to promote the films. Manufactured controversies are being created to gain limelight and continuance of such practices highlights the plight and plethora of malfunctioning of CBFC.

Finally we can say that Film censorship is necessary because a film motivates thought and action and assures a high degree of attention and retention as compared to the printed word. The combination of act and speech, sight and sound in semi darkness of the theatre with elimination of all distracting ideas will have a strong impact on the minds of the viewers and can affect emotions. Therefore, it has as much potential for evil as it has for good and has an equal potential to instill or cultivate violent or bad behaviour. It cannot be equated with other modes of communication. Censorship by prior restraint is, therefore, not only desirable but also necessary.

[59] Dr. Sukanta K. Nanda, *Media Law*, Central Law Publication, Allahabad, 2014, p. 259.

Role of UDRP in Resolving the Disputes Between Trademark Owners and Domain Name Holders

Munish Swaroop*

Introduction

The impetuous evolution of information technologies, and, in particular, the use of Internet has presented some significant challenges, which aimed to adapt to the new demands that technology brings. Information and communication technology law is a new branch of the law in comparison to other laws and it comprises of the great number of issues that still demand detailed examination.

The most important and challenging issue to be solved is fair and successful resolution of the disputes relating to domain names. A domain name is an addressing construct, used for finding and identifying computers on the Internet. Computers use Internet Protocol (IP) Addresses, which are a series of numbers used to identify each other on the Internet; however, many people find it hard to remember IP Addresses. Because of this, domain names were developed so that easily remembered names and phrases could be used to identify entities in the Internet instead of using an IP Address.

According to final report of the WIPO Internet Domain Name Process, "*a domain name is an IP address in a human-friendly form*"[1].Therefore, when described human-friendly form corresponds to a company name or a trademark, it turns into important and valuable asset. And when domain name is associated with a trademark, it becomes a powerful commercial tool. Consequently, businesses emphasize the necessity to own a domain name that connects to its trademark.

Before the Internet domain names, the trademarks performed the role of goods or services identifier. Invention and development of the Internet lead to increased growth of conflicting issues. Particularly, conflicts take place in the area of trademarks and domain names application. Therefore available means gives rise to the practice of registration trademarks as domain names. Trademark owners are desperate to protect their legal rights. Consequently, all of the disputes which might occur regarding trademark

**** Research Scholar, Department of Human Rights, School for Legal Studies, Babasaheb Bhimrao Ambedkar University, Lucknow.***

[1] See World Intellectual Property Organization (WIPO), The Management of Internet Names and Addresses: Intellectual Property Issues, Report of the WIPO Internet Domain Name Process (30 Apr 1999), available at http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.doc-accessed on 06/04/2016 at 10:47 am.

registration and protection could be resolved within the jurisdiction of the trademark's holder country.

Disputes relating to domain names involve trademarks, accordingly, for the resolution of a relevant dispute courts have been governed by traditional legislation, namely trademark law, passing off , unfair competition and other similar laws. The expansion of the Internet and incontrollable character of cyberspace caused problems in applying the traditional legislative means while deciding domain name disputes.

The *sui generis* international system for resolution of disputes between trademark owners and domain name holders requires the creation of an effective system to overcome this kind of problems. Due to the overwhelming demands and stress on the national court systems, Internet Corporation for Assigned Names and Numbers (ICANN) promulgated a private arbitral forum in 1999 for the resolution of domain names disputes called Uniform Disputes Resolution Process (UDRP). It has a responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment[2].

There is a need to know the reasons which causes disputes between domain name holder and trademark owners and the means by which domain name disputes can be successfully resolved with the main focus on the UDRP. At the same time, it is also required to know the main shortcomings in the UDRP system. This paper will try to throw some light on both the consequences of the observed practice in implementing the UDRP and providing remedy for cybersquatting. Moreover, while finalizing major aspects of the UDRP evolution and operation, this paper will also attempt to propose reform measures which, could increase efficiency of the UDRP system.

What are Domain Names?

Domain Names: Meaning

In order to understand domain names it is first necessary to understand what IP addresses are.

Internet Protocol (IP) Addresses

Among various other protocols, Internet uses an important protocol named Internet Protocol (IP)[3] which makes computers and other gadgets possible to instantly communicate with one another over a diverse range of physical links. The fundamental identifier on the internet is an IP address. An IP address is a binary number that uniquely identifies computers and other devices on a TCP/IP network[4].

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[2] See, http://www.icann.org/tr/english.html accessed on 06/04/2016 at 10:55 am.

[3] C.M. Kozierok, "The TCP/IP Guide: A Comprehensive, Illustrated Internet Protocols Reference," No Starch Press, 1st Ed., ISBN-13: 978- 1593270476, Oct. 2005.

[4] *Available at* http://www.google.co.in/url?q=http://compnetworking.about.com/od/workingwithipaddresses/g/ip-addresses.htm&sa=U&ved=0ahUKEwjuq833vIHPAhXBNo8KHb1XDe0QFggi

Each and every computer connected to this network is given a unique electronic address, which is called Internet Protocol (IP) address. Each identifiable location in cyberspace has its own distinctive IP address[5]. Moreover any machine connected to the Internet has an IP address: Xbox games, cell phones, fax machines, and even soda pop dispensers have IP addresses. In every case, the IP address acts both like a car license plate and like a telephone number: it shows ownership, allows the machine to be located by other machines, and empowers authorities to track and protect people's safety, if need be.

How IP addresses look:

IP addresses have two common formats[6].

- IP version 4
- IP version 6

IP version 4 addresses are comprised of four numbers-only segments separated by dots:

- e.g. 127.0.0.1
- e.g. 253.16.44.22
- e.g. 72.48.108.101

IP version 6 addresses are more complex. IPv6 addresses are comprised of 8 segments:

- e.g. 3ffe:1900:4545:3:200:f8ff:fe21:67cf
- e.g. 21da:d3:0:2f3b:2aa: ff: fe28:9c5a

IP address is not the same as www domain name addresses. For nearly every web server, the IP address is invisibly translated into natural English "domain name" for ease of use. But technically speaking, the IP address is the true identifier of a web server...the domain name is simply a redirector pointer to help people find the web server.

Here are three IP addresses, with their corresponding domain names. Both the IP address and domain name URL can be used to connect to the same web server:

- e.g. 72.246.51.15 = www.nasa.gov
- e.g. 152.91.56.138 = www.gov.au
- e.g. 208.185.127.40 = www.about.com[7]

Internet authorities allot large bundles of IP address numbers to regional internet service providers. Those ISP's (Internet Service Providers), in turn, assign the IP addresses to every server and every internet user who logs on. Yes, there are millions of IP addresses active at any instant.

MAc&usg=AFQjCNFtj6hQiWPTsPWO_eGYntcDYJT6BQ accessed on 06/04/2016 at 11:30 am.

[5] Peter B. Maggs, *et al*., *Internet and Computer Law: Cases – Comments – Questions*, (St. Paul, MN: West Group, 2001) p. 457.

[6] *Available at*: http://netforbeginners.about.com/od/i/f/ip_address.htm.

[7] *Available at: http*://netforbeginners.about.com/od/i/f/ip_address.htm.

Technically each host connected to the Internet has a unique IP address. An Internet Protocol Address[8] is the numerical address of the form 192.0.43.10 (IP Version 4) or 2001:500:88:200:0:0:0:10 (IP Version 6) by which a location in the internet is identified. Computers on the Internet use IP addresses to route traffic and establish connections among themselves. E.g. when a request for a Webpage is sent from a client computer system to a Web server, the client computer includes the IP address of the Web server.

Every IP addresses are consist of string of digits delimited by periods (commonly known as dots). The delimited field indicates the network, sub-network and the local address, read from left to right. A typical IP address might appears as "122.228.29" where "122" denotes the network, "228" denotes the sub-network and "29" denotes the computer itself. All the numeric form is known as the IP address.

Domain names

As the popularity of the Internet increased so too the difficulty to remember these numerical addresses became obvious[9]. Thus, for the purpose of convenience, a word / alphabet based system called as Domain Name System (DNS) was introduced[10]. In simple, a domain name is the word / alphabet based substitute to the numeric IP addresses. These alternates to the string of numbers are human comprehensible and memorable in nature[11]. Just like the address of a person in the real world, the domain names are the addresses of the respective domains in the global computer network[12]. While logging onto the Internet through a server, the server would interpret the said domain name into its particular corresponding numerical IP address.

According to final report of the WIPO Internet Domain Name Process, "*a domain name is an IP address in a human-friendly form*"[13].Domain names are the plain English references to the IP addresses[14]. Similar to the IP numeric addresses, the domain names are divided into fields separated by full stops (in the Internet language called "dot"). For example, "www.facebook.com" is a characteristic example of a domain name. As mentioned above, the overlapping system of mnemonic addresses is designed to make the

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[8] *Supra note 2.*

[9] Paul Sugden, Trademarks and Domain Names in Jay Forder and Patrick Quirk (eds.), *Electronic Commerce and the Law*, (Australia: John Wiley & Sons, 2001) p. 203.

[10] Michael Froomkin, ICANN‟s "Uniform Dispute Resolution Policy" – Causes and (Partial) Cures, *Brooklyn Law Review*, Vol. 67, No. 3, 2002, pp. 605 - 718 at p. 615.

[11] Michael Chissick and Alistair Kelman, *Electronic Commerce: Law and Practice*, (London: Sweet & Maxwell, 1999) p. 17.

[12] Pankaj Jain and Pandey Sangeet Rai, *Copyright and Trademarks Laws Relating to Computers*, First edition, (Lucknow: Eastern Book Company, 2005) p. 89.

[13] See World Intellectual Property Organization (WIPO), The Management of Internet Names and Addresses: Intellectual Property Issues, Report of the WIPO Internet Domain Name Process (30 Apr 1999), *available at* http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.doc accessed on 06/04/2016 at 12:22 pm.

[14] *Ibid.*

Internet more users friendly. Consequently, when a domain name is typed into a computer, the Internet software automatically converts the domain name to the numbered address. Domain names serve as humanly memorable names for Internet participants, like computers, networks, and services.

A domain name represents an Internet Protocol (IP) resource. Individual Internet host computers use domain names as host identifiers, or hostnames. The term "domain name" can be described as a mean of defining IP (Internet Protocol) address to which it is ascribed. Technically, the domain name has the subordinated character under the relation to the so-called IP-address which possesses any information resource in the Internet.

Domain name is distinct from website and Universal Resource Locator (URL). Domain name, being the substitute to IP address, forms only part of the other two. However the distinction between domain name and website is blurring, since it doesn't have much practical significance, and therefore many use these terms interchangeably. While domain name is a part of the website, the URL is the extended path of the website,[15] which helps in locating the website[16]. This can be better illustrated by the following example. Ex: In http://www.un.org, un.org is the domain name, "www.un.org" is the website, and http://www.un.org is the URL.

Initially the role of domain name, just like postal addresses, was confined to provide address for computers on the Internet for the purpose of communication. However the situation changed soon with the beginning of commercial activities over the Internet. The domain name system has played a pivotal role in the development of the modern day e-commerce. The identification of goods and services as the goods or services provided by respective entities is indispensible in the modern day commerce, since it helps the buyers to go for quality goods and services. While in the traditional commerce this function of identification is performed by the trademarks of the business entities,[17] on the Internet, the domain names perform the same function[18].

Domain names, being the simple and easily memorable form of Internet addresses, are designed in such manner that they function to enable the netizens to locate the specific site on the Internet among rapidly increasing uncountable number of sites. This helps the

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[15] Clacky McSnackins, "Explaining the Difference between a URL and a Domain", available at <http://www.helium.com/items/235627-explaining-the-difference-between-a-url-and-a-domain> Last visited, 05 Aug 2016 at 11: 30 am.

[16] Suzanne James, "Explaining the Difference between a URL and a Domain", available at <http://www.helium.com/items/56913-explaining-the-difference-between-a-url-and-a-domain> Last visited, 05 Aug 2016 at 10:20 am.

[17] Shahid Ali Khan and Raghunath Mashelkar, *Intellectual Property and Competitive Strategies in the 21st Century*, (The Netherlands: Kluwer Law International, 2004) p. 191.

[18] Richard Stim, *Trademark Law*, (Canada: West Legal Studies, 2000) p. 99.

online customers to reach the website of the particular business entity from where they intend to purchase[19]. Thus, with the increase in online business activities, the domain name has not only acquired the status of being the business identifier, but also has been considered as most important by the traders, since it is the name that attracts the customers in the modern day business[20].

Conflict between domain names and trademarks

The domain name system presents a series of conflicts with the basic principles of existing trademark laws in the world. Conflicts between trademark rights and domain name registrant occur in a number of ways.

C**yber squatting**

It occurred when a third party registering someone else trademark as a domain name with the intention to offer it back to the true owner at a substantial fee. The law of Trademark interferes here to protect the true owner who has the exclusive right to the trademark. Cybersquatting acts have been criminalised in many countries in the world. This is to protect the legal owner. In, A.*G. Spalding & Bros vs. A. W. Gamage Ltd.*[21] court observed "Nobody has any right to represent his goods as the goods of somebody else. It is also sometimes stated in the proposition that nobody has the right to pass off his goods as the goods of somebody else"

Typo squatting

Cyber squatting may take the form of typosquatting, where the domain name registrant registers a variant of a famous trademark. For instance, micros0ft.com (for microsoft.com), siffy.com (for sify.com), yaho.com (for yahoo.com), etc. The purpose of a typo squatter is the same as that of a cyber squatter; only the mode of trademark infringement is slightly different. In *Rediff Communication Limited vs. Cyberbooth*[22], the plaintiff had filed a case against the defendant, who had adopted the domain name *rediff.com* as part of their trading style, which was alleged to be deceptively similar to the plaintiff, Rediff.com.

UDRP: The Background

In response to the growing concerns relating to intellectual property issues associated with domain names and the increasing number of abusive domain name registrations, a White Paper was produced by the United States Department of Commerce, which called on WIPO to conduct a study and make recommendations for a uniform approach to

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[19] Anish Dayal, Law and Liability on the Internet in Kamlesh N. Agarwala and Murali D. Tiwari (eds.), *IT and Indian Legal System*, (New Delhi: MacMillan, 2002) pp. 52 - 71 at p. 56.

[20] Paul Sugden, Trademarks and Domain Names" in Jay Forder and Patrick Quirk (eds.), *Electronic Commerce and the Law*, (Australia: John Wiley & Sons, 2001) pp. 199 - 225 at p. 199.

[21] (1915) 32 RPC 273 at 283.

[22] A.I.R. 2000 Bom.27.

resolving trademark/domain name disputes involving cybersquatting (as opposed to conflicts between trademark holders with legitimate competing rights). In addition, the Internet Corporation for Assigned Names and Numbers, a non-profit California-based corporation was formed in 1998 for the purpose of, among other things, addressing the management of the domain name system.

Negotiating a new international treaty was considered too involved a process, and relying on the development of national laws was seen as unlikely to result in an effective mechanism suited to the international nature of these disputes. To resolve domain name disputes, an internationally uniform and mandatory procedure to deal with what frequently developed into cross-border disputes in an efficient manner was needed. With the support of its Member States, WIPO, which is mandated to promote the protection of intellectual property worldwide, conducted extensive international consultations, resulting in the publication of a Report which addressed domain name issues and made recommendations for their resolution.

The Final Report of the WIPO Internet Domain Name Process (First WIPO Report) recommended the creation of an online administrative dispute resolution procedure, which would have universal application for all .com,.net and .org registrations. The procedure would therefore apply to any name registered in those gTLDs, irrespective of the registrar through which the registration was made and irrespective of the date of registration.

After consideration and approval by the WIPO Member States, the First WIPO Report was submitted to ICANN for its review. In August 1999, ICANN resolved to adopt the Uniform Domain Name Dispute Resolution Policy, which, essentially, implements the above WIPO recommendations. ICANN also appointed dispute resolution service providers to administer disputes that are brought under the UDRP, the WIPO Arbitration and Mediation Centre being the first such dispute resolution service provider. The UDRP came into effect on December 1, 1999. Since its entry into force, the UDRP has been widely used as a tool to combat the abusive registration of domain names by cybersquatters.

Procedural aspects of the UDRP

The procedure under UDRP for the determination of question can't be utilized for resolution of dispute between two trademark holders or between a trademark holder and a registrant who has rights or legitimate interests. Infact, the UDRP does not apply if the registrant has been known by the name or used it in connection with a bona fide offering of goods or services or for a legitimate non-commercial purpose[23]. Additionally, the UDRP figures substantive law which works in resolution of domain name dispute. What's more, managing of the cases concerning trade mark registrations which have been made before the UDRP became effective is acknowledged inside the UDRP system.

[23] See Hömle, Julia, Cros-border Internet Dispute Resolution, p. 187.

The responsibility for domain name system regulation, is on the ICANN which imposes obligation on domain name registrar to adopt the UDRP as their dispute resolution procedure. The UDRP Policy requires from the registrars of domain name under dot-com-net to adopt it as their dispute resolution procedure before they will be accredited by ICANN, therefore anyone registering a domain name through an accredited registrar is contractually bound to commit to arbitration under the UDRP as an inescapable part of the registration contract[24]. Since the complainant proves his rights in a trademark or in a service mark, the registration of a domain name takes place.

In order to determine whether the UDRP can be applied to only certain types of the generic top-level domains (TLDs), consideration should be given to the statistical evaluation which shows that about 70% of all domain name registrations are done as regards to the gTLDs. Moreover, the UDRP can be applied to the national ccTLD only if they have been adopted on a voluntary basis. Further, the UDRP has also served as a model for various other ccTLD registries to develop alternative dispute resolution procedures which are not administered by the WIPO Centre, but by the ccTLD registries themselves or other organizations providing the infrastructure to process domain name conflicts in the ccTLD.

Rules for Uniform Domain Name Dispute Resolution Policy (the Rules)[25] is the main legal documents which govern the realization of all proceedings under the UDRP, which is in addition to the general UDRP rules governing the filing and administration of a complaint. All the four ICANN-approved providers have its own Supplemental rules. The UDRP and its accompanying Rules are incorporated by reference in all registration agreements between registrants of gTLD and registrars approved by ICANN. According to the Rules, the UDRP procedure divided into several important stages:

Stages in the procedure

The basic stages in a UDRP procedure are[26]:

(a) Filing of a Complaint with an ICANN-accredited dispute resolution service provider of the Complainant's choice, such as the WIPO Center;
(b) Filing of a Response by the person or entity against whom the Complaint was made;
(c) Appointment by the chosen dispute resolution service provider of an Administrative Panel comprising one or three persons who will decide the dispute;

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[24] See Mueller, Milton, Rough justice, an analysis of ICANN's Uniform Dispute Resolution Policy.

[25] In 1999 ICANN approved implementation of the Rules for Uniform Domain Name Dispute Resolution Policy. In 2009 the Rules were replaced by the new version, and it comes into effect for all UDRP proceedings in which a complaint is submitted to a provider on or after 1 March 2010.

[26] Rules for Uniform Domain Name Dispute Resolution Policy, approved by ICANN on October 24, 1999, available at http://www.icann.org/udrp/udrp-rules-24oct99.htm at

(d) Issuance of the Administrative Panel decision and the notification thereof to all relevant parties; and
(e) Implementation of the Administrative Panel decision by the registrar concerned, should there be a decision that the domain name in question be cancelled or transferred.

What are the major advantages of UDRP?
Compared with conventional court litigation the UDRP has two major advantages. The main advantage of the UDRP procedure is that it typically provides a faster and cheaper way of resolving a dispute regarding the registration and use of an Internet domain name. The procedure is considerably more informal than litigation and the decision-makers are experts in such areas as trademark law, domain name issues, electronic commerce, and the Internet and dispute resolution. Practice shows that in the absence of exceptional circumstances it takes on average no more than two months to resolve a UDRP dispute. Another advantage of the UDRP is that, in contrast to national court decisions, which require time-consuming enforcement procedures, a UDRP decision merely needs to be notified to the registrar, which is then required to implement the Administrative Panel finding.

Shortcomings of the UDRP.
Number of researchers saw, the UDRP as a relatively new approach has been object of much discussion and critical remarks concerning it cover not only organizational structure and procedural practice of the system, but also consider efficiency of the cases settled out of the courts in the scope of the UDRP. In spite of the fact that the a hefty portion of given comments and remarks on the proficiency of the UDRP are for the most part positive, there are still numerous uncertain issues in the framework that may cause serious obstacles.

On the basis of miscellaneous facts and documents of renowned authors in discussed area, it is important to analyze the most important problems. One of the argument of prejudice against the UDRP system is the proved fact that the majority of the cases have been handled in favour of complainants, exactly trademark owners.[27] In many science works on domain name dispute resolution, authors point out vulnerable and weak position of respondents in relation to complainants. After decision is reached, in most cases complainant seems satisfied when his complaints are fulfilled and, consequently, domain name is being transferred into the possession of the complainant, or it could be cancelled or changed.

[27] Mueller found that almost eighty percent of the all cases filed under the UDRP were decided in favour of complainants. Milton Meuller, Rough Justice, An Analysis of ICANN‟s Uniform Dispute Resolution Policy supra notes 125, available at http://www.acm.org/usacm/IG/roughjustice.pdf accessed on 10/04/2016 at 13:33 pm.

Further reduction of the complainant right to control election of the panel will help in achieving fairness of the process and increase confidence and trust in made decisions. Since the UDRP has been designed as a non-binding process[28], it simultaneously demonstrates further privilege for a complainant. To be concrete, the complainant can bring the case for the court consideration if he is not successful in the process. It is often pointed out that the respondent will in most cases be a weaker party than the complainant.

A court of "competent jurisdiction" probably may be any court able to assert jurisdiction over the dispute and/or the parties. The definition of competent jurisdiction was not set in a clear manner and properly explained. In any case, the Final Report mentions in this respect: "In the WIPO Interim Report, it was recommended that the domain name applicant should be required, in the domain name registration agreement, to submit, without prejudice to other potentially applicable jurisdictions, to the jurisdiction of (i) the country of domicile of the applicant, and (ii) the country where the registration authority was located."

Inconsistency in deciding cases within the UDRP procedure can occur particularly where there is no guideline on the choice of law. As the WIPO Final Report indicates that the applicable law should be settled by the panel according to traditional choice of law concepts, namely "in applying the definition of abusive registration, the panel of decision-makers shall, to the extent necessary, apply the law or rules of law that it determines to be appropriate in view of all circumstances".

The next issue that emerges is that the Policy does not implement an appeal mechanism of the panel's decision nor a compensation system within its proceedings. Consequently, it means that when parties dissatisfied with the decision reached, they have to take their cases to the courts through its costly and time-consuming proceedings. But here comes the paradox – parties tried to avoid complex, long proceedings and wasted money still face with the difficulties while seeking for compensation and protection of their rights.

The UDRP is only one amongst other alternative dispute resolution (hereafter ADRs) systems, and the national court systems remain available too. It seems, though, other ADRs are even more flawed and do not offer the UDRP's advantages of swift, in extensive and non bureaucratic proceedings, nor its efficiency and transparent outcomes. Most importantly though it must be reminded the flaws often pointed to the UDRP system are common to other ARDs as well and even national court systems.

Suggestions for the improvement of the UDRP system

[28] See, UDRP, Art 4(a).

After a thorough review of the existing case laws and well researched documents on the topic, it is proposed that the following suggestions may be considered

1. It is suggested to formulate new official guidelines aimed at improvement the UDRP policy and to make clear specific issues that were differently construed among the panellists and consequently, caused conflicts between domain name holders and trademark owners. Thus, for instance, we would mention necessity to reconsider rules which prohibit complainant to apply the UDRP proceeding repeatedly in relation to the same domain name. Moreover, it is advisable to pay attention on the usage of negotiation and mediation procedures, in the case if the parties consent to apply them;
2. Again, the UDRP system will operate more effectively if it envisages prolongation of time limits. Thus, art 5 (a) of the Rules contains provisions, which adjust unreasonably short period of time for respondent to acknowledge "*within twenty (20) days of the date of commencement of the administrative proceeding the Respondent shall submit a response to the Provider*." It is important to add that one of the reasons for the high rate of defaults in the UDRP procedure is due to the short time they have to respond to the complaint.
3. In order to establish precedents and contribute to legal certainty, the appellate mechanism would be the best option. In the framework of the UDRP launching of appeal process would be advantageous if the prices incorporated are reasonable and similar to the costs of initial proceedings,
4. Provide more precise definitions and provide more examples for terms such as bad faith and legitimate interests,
5. Recommend a choice of law provision to guide disputes among complainants and respondents of diverse jurisdictions,
6. Provide guidelines for evidentiary documentation, especially for common law mark owners,
7. Provide guidelines for the refusal of cases.

Conclusion

From an overview of the legal problems imposed by the Internet domain names, analysis of the background on the conflicts between trademark owners and domain name holders, and examination of the ICANN domain name dispute resolution policy, exactly, the UDRP policy we come to a conclusion that discussed dispute resolution procedure allows trade mark owners to fight efficiently and successfully cybersquatting. The key to successful implementation of the UDRP is in the time efficient solutions, low cost, swift enforceability and the quality of its human resources, that is, the of panellists who participate in the arbitrations.

It is an undisputed fact that UDRP serves an important function to resolve domain name disputes in an out-of-court proceeding that can be implemented on an international basis. The question is whether the process is as fair and effective as it should be, and astonishingly, the answer is somewhat elusive.

In view of all revised circumstances, despite of the many benefits of the Uniform Domain Name Dispute Resolution procedure, certain issues still need more clarification. This is the case in regard to the flaws of the UDRP system which sometimes results with an inappropriate settlement of the disputes between trademark owners and domain name holders. Nevertheless, the UDRP process remains its position as successful and authoritative instrument though with some inadequacies and complications of procedural aspects.

Genesis of Right to water in India and World: A study in Human rights perspectives

Lav Lesh Kumar*

Introduction

This paper examines the status of human right to water and water rights in India today. After exploring the judicially evolved fundamental right to water, it discusses some key points on how water management and development is grounded under the Constitution of India. It goes on to identify areas to strengthen water rights in the country. It then reviews legislative activity across India since the dawn of the new century and makes some important inferences on the substance of these laws from a rights based perspective.

Right to Water So far

Recognition of the serious problem of water scarcity and attempts to address them started earnest in 1970s from the international community. In 1972 the United Nations Conference on Human Environment held in Stockholm identified water as one of the natural resources that needed to be safe guarded[1]. Five years later in 1977, the United Nations Water Conference held at Mar del Plata in Argentina issued a Mar del Plata Action Plan which was designed to address the problem of water resources. The Action Plan consists of a number of recommendations and resolutions, pertaining to the crucial issues in water sector. The recommendations include assessment of water resources, water use and efficiency, policy, planning and management, etc.

The resolutions addressed areas such as community water supply, agricultural water use, research and development, river commissions, international co-operation and water policies in the occupied territories. An agreement was concluded to proclaim the period 1981 to 1990 as the 'International Drinking Water Supply and Sanitation Decade' during

Research Scholar, Department of Human Rights, School for Legal Studies, Babasaheb Bhimrao Ambedkar University, Lucknow.

[1] Principle 2 of the Stockholm Declaration on Human Environment States that the natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystem must be safeguarded for the benefit of the present and future generation through careful planning or management, as appropriate". For the full text of Stockholm Declaration see Declaration of the United Nations Conference on the Human Environment, June 16, 1972, UN Doc. A/CONF.48/14/Rev. 1 , Sales No.E.73.1I.A. 14 (1973); reprinted in 111.L.M. 1416.

which governments would assume a commitment in the drinking water supply and sanitation sectors[2].
The debate on right to water was begun with this Mar del Plata conference. Resolution II on Community Water Supply declared the content of right to water for the first time, i.e. "all people whatever their stage of development and their social and economic conditions, have the right to have access to water in quantities and of a quality equal to their basic needs". As such Mar del Plata conference was a milestone in the debate on right to water, provided the basis for further discussion even continuing today. But a shift in the concept of water from a common basic need to a commodity can be seen in the following conferences.

One of such important conference was the International Conference on Water and Environment held in Dublin in 1992. Principle 4 of the Dublin Statement proclaims that "Water has an economic value in all its competing uses and should be recognized as an economic good". Yet the statement clarified that within this principle "it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price". It confirmed the right to water at an affordable price and not free of charge. These conferences recognized the past failures in realizing the economic value of water, which in their opinion ultimately lead to the wasteful practices.

In 1996 the world community witnessed the establishment of World Water Council (WWC) and Global Water Partnership (GWP) having strong representation of multinational water companies and aid agencies to act as a think tank on water resource matters. In the following years three world water forums were held in different parts of the world under the auspices of these bodies. The Marrakech Declaration issued in the First World Water Forum held in Marrakech, Morocco, 1997 did not go as far as Dublin Conference with regard to Right to Water. The second World Water Forum held in Hague, Netherlands in 2000, recognized that the 'access to safe and sufficient water and sanitation are basic human needs'.

The Kyoto World Water Forum, 2003 merely stated that - "We will enhance poor people's access to safe drinking water and sanitation". The importance of declaring water as a basic human need and a fundamental right was further highlighted in the UN General Assembly in its resolution on Right to Development. This resolution reaffirmed that in the realization of the Right to Development, the rights to food and clean drinking water are fundamental human rights and their promotion constitutes a moral imperative for the

[2] The United Nations General Assembly did not refer in Resolution 32/158 (adopting the report of United Nations Water Conference) for the recommendation to declare the decade of 1981- 1990 as the International Drinking Water Supply and Sanitation Decade. However this matter was addressed by the General Assembly in a later resolution in 1 980. Resolution 35/1 8, adopted by the General Assembly on November 10, 1980 at the 55th Plenary Meeting, after referring to the Mar del Plata Action Plan, proclaimed "the period 1981-1990 as the International Drinking Water Supply and Sanitation Decade"

national governments and the international community. Moreover reducing by half the proportion of people without sustainable access to safe drinking water forms one of the prime goals in the UN Millennium Declaration 2000.

In December 2000 the General Assembly proclaimed the year 2003 as the 'International Year of Fresh Water' and another resolution adopted in December 2003 declared the decade 2005-2015 as 'International Decade for Action, Water for Life.' On a large scale, the Committee on Economic, Social and Cultural Rights in November 2002 adopted its General Comment on the Right to Water. The Committee underlines in its General Comment (G.C.) that "While the human Right to Water is indispensable for leading a life in human dignity and that it is a prerequisite for the realization of other human rights". The main declarations of G.C. are[3],

- Water should be treated as a social and cultural good, and not primarily as an economic good.
- The factors that apply in all circumstances in enjoying right to water are, availability - the water supply for each person must be sufficient and continuous for personal and domestic uses; quality - the water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards, that constitute a threat to a person's health; accessibility - water, water facilities and services have to be accessible to everyone without any discrimination.
- Right to water includes freedoms and entitlements to drinking water, water for household purposes, and water for agricultural purposes and sanitation.
- The relationship of the right to water with the human right to life and human dignity is obvious.

The G.C. again calls for states to "accept comprehensive and integrated strategies and programs to ensure that there is sufficient and safe water for present and future generation". By placing these obligations the G.C. put forwards a challenge before states in regard to 'immediate obligations' that they have in relation to the right to water such as the guarantee that the right will be exercised without discrimination of any kind and the obligation to take steps towards the full realization of right to water. The committee urges states to pay particular attention to the relevance of water resources and entitlements for women. By giving these messages to states, G.C. emphasized the negative role of the state in preventing water right violation and positive role of the state to implement measures for the realization of right to water. It explicitly stated that, "Water should never be used as an instrument of political and economic pressure".

Right to Water and Water Rights in India: A Judicial Initiation

Legally, and conceptually, the human *right to water* to every person needs to be understood differently from the bundle of *water rights* available to water consumers and users in the country. Let us first examine the right to water. To the question as to whether

[3] See UN Document HRl/GEN/l/Re

there is a fundamental right to water for every person in India the short legal answer has to be yes. This is because such a right has been judicially evolved by the Supreme Court and various High Courts of the country over the years. The judicial creation of a fundamental right to water in India is briefly explored below.

The right to 'pollution free water' and the right of access to 'safe drinking water' has been read as a part of 'Right to Life' under Article 21 of the Constitution of India. This has been possible because of a liberal and activist interpretation of the fundamental right to life by the Supreme Court as well as the High Courts of the country in series of cases before them. After initially talking about the right to water in the context of pollution cases, courts have delivered a growing body of verdicts on the more fundamental concerns of access to drinking water and on the right to safe drinking water as a fundamental right[4]. One noticeable trend is that this has happened mostly in cases where inadequate water supply to different cities was legally questioned and challenged. The context and evolution of the right in these cases are discussed below. In a case relating to the scarcity and impurity of potable water in the city of Guwahati, it was contended that the municipal corporation is responsible for supplying sufficient drinking water[5]. The municipal corporation in its counter affidavit said that while it is well aware about its duties with regard to supply of drinking water to the citizens, due to its financial constraints it could not augment its existing plant[6]. The court made clear that 'Water, and clean water, is so essential for life. Needless to observe that it attracts the provisions of Article 21 of the Constitution'.

Likewise, in a petition filed by an advocate for suitable directions to ensure regular supply of water to the citizens of Allahabad, the High Court reiterated the fundamental right to drinking water[7]. The court cited with approval the Supreme Court's decision holding that the need for a decent and civilized life includes the right to food, water, and a decent environment.[8]

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[4] These cases include *Wasim Ahmed Khan* v. *Govt. of AP*, 2002 (5) ALT 526 (D.B.); *Mukesh Sharma* v. *Allahabad Nagar Nigam &Ors.*, 2000 ALL. L.J. 3077; *Diwan Singh and another*, v. *The S.D.M. and other* 2000 ALL. L.J. 273; *S.K. Garg* v. *State of UP*. 1999ALL. L.J. 332; *Gautam Uzir & Anr.* v. *Gauhati Municipal Corpn.* 1999 (3) GLT 110.

[5] *Gautam Uzir & Anr.* Vs. *Gauhati Municipal Corp.* 1999 (3) GLT 110.

[6] Para 6 of the affidavit–in–opposition filed by Gauhati Municipal Corporation and quoted in 1999 (3) GLT 110.

[7] *S.K. Garg v. State of UP* 1999 ALL. L. J. 332.

[8] The Supreme Court held in *Chameli Singh v. State of UP* (1996) 2 SCC 549: AIR 1996 SC 1051, 'The at right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights enshrined in the Universal Declaration on Human Rights and convention or under the Constitution of India cannot be exercised without these basis human rights'.

In another case, the Supreme Court had observed, 'Drinking is the most beneficial use of water and this need is so paramount that it cannot be made subservient to any other use of water, like irrigation so that right to use of water for domestic purpose would prevail over other needs'[9].

In view of these decisions, the Allahabad High Court directed that a high powered committee be set up to look into the problem of access to water and decide on the ways and means to solve it on a war footing[10]. The Andhra Pradesh High Court reiterated this position saying that the right to safe drinking water is a fundamental right and 'cannot be denied to citizens even on the ground of paucity of funds'[11].

In this line of cases in 2006 a Public Interest Litigation (PIL) was decided by the Kerala High Court ventilating the grievances of the people of West Kochi who had been clamoring for supply of potable drinking water, for more than three decades. Noting that the petitioners 'have approached this Court as a last resort' the Court held that: We have no hesitation to hold that failure of the State to provide safe drinking water to the citizens in adequate quantities would amount to violation of the fundamental right to life enshrined in Article 21 of the Constitution of India and would be a violation of human rights. Therefore, every Government, which has its priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes. Nothing shall stand in its way whether it is lack of funds or other infrastructure. Ways and means have to be found out at all costs with utmost expediency instead of restricting action in that regard to mere lip service[12].

The intention of the judiciary to reinforce the right to pollution-free waters is implicit in the M.C. Mehta case[13] (1988) where the tanning industries located on the banks of the river Ganga were alleged to be polluting the river. The Court issued directions to them to set up effluent plants within six months from the date of the order. It was specified that failure to do so would entail closure of business. The Court also issued directions to the Central Government, UP State Pollution Control Board and the District Magistrate. Although this judgment has made no reference to the right to life, the supporting judgment has noted that the pollution of river Ganga is affecting the life, health and ecology of the Indo-Gangetic Plain.

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[9] *Delhi Water Supply and Sewage Disposal Undertaking v. State of Haryana,* (1996) 2 SCC 572: AIR 1996 SC 2992.

[10] Further, the Court said that since the matter involved technical expertise, the committee should consult experts also in this regards. If any complaints were made by the citizens of any locality that they were not getting water, the committee would look into it and do the needful. See para 9 in S.K. Garg v. State of UP 1999 ALL. L.J. 332.

[11] *Wasim Ahmed Khan v. Govt. of AP,* 2002 (5) ALT 526.

[12] *Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala,* 2006(1) KLT 919, para 3.

[13] *MC Mehta v Union of India,* AIR 1988 SC 1037

In L.K. Koolwal v State of Rajasthan[14] the High Court in 1988 gave directions to clean the city of Jaipur and save it from its unhygienic conditions. The Rajasthan Court in this case invoked Art 51 A (g) of the Constitution and was of the view that though this provision is a Fundamental Duty, it gives citizens a right to approach the Court for a direction to the municipal authorities to clean the city; and that maintenance of health, sanitation and environment falls within Art 21 thus giving the citizens the fundamental right to ask for affirmative action ((Leelakrishnan, 2002).

The case was filed as a writ petition by citizens of Jaipur through the petitioner Mr. L.K. Koolwal to compel municipal authorities to provide adequate sanitation. The Court in this case has made an important point that when every citizen owes a constitutional duty to protect the environment (Article 51A), the citizen must also be entitled to enlist the court's aid in enforcing that duty against the recalcitrant state agencies. Another noteworthy contribution in the Koolwal judgment is the Court's elaboration of Article 19 (1) (a) – guaranteeing freedom of speech – to include the 'right to know'. In this case, the Court extends the right to know to entitle the petitioner to full information about the municipality's sanitation programme, or the lack thereof.

It was in 1990 that a court clearly recognised the right of people to clean water as a right to life enshrined in Article 21 of the Constitution, for the first time. The Kerala High Court in Attakoya Thangal v. Union of India[15] attributed right to clean water as a right to life in Article 21. In this case, it was questioned whether a scheme for pumping up ground water for supplying potable (drinking) water to Laccadives (now known as Lakshadweep Islands) in the Arabian Sea, would not bring more long-term harm than short-term benefits. The Kerala High Court in this matter asked for a deeper study to examine whether the scheme, if allowed to operate, would not dry up and result in salt water intrusion into the aquifers. Stressing the need for inter-disciplinary co-operation for provision of civic amenities, the judge observed that "the administrative agency cannot be permitted to function in such a manner as to make inroads into the fundamental right under Art 21. The right to life is much more than a right to animal existence and its attributes are manifold, as life itself. A prioritization of human needs and a new value system has been recognized in these areas. The right to sweet water and the right to free air are attributes of the right to life, for, these are the basic elements which sustain life itself."[16]

It was in the next year, 1991, which the Supreme Court itself enlarged the scope of the right to live to explicitly include the right to enjoyment of pollution free water and air for full enjoyment of life in Subhash Kumar v. State of Bihar[17].

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[14] AIR 1988 Raj 2.
[15] 1990 KLT 580
[16] *Id*, p 583.
[17] AIR 1991 SC 420

However, the Court did not get an opportunity to apply the principle as it found the petitioner to have made a false allegation due to a personal grudge towards the respondent company. Subhash Kumar filed public interest litigation to prevent the pollution of the Bokaro river water from the sludge/ slurry discharged from the washeries of the Tata Iron & Steel Co. Ltd. (TISCO). The petition further alleged that the effluents in the shape of slurry flow into the Bokaro River, which are carried by the river water to distant places, pollute the river water, as a result of which the river water is not fit for drinking purposes nor is it fit for irrigation purposes. The continuous discharge of slurry in heavy quantity by TISCO poses risks to the health of people living in the surrounding areas and as a result of this discharge the problem of pure drinking water has become acute. The petitioner has asserted that in spite of several representations, the state of Bihar and the State Pollution Control Board has failed to take action against the company.

The Court on a review of the facts and the averments contained in the counter affidavits did not accept the petitioner's allegations. However, the court in this matter reiterated the use of Article 32 as an instrument for safeguarding citizens' fundamental right to life and averred that the right to live under Article 21 of the Constitution includes the right of enjoyment of pollution-free water and air for the full enjoyment of life. Later in 1996 under the petition from an advocacy group in the case Indian Council for Enviro-Legal Action v Union of India[18], the Supreme Court found that the responsibility for costs of remedying water problems falls on companies in the wrong.

An industry producing toxic material was dumping its sludge in such a manner that much of it was draining into the earth making the soil reddish and the ground water highly polluted. The water became dark in colour and was no longer fit for consumption by human beings or by cattle. Sludge also flowed into irrigation canals. Crops were affected. Another industry was discharging untreated water emanating from a sulphur acid plant. National Environmental Engineering Research Institute (NEERI) prepared a report and brought it to the notice of the court. It also contained the opinion of experts from the Ministry of Environment and Forests and views of the State Pollution Control Board.

The Court said, "The damage caused by the untreated highly toxic wastes resulting from the production of 'H' acid and the continued discharge of highly toxic effluents from sulphuric acid plant flowing through the sludges – is indescribable. It has inflicted untold miseries upon the villagers and long lasting damage to the soil, to the underground water and to the environment of the area in general."

The Supreme Court fixed the responsibility on the errant industry and asked the Central Government to recover the expenses for remedial action from the industry. The court accepted this as public interest litigation on behalf of the villagers of Bichiri whose rights to life were being affected by these industries. In a more recent high court case, the ambit

[18] AIR 1996 SC 1446

of Article 21 was enlarged to include the 'right to water' in S.K.Garg v State[19], where large parts of Allahabad were being deprived of clean and sufficient water. Under the guidance of the High Court, a committee was set up for testing and supply of water.

A perusal of the relevant judgments shows that while the highest court has been reluctant to confer specifically a right to a clean and humane environment under Art 21 of the Indian Constitution, various high courts in the country have specifically brought right to safe water and sufficient sanitation under Art 21 as Right to Life. There are several such judgments from different high courts in the country. These cited above represent only a few, well-known judgments.

Right to Safe Drinking Water directly under the Constitution

Even while the cases above make it clear that there is a judicially evolved fundamental right to water, such a right is not explicitly incorporated under the Constitution of India. The closest that we came to directly incorporating this right was when the National Commission that reviewed the Constitution recommended in its report in 2002 that a new Article 30D be inserted in the Constitution thus: *'Every person shall have the right—(a) to safe drinking water …*' That recommendation of the National Commission reiterated what the higher courts have been holding in similar words in the past few years. In that sense one may argue that the National Commission was merely recognizing a pre-existing right, not creating a new one! Somehow, the said recommendation of the National Commission that reviewed the Constitution, much like the Report of the Commission itself containing the recommendation, is gathering dust in New Delhi. The fact that it was the National Democratic Alliance (NDA) Government at the centre which had constituted the National Commission—and which soon went out of the government following the submission of the Report—has not helped.

Even while recognizing that water is a state subject, and capable of evoking intensely political and emotive reactions, a national consensus in explicitly incorporating a fundamental right to water may not be elusive. Right to education of a child from 6–14 years age is a judicially evolved right which has been explicitly incorporated as a fundamental right under new Article 21A of the Constitution of India. There is no reason why drinking water being more fundamental than even elementary education—and similarly judicially circumstanced as education—should not follow the same route. There is another good reason as to why explicitly recognized and well-defined right to water needs to find a direct entry into the Constitution of India. Chapter 10 of this *Report points* out, various cases before the courts confirm that the fundamental human right to water is well established. Yet, the actual content of the right has not been elaborated upon in judicial decisions. This has also meant that the judicial response to specific cases on violation of right to water can be adhoc. Even in the cases discussed above, a closer look at the verdicts can reveal fault-lines. Take, for example, the 2002 case in the High Court of Andhra Pradesh. The High Court said that the right to safe drinking water is a

[19] AIR 1999 All 41

fundamental right and 'cannot be denied to citizens even on the ground of paucity of funds'. Then it contradicted itself. The judgment also says that though the state is under an obligation to provide at least drinking water to all its citizens, 'the limited availability of water resources as well as financial resources cannot be ignored'. The Court could have categorically declared that the state's failure to provide safe drinking water was unconstitutional. However, the judge felt that to issue such a direction would be only 'utopian'. This judicial ambivalence explains why the *rights* regime in the country tends to be a *right without remedies* regime.

In the above case while the court desisted from making a categorical declaration, it could say clean water is a fundamental right only because of the soft nature of the operative directions it ultimately made.

Legislative Provisions Regarding Right to Water

Under the Constitution, the legislative competence for water and water based resources is divided between the Union (national or federal level government) and the States (regional level government). Major subjects such as water supplies, irrigation and canals, drainage and embankments, water storage and water power are controlled by the latter. As water is primarily State-controlled, there are a plethora of laws related to the different areas of water such as irrigation, navigation, pollution, and cess. Moreover, these laws may differ from state to state.

The concern of the Union with respect to the resources is mainly in inter-state water sharing and specific areas essential for the economic development of the country. This latter category includes many of the inherited colonial laws relating to water[20]. A brief overview of colonial laws applicable to India (including regulation of irrigation, fisheries, electricity, canal and drainage) demonstrates that the Crown had extended its control over all aspects of water, types of water and sources of water. For instance, the preamble to the Northern India Canal and Drainage Act, 1873 states, 'the provincial government is entitled to use and control, for public purposes, the water of all rivers and streams flowing in natural channels, and of all lakes and other natural collections of still water'. Similarly, the Bombay Irrigation Act, 1879, lays down that 'whenever it appears expedient to the state government that the water of any river or stream flowing in a natural channel...should be applied or used by the state government...the state government by notification, may declare that the said water will be so applied'.

There is a need to revamp these old irrigation laws prevalent in most states of India. One apparently progressive piece of legislation is the recent enactment 'Andhra Pradesh

[20] Embankment Regulation, 1829, Northern India Canal and Drainage Act, 1873, the Bengal Irrigation Act, 1876, the Northern India Ferries Act, 1878, the Indian Electricity Act, 1910, Jharia Water Supply Act, 1914, the Madras River Conservancy Act, 1884, the Indian Fisheries Act, 1897 are some such laws.

Farmers Management of Irrigation Systems, 1997' which provides for the constitution of farmers' organisations and water user association for the irrigation sector.

Another feature of Indian law is the discrepancy between the ownership of surface water and the ownership of ground water (water beneath the surface). While surface water is considered a state property, ground water belongs to the owner of the land. Unrestricted extraction from the ground by some could lead to inequities and injustice to others as people share the same aquifers. To try and limit this Central Ground Water Authority has promulgated 'Environment Protection Rules for Development and Protection of Groundwater'. Additionally, the Working Group on Legal, Institutional and Financial Aspects, constituted under the Ministry of Water Resources, has suggested that the state should play the role of a facilitator while user organisations and panchayats (a form of local self-government) should act as regulatory agencies.

A large number of enactments regarding water and water based resources have been passed concerning water supply for drinking purposes, irrigation, and rehabilitation of evacuees affected by the operations of schemes for water resources management. However, none of these laws enumerate an explicit 'right to water'. Instead, some of the laws[21] have expressly abolished usufructs (rights to use a resource) and customary rights. It is largely clear from the case law that people and communities have had to claim these rights back from the authorities.

In addition, the Indian Legal System provides four further legal routes to address water pollution and water quality problems, thus helping to reinstate the rights of people and other living beings to clean and unpolluted waters.

1. A comprehensive scheme of administrative regulation through the permit system of the Water (Prevention and Control of Pollution) Act, 1974;
2. Provisions of the Environment (Protection) Act, 1986 relating to water quality and access to water through its notifications on permissible quality standards, environmental impact assessments, public hearings, etc.;
3. Public nuisance actions against polluters, including municipalities charged with controlling water pollution; and
4. The common law right of riparian owners to unpolluted waters.

Need for a 'Good Quality' Right to Water

On a related note, the mere incorporation of a right need not necessarily be seen as remedy or result inducing in itself. There are three conditions for a 'good quality' human right to be effective: the right needs to be fundamental, universal, and clearly specifiable. Can the right to water in India meet the said three conditions? While the basic need for, and hence right to, water is universally accepted as a fundamental right, it has struggled to

[21] Section 3 of the Kumaon and Garhwal Water (Collection, Retention and Distribution) Act, 1975, abolishes all existing rights if any (whether customary or otherwise vested in any individual or village communities) to use water in areas to which this Act extends

meet the test of specificity in the Indian context. This is simply because it has not been possible to specify a level below which the right to water can be said to be denied. It is for this reason that the literature on social and economic rights produced by the United Nations (UN) over the years emphasizes that all socio-economic rights subject to a regime of 'progressive realisation' can only be effective if 'minimum core obligations' are built in to them. The minimum core obligation of the state flowing from the right to water of every person has not yet been defined and specified in India either by the legislature or by the courts. Perhaps it is time to clearly recognize that a certain quantity of water (litres per capita per day or lpcd) is a most basic human need and should be seen as an inviolable part of the fundamental right to water[22]. Explicit incorporation of a right that is fundamental and universal and, more importantly in the Indian context, clearly specifiable in terms as laid out above has the potential to catalysing changes in law and policy in the area.

A categorical carving out of a fundamental right to water in the Constitution of India has the potential to mobilize the people, the media, and ultimately the decision-makers. Besides, it can serve to underline the fact that ensuring a certain quantity of water to every person in the country is a non-negotiable and mandatory legal requirement. This is important given that the new national guideline for drinking water known as the National Rural Drinking Water Programme (NRDWP) states that it is necessary to 'move *ahead* from the conventional norms of litres per capita per day (lpcd) to ensure drinking water security for all in the community'. The basic unit now considered is the household, and as noted in Chapter 10 of this *Report* the key concern with the new framework is that 'the focus on the individual makes way for a focus on the household.'[23]

A fundamental right to water to every person in the country making it explicit, categorical, and non-negotiable shall help to bring back the focus on every individual and will set the right legal route towards securing water security for all. It is also often argued that given the limited financial resources of water utilities how can the incorporation of a right help work in such a scenario? In keeping with the tone and scope of the present paper, a quick, legal, rights based answer is proffered here. As the author has noted in the past, the argument of realizing social and economic rights 'progressively' cannot be used by the government to say that its hands are tied when it comes to giving effect to its 'minimum core obligation' in respect of these rights.

The fundamental rights under the Constitution of India can only be seen as representing these core obligations. Further, the rights language alone can enforce a cash-strapped,

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[22] Say 40 lpcd—same as the Rajiv Gandhi National Drinking Water Mission rate to provide safe drinking water to the 'problem villages' and to the rural population—is a minimum requirement. On this specific point see Upadhyay, Videh (2003), 'Claiming Water', *Down to Earth*, available at http://www. India environment portal. org. in/node/3259 Last accessed on 24 April 2016.

[23] Cullet, 'Evolving Regulatory Framework for Rural Drinking Water' in IDFC (ed.) *India Infrastructure Report2011,* Oxford University Press, New Delhi.

unwilling government to divert money to a cause that it never seriously paid attention to. The point here is not whether we have the resources to honour a right but whether we can shake the modest resource basket that we have, to the prioritize funding of areas more fundamental to our existence. We cannot wait for more resources to provide those conditions that honour the irreducible minimum 'right to be human'[24]. A fundamental right of access to safe drinking water squarely falls in this domain.

Conclusion

To conclude, some of the points made in the paper may be recapitulated. The judicial creation of a fundamental right to water in India has been significant but in specific cases the judicial approach can be adhoc and with fault lines embedded in it. This, and other good reasons outlined in the first part of the paper, suggest as to why explicitly recognized and well defined right to water needs to find a direct entry into the Constitution of India. We need to put behind us a certain judicial ambivalence that threatens to reduce a *rights* regime to a *right without remedies* regime.

The minimum core obligation of the state flowing from the right to water of every person has not yet been defined and specified in India either by the legislature or by the courts. It is felt that the time to do that is here and now. It is also critical to reconcile the fundamental right to water with the mandate for water supply and management with the rural and urban local bodies. Amongst other things, this should make obvious the fact that municipal corporations/councils are duty-bearers who are obliged to honour the fundamental right to water of every person. Also, in the context of the fact that all the recent decentralizing' government initiatives have sought to vest powers informal village groups/ associations, the water rights regime needs to evolve conditions under which a group entity can become a true right holder so that an entity like a legally constituted Village Water Supply Committee (VWSC) or a Water User Association (WUA) can enforce such rights. Even while a more mature group rights regime in water is imperative one feels that given the state of water laws we are still some distance and time away from it and a lot of work needs to be done. The critical emerging issues to be addressed on the way ahead (in their specific contexts) have already been explained through a review of need of good quality right to water so and thus need not be restated here.

[24] Upadhyay, Videh (2003) 'The Right to live is Non-negotiable', *Indian Express*, 14 June.

Traditional Knowledge and Biodiversity

Harkiran Kaur*

Abstract

Indigenous people and traditional communities often have a deep understanding of their environment and its ecology. They know of numerous uses to which plants and animals can be put- as food, for example, or as medicines and dye stuffs. Differing cultivation-techniques have been developed for large number of plants. This knowledge forms an important basis for the conservation of global bio-diversity and for its sustainable use. Culture and biological diversity are closely interlinked. When indigenous people have their environments destroyed, when they are uprooted and displaced and lose their identity, there is a danger that their vast fund of knowledge will be lost – both to the people themselves and to the whole of humanity[1]*. Attempts to exploit traditional knowledge for industrial or commercial benefits may lead to prejudicial misappropriation of the same from its rightful holders. Hence it becomes pertinent to develop ways and means of protecting and nurturing traditional knowledge, thereby ensuring sustainable development compatible with the interests of the traditional knowledge holders'*[2]*.The objective of this paper is to inspire, motivate, cultivate inquisitiveness, shape the opinion and enlighten the traditional knowledge and biodiversity.*

Keywords: Traditional Knowledge, community, Biodiversity

Introduction

Traditional knowledge is the information that people in a given community, based on experience and adaptation to a local culture and environment have developed over time, and continues to develop. This knowledge is used to sustain the community and its culture and to maintain the genetic resources necessary for the continued survival of the community. Traditional knowledge includes mental inventories of local biological resources, animal breeds and local plant, crop and tree species. It includes practices and technologies, such as seed treatment and storage methods and tools used for planting and harvesting. Traditional knowledge (TK) also encompasses belief systems that play a fundamental role in a people's livelihood, maintaining their health and protecting and replenishing the environment.

Research Scholar, Department of Law, School for Legal Studies, Babasaheb Bhimrao Ambedkar University, Lucknow, U.P.

[1] Available at http:// www.conservation.development.net/Projectkte/Nachhaltiykeit/co./Laender Des Suesdens/ Themenblaetter/ pdf/Biodiv-TK- erg/-traditional-knowedg.pdf(accessed on 10.02.2016 at 19:22).

[2] Juhichoudhary, "Intellectual Propertyand Traditional Knowledge"' available at http://www. legal service India.com/article/198-Intellectual-Pproperty-and-Traditional knowledge.html (accessed on 20.01.2016 at 16:03).

The term "*traditional"* used in describing the knowledge does not imply that this knowledge is old or non-technical in nature, but "tradition-based". It is traditional because it is created in a manner that reflects the traditions of the communities, therefore not relating to the nature of the knowledge itself, but to the way in which that knowledge is created, preserved and disseminated.[3]

Examples of traditional knowledge:-
The use of plao-noi in Thailand for treatment of ulcers.

- The use of the hoodia cactus by Kung Bushman in Africa to starve off hunger.
- The use of turmeric in India for wound healing.
- The use of ayahuasca in the Amazon basin for sacred religious and healing purposes.
- The use of joublie in Cameroon and Galion as a sweetener

Traditional holders face various difficulties. In some cases, the very survival of the knowledge is at stake, as the actual survival of communities is under threat. External social and environmental pressures, migration, the encroachment of modern lifestyles and the disruption of traditional ways of life can all weaken the traditional means of maintaining or passing knowledge on to future generations. There may lie a risk of losing the very language that gives the primary voice to a knowledge tradition and the spiritual world-view that sustains the tradition. Either through acculturation or diffusion, many traditional practices and associated beliefs and knowledge have been irretrievably lost. Thus, a primary need is to preserve the knowledge that is held by elders and communities throughout the world.

Another difficulty facing TK holders is the lack of respect and appreciation for such knowledge. For example, when a traditional healer provides a mixture of herbs to cure a sickness, the healer may not isolate and describe certain chemical compounds and describe their effect on body in the terms of modern bio-chemistry, but the healer has, in effect, based this medical treatment upon generations of clinical trials undertaken by healers in the past, and on a solid empirical understanding of the interaction between the mixture and human physiology. Thus, sometimes the true understanding of the value of TK may be overlooked if its scientific and technical qualities are considered from a narrow culture perspective.

Yet another problem conferring TK holders is the commercial exploitation of their knowledge by others, which raises questions of legal protection of TK against misuse, the role of prior-informed consent, and the need for equitable benefit-sharing. Cases involving natural products all bear evidence to the value of TK in the modern economy. A lack of experience with existing formal systems, limited economic resources, cultural factors, lack of a unified voice, and in many cases a lack of clear national policy

[3] Available at http://shr.aas.org/tek/handbook/handbook pdf (accessed on 20.01:2016 at 15:49).

concerning the utilization and protection of TK, results in these populations often being placed at a decided disadvantage in using existing IP mechanisms. At the same time, lack of understanding and clear rules concerning the appropriate use of TK creates areas of uncertainty for those seeking to use TK in research and development of new products. There is a common need for well-established, culturally appropriated and predictable rules both for the holders and legitimate users of TK.

A further challenge is to address the international dimension of the protection of TK and benefit-sharing for associated genetic resources, while learning from existing national experiences. Only through the participation of communities and countries from all regions can this work go forward to produce effective and equitable outcomes that are acceptable to all stakeholders.

These challenges are diverse and far reaching, and involve many areas of law and policy, reaching well beyond even the most expansive view of intellectual property. Many international agencies and processes are engaged on these and related issues. But responses to these problems should be coordinated and consistent, and need to provide mutual support for broader objectives. For instance, IP protection of TK should recognize the objectives of the CBD concerning conservation, sustainable use and equitable benefit-sharing of genetic resources. In general, the preservation and protection against loss and degradation of TK should work hand-in-hand with protection of TK against misuse and misappropriation. So when TK is recorded or document with a view to preserving it for future generations, care needs to be taken to ensure that this act of preservation does not inadvertently facilitate the misappropriation or illegitimate use of the knowledge.[4]
There are many reasons for the protection of traditional knowledge which are the following:

- Equity considerations- The custodians of traditional knowledge should receive fair compensation if the knowledge leads to commercial gains.
- Conservation concern- The protection of traditional knowledge contributes to the wider object of conserving the environment, biodiversity and sustainable agricultural practices.
- Preservation of traditional practices and culture- Protection of traditional knowledge would be used to raise the profile of the knowledge and the people entrusted with it both within and outside communities.
- Prevention of appropriation by unauthorised parties avoiding biopiracy
- Promotion of its use and its importance to development.[5]

[4] Available at http:/www.wipoint/freepublications/en/tk/920/wipo-pub-920.pdf accessed on 20.04.2016at 15:54).
[5] Available at http://www.iprcommission.org/papers/pdfs/final.report/ch4final.pdf accessed on 20.04.2016 at 16:11.

Recognition of Traditional Knowledge Under The Convention On Biodiversity, 1992
The UN Conference on Environmemnt and Developmnet in Rio de Janerio in1992 marked the first occasion on which the value of traditional knowledge was given broad recognition. Reference is made to the indigenous and local communities in the Preamble to the CBD and in four of its articles. The most important section in this regard is Article 8(j).

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

Thus it is clear that there is a general agreement within the international community that there is a need to recognize the traditional knowledge. The concern is to recognize it, take measures to ensure that communities are involved in the preservation and development of it and proper benefits return to them in case of commercial exploitation by others. But the method of achieving it is left to individual nations. But there are no uniform norms regarding the protection of different types of traditional knowledge owned by local communities. The reasons being that the international community never had an occasion to look at the protection of traditional knowledge in its entirety.[6]

Prior informed consent (PIC): According to the principle of prior informed consent (PIC), TK holders should be fully consulted before their knowledge is accessed or used by third parties and an agreement should be reached on appropriate terms; they should also be fully informed about the consequences of the intended use. The agreed scope of use may be set out in contracts licence or agreements which would also specify how benefits arising from the use of TK should be shared. The principal of PIC concerning access to genetic resources is one of the cornerstones of the CBD.

Equitable benefit sharing: The fair and equitable sharing of benefits from the use of genetic resources is one of the objectives of the CBD, and the CBD also encourage equitable sharing of benefits from the use of certain forms of TK. According to this principle, the TK holders would receive an equitable share of the benefits that arise from the use of the TK, which may be expressed in terms of compensatory payments, or other non-monetary benefits.[7]

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[6] Jain Vijendra J.(28/4/2008), "Safeguarding the Traditional Knowledge in India", Seminar of APJA,Delhi, available at http://www.highcourtchd.gov.in/right-menu/events/apjaspeech.pdf (accesses on17/4/2016 16:26).
[7] *Supra note* 4.

Following are the Priorities For action at both at the national and international level:

At the national level

- Local and indigenous groups must be enabled both to take part on an equal footing in decision-making process about the use of biological resources and to defend their interests.
  Contracting states must inform indigenous communities of their rights and duties under Article8(j) and of other relevant provisions.
- Contracting states must work with indigenous representatives to develop national legislation assuring the protection of indigenous knowledge.
- Contracting states must recognize land rights and rights of access to resources because they represent the basis for the continued existence and further development of indigenous systems of knowledge.

At the International Level

- The collective rights of indigenous and local communities over their biodiversity and over the knowledge based on this must be recognized.
- Indigenous communities must be involved in the political process: The convention does not grant the same status to indigenous communities as to contracting parties but indigenous people can be granted information and unlimited right of expression i.e. more than mere observer-status.
- In order to ensure the equitable distribution of benefits accruing from traditional knowledge, these benefits must be acknowledged in the relevant trade-agreements (such as TRIPS) and in regulations on intellectual property (activities of the World Intellectual Property Organization WIPO)[8]

Traditional Knowledge And Intellectual Property Rights (IPR)

One of the key results of the industrial revolution of the west is the creation of the Intellectual Property rights (IPRs) regime- a system based on the western legal theory and economic philosophy. IPRs are means to assure rewards to innovators, and are claimed to have been an important driving force behind the rapid industrial growth in the developed world. They were primarily evolved to protect mechanical and chemical innovations for which identification of novelty, inventive step and innovator is relatively straight forward.

IPR regime is now extended to the biological resources beyond the conventional domain of mechanical and chemical innovations. It is argued that the evolution of modern IPRs regime, as it exists today, has essentially evolved in response to a need in the aftermath of industrial revolution within Europe and does not in principle provide protection for the knowledge of the traditional communities in public domain. Many people have expressed the view that imposition of the current IPR system will not be suitable for the protection of traditional knowledge (TK). TRIPS Agreement is incompatible with the international

[8] *Supra note* 1.

human rights norms and hinges rights of the indigenous and local communities over their natural resources.

The existing IPR regime also does not provide protection for the inventions that are based on the prior existing knowledge, e.g. knowledge held in the public domain. Many have opined that the current IPR framework is ill equipped to reward the innovations that have originated from a community of people. The TRIPS Agreement also does not provide any specific mention about the traditional knowledge and innovations which are in the public domain. In actual sense, IPRs are utilized as legal means to appropriate the traditional knowledge of the communities. In some countries, patents are granted for processes, products, innovations, naturally-occurring plants, animals, human generic material, micro-organisms and parts or components of plants and animals such as, genes, cell, DNA sequences and biological, microbiological processes and non- biological process.[9]

Whatever the IPRs forms of protection for a certain component of TK may be, whether copyright, patent, trademark, geographical indications or tradename, a serious obstacle that title-holders (either communities or individuals) are likely to face is the cost of acquisition of rights (when registration is required such as in the case of patents, industrial designs and trademarks) and, more generally, of enforcement of the relevant rights. Administrative and judicial procedures are often long and costly. The availability of IPRs protection for TK may be, therefore, of little or no real value to those who may claim right in TK.[10]

The current IPR system cannot protect traditional knowledge for three reasons:

1) The current system seeks to privatize ownership and is designed to be held by individuals or corporations, whereas traditional knowledge has collective ownership.
2) Second, this protection is time- bound, whereas traditional knowledge is held in perpetuity from generation to generation.
3) Third, it adopts a restricted interpretation of inventions which should satisfy the criterion of novelty and be capable of in industrial application, whereas traditional innovation is incremental, informal and occurs over time.

A sui generis, or alteration law, is therefore necessary to protect traditional knowledge[11].

Trips and protection of traditional knowledge:

Article 27(1) of TRIPS provides that patents shall be made available for any inventions-product or process in all fields of technology provided that they are new, involve an

[9] Venkatraman K. And Swarnlatha S. (13/07/2008), "Intellectual Property Rights, Traditional Knowledge and Biodiversity of India", Journal of IPR, Volume 13,p 316-335, Available at nopr.niscair.res.in/bitstream /123456789/1781/1/JIPR%2013(4)%20326-335.pdf, accessed on 15.03.2016 at 12:31.

[10] Available at http://www.quno.org/geneva/pdf/economics/Discussion/Traditional Knowledge-IP-English.pdf (accessed on 13.02.2016 at 13:47).

[11] Supra note 6.

inventive step and are capable of industrial application. The agreement fails to define terms like *'new'*, *'inventive step'* and *'industrial application'*, leaving the door open for interpretation that suit the interests of the more dominant member states.

According to Article 27.3(b), *"Members may exclude from patentability plants and animals other than micro-organisms, and essential biological processes for the production of plants or animal other than non-biological and microbiological processes. However, member shall provide for the protection of plant varieties either by patents or by an effective suigeneris system or by any combination thereof"*. Clearly, according to TRIPS, micro-organisms must be provided patent protection. But the articles fail to provide an exhaustive list of subject matters that cannot be patented. This allows scope for interpreting discoveries as patentable if they fulfil the utility criterion. If the agreement had explicitly excluded discoveries from being patented, developed countries could not have extended patent protection to non-inventions, especially in the area of bio-technology.

The indigenous knowledge developed over centuries, passed on from one generation to another, is recognised by some developed countries like the US as *'prior art'* only if it has been recorded in writing. This has enabled research institutes to obtain information from indigenous people and patent their knowledge by merely identifying and isolating particular chemicals or giving scientific names to age-old practices.

Moreover, TRIPS does not protect indigenous knowledge, thus enabling MNCs to earn huge profit without paying even a penny to the people who are the sources of the original information. Indigenous and local communities lack the means to obtain intellectual property protection over their innovations. Although the significant amount of biological resources used and maintained by indigenous people are useful to industry and to the world community, there is no effort to provide protection to this knowledge Lord Hoffman had said, *"It was not necessary for an active substance to be identifiable or reproducible for it to have been made available to the public"*. He gave the example of Amazonian Indians who had known for centuries that the cinchona bark can be used to treat malarial and other fevers. It was only in1820 that quinine was isolated and extracted from the bark. According to him, the Amazonian Indian who believed that the effect of cinchona was due to the spirit of the bark could 'know' about quinine even though they did not know the chemical by name, or its chemical structure. If one were to take a cue from this, it would follow that plant and animal products, including herbal preparations, lack novelty even if there is no prior public knowledge of the presence of a particular active substance that produces the desired results.

Thus it can be said that most indigenous people know about the utility of the biological resources in their region and use them for various purposes. It would be unfair to award patents over products based on such indigenous knowledge without due credit being given to the original holders of such knowledge. It is totally unjust to allow multi-national companies (MNCs) to exploit such knowledge in order to reap rich rewards for them

without enabling any benefit to flow back to the indigenous people who possessed the knowledge in the first place. Developing countries are, therefore, justified in demanding a review of Article 27.3(b) and asking for indigenous knowledge to be protected under the TRIPS Agreement.

The African Group, in its joint communication to the WTO, has urged that the following modifications be made to the agreement: Inclusion of provisions to prevent bio-piracy as well as to protect traditional knowledge.; recognition of the right of traditional communities or traditional practitioners to decide whether or not to commercialise their knowledge; inclusion of a provision mandating prior informed consent from indigenous people for the use of their knowledge and preventing third parties from using; offering for sale, selling, exporting or importing their knowledge without such consent; inclusion of a provision guaranteeing full remuneration to the indigenous communities for their traditional knowledge. The views expressed by Latin American countries and India are more or less on similar lines.[12]

Controversial patent cases involving traditional knowledge and genetic resources:

Turmeric: Turmeric *(curcuma longa)* is a plant of the Ginger family yielding used as a spice for flavouring Indian cooking. It also has properties that make it an effective ingredient in medicines, cosmetics and as a colour dye. As a medicine, it is traditionally used to heal wounds and rashes. In 1995, two Indian nationals at the University of Mississipi Medical Centre were granted US Patent no. 5,401,504 on "*use of turmeric in wound healing*". The Indian Council of Scientific and Industrial Research (CSIR) requested the US patent and trade mark office (UPSTO) to re examine the patent. CSIR argued that turmeric has been used for thousands of years for healing wounds and rashes and therefore its medical use was not novel. Their claim was supported by documentary evidence of traditional knowledge, including an ancient Sanskrit text and a paper published in 1953 in the Journal of the Indian Medical Association. Despite agreement by the patentees the UPSTO upheld the CSIR objection and revoked the patent. The turmeric case was a landmark case as it was the first time that a patent based on the traditional knowledge of a developing country has been successfully challenged. The legal costs incurred by India in this case have been calculated by the Indian Government to be about at US $ 10,000.[13]

Neem: Neem *(Azadirachta Indica)* is a tree from India and other parts of south and south-east Asia. It is planted now across the tropics because of its properties as a natural medicine, pesticide and fertilized. Neem extracts can be used against hundreds of pests and fungal diseases that attack food crops; the oil extracted from its seeds it used to treat

[12] Devaiah H.V., "TRIPS, Indigenous Knowledge and the bio-rush", available at http://www.sarai .net/ research /knowledge- culture/critical-public-legal-resources/tripsindigenous knowledge andthebio-rush.pdf (accessed on 07.02.2016 at 16:13).

[13] Available at http://www.iprcommission.org/papers/pdfs/final.report/ch4final.pdf accessed on 20.04.2016 at 16:11.

colds and flu; and mixed in soap, it is believed to offer low cost relief from malaria, skin diseases and even meningitis. In 1994 the EPO granted European patent No. 0436257 to the US Corporation W.R. Grace and USDA for a "method for controlling fungi on plants by the aid of hydrophobic extracted neem oil". In 1995 a group of international NGOs and representatives of Indian farmers filed a legal opposition against the patent. They submitted evidence that the fungicidal effect of extract of neem seeds had been known and used for centuries in Indian agriculture to protect crops, and thus was the invention claimed in EP257 was not novel. In 1999 the EPO determined that according to the evidence "all features of the present claim have been disclosed to the public prior to the patent application….and the patent was considered not to involve an inventive step". The patent was revoked by the EPO in 2000[14].

Basmati: A patent was granted by the US patent and Trademark office (PTO) to Rice Tec, a Texas based company over rice derived from traditional "Basmati" rice- a product long associated with South Asia and economically significant in that region. The Indian Government has successfully challenged 4 of the 20 claims made by Rice Tec. The validity of the other claims, however, remains unchallenged.

Ayahuasca: A patent was granted by the USPTO to a US citizen over a variety of the Ayahuasca vine, which has been used for generations by indigenous people in the Amazon for ceremonial and healing purposes. After challenge by the Coordinating Body for Indigenous Organizations of the Amazon basin, the coalition for Amazonian Peoples and their Environmental, and the Centre for International Environmental Law (CIEL), the patent was overturned in 1999 for lacking novelty. However, further arguments by the patentee persuaded the USPTO to reverse its decision and announce in early 2001 that the patent should stand. Because of the date of filing of the patent, it was not covered by the new rule in the US on *inter partes* re-examination. CIEL was therefore unable to comment on the arguments made by the patentee that led to the patent being upheld[15].

Hoodia Cactus: The San, who live around the Kalahari Desert in Southern Africa, have traditionally eaten the Hoodia Cactus to stave off hunger and thirst on long hunting trips. In 1937, a Dutch anthropologist studying the San noted this use of Hoodia; scientists at the South African Council for Scientific and Industrial Research (CSIR) only recently found his report and began studying the plant. In 1995 CSIR patented Hoodia's appetite-suppressing element (P57). In 1997 they licensed P57 to the UK biotech company, Phytophasin. In 1998, the pharmaceutical company Pfizer acquired the rights to develop and market P57 as a potential slimming drug and cure for obesity (a market worth more than £6 million), from Phytopharm for upto $32 million in royalty and milestone payments.

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[14] *Ibid.*

[15] Available at http://www.iprcommission.org/papers/pdfs/final.report/ch4final.pdf accessed on 20.04.2016 at 16:11

On hearing of possible exploitation of their traditional knowledge, the San people threatened legal action against the CSIR on grounds of *"biopiracy"*. They claimed that thus traditional knowledge had been stolen, and CSIR had failed to comply with the rules of the Convention on Biodiversity, which requires the prior informal consent of all stakeholders, including the original discovered and users. Phytopharm had conducted extensive enquires but were unable to find any of the "knowledge holders". The remaining San were apparently at the time living in a tented camp 1500 miles from their tribal lands.

The CSIR claimed they had planned to inform the San of the research and share the benefits, but first wanted to make sure the drug proved successful. In March 2002, an understanding was reached between the CSIR and the San whereby the San, recognised as the custodians of traditional knowledge associated with the Hoodia plant, will receive a share of any future royalties. Although the San are likely to receive only a very small percentage of eventual sales, the potential size of the market means that the sum involved could still be substantial. The drug is unlikely to reach the market before 2006, and may yet fail as it progresses through clinical trials. This case would appear to demonstrate that with goodwill on all sides, mutually acceptable arrangements for access and benefit sharing can be agreed. The importance of intellectual property in securing future benefit appears to have been recognised by all parties including the San[16].

Indian initiatives for the protection of bio-diversity:
To conserve the biodiversity and counter the problem of biopiracy, India made a maiden effort in the world by enacting the following three legislations in the parliament) The Protection of Plant Varieties and Farmer's Right Act, 2001;b) The Biological Diversity Act, 2002; and c) The Patents Amendment Act, 2005.

Protection of Plant Varieties and Farmer's Right Act, 2001
The Protection of Plant Varieties and Farmer's Right Act, 2001 (PPVFR Act) seeks to protect the rights of farmers and breeders on plant varieties. The Act recognizes the individual and community roles played by farmers in the improvement and conservation of varieties. Under the PPVFR Act, Plant Breeder's Right (PBR) on a plant variety is established by registration of the variety. By registering a plant variety, the person becomes its PBR holder. The Act includes the provisions with regard to researcher's rights, benefit sharing between breeders and farming or tribal communities who have contributed to genetic diversity used by the breeder and establishment of a national gene fund to promote conservation[17].

Biological Diversity Act, 2002
The CBD states that a member country should facilitate access to its genetic resources by other parties on mutually agreed terms, but that access requires a PIC (prior informed

[16] *Ibid.*
[17] *Supra note* 9.

consent) of the country providing the resources. It also provides for an equitable sharing of any benefits arising from the commercial use of these resources, or any traditional knowledge (TK) associated with the biological resources subject to domestic legislations. In response to its obligations under the CBD, after the ten years of negotiations and discussions with all the stake holders, India has enacted the Biological Diversity Act in 2002. The National Biodiversity Authority (NBA) was set up under Section 8 of the Act to deal with requests for access to genetic resources by foreigners, and to manage requests to transfer the results of any related research out of India and to determine benefit-sharing arising from the commercialization.

The main features of the Act relating to the protection of traditional knowledge are to respect and protect knowledge of local communities related to biodiversity and secure sharing of benefits with local people as conservers of biological resources and holders of knowledge and information relating to the use of biological resources.

The Act prescribes some special provisions for the protection of TK. Among them Chapter II of the Act regulate access to biological diversity. The Act prohibits *'certain persons'* from obtaining any biological resources occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-safety and bio-utilization. The Act prevents any person from transferring the results of any research for monetary consideration or otherwise to such certain persons without previous approval of the NBA (Section 3, 4). Section 6 of the Act, is the key provision dealing with IPRs on biological resources and associated knowledge. According to this provision, no person shall apply for any IPR, by whatever name called, in or outside India for any invention based on any research or information on a biological resource obtained from India without obtaining the previous approval of the NBA.

With the assistance of NBA, eighteen State Biodiversity Boards (SBBs) have been formed by their respective state governments. Several biodiversity management committees have also been constituted by SBBs. The main function of the BMC constituted under each local body as per section 41(1) of the Act and Rule 22(1-11) of Biodiversity Rules (2004), is to prepare People's Biodiversity Registers, which shall contain comprehensive information on the availability and knowledge of local biological resources and medicinal or any other traditional knowledge associated with them[18].

The Patent (Amendment) Act, 2005

With the adoption of TRIPS Agreement in 1995, India has to amend its patent laws to fulfil its obligations under TRIPS Agreement. Accordingly, in 2005 India has enacted the

[18] Venkatraman K. And Swarnlatha S. (13/07/2008), "Intellectual Property Rights, Traditional Knowledge and Biodiversity of India", Journal of IPR, Volume 13,p 316-335, available at nopr.niscair.res.in/bitstream /1234.
56789/1781/1/JIPR%2013(4)%20326-335.pdf, accessed on 15.03.2016 at 12:31.

Patents (Amendment) Act and introduced product patents along with some provisions relating to TK.

Firstly, the changes made to the definition of the term *'patent'* which means a patent granted for an invention under the Act [Section 2(1)(m)] and specifications of '*invention'* which are not patentable in Section 3 of the Act which states that *'a mere new use for a known substance'*[Section 3(d)] and *'an invention which in effect, is traditional knowledge or which is aggregation or duplication of known properties of traditionally known component or components'* [section 3(p)] will not be an invention.

Secondly, the inclusion of the new provision of patent opposition proceedings which can be done on limited groups under section 25(1) of Act as: Where an application for a patent has not been granted any person may, in writing, represent by way of opposition to the controller against the grant of patent on the ground of patentability including novelty, inventive step and industrial applicability, or non-disclosure or wrongful disclosure mentioning in complete specification, source and geographical origin of biological material used in the invention and anticipation of invention by the knowledge oral or otherwise available within local or indigenous community in India or elsewhere.
Thirdly, inclusion of the provision for the opposition of a complete patent specification of an invention which was publicly known or publicly used in India before priority date of that claim [Section 25(3)(d).

The reason for the inclusion of all the above provisions is to defy the challenges of misappropriation of the TK which is already in the public domain in India or its use is known to the Indian communities or individuals from the time immemorial. One inference can be drawn from these provisions that all of them are defensive in nature which can help to oppose the patents granted for inventions whose source and geographical origin of biological material used or the knowledge, oral or otherwise is available within any local or indigenous community in India or elsewhere.[19]

Traditional Knowledge Digital Library

After fighting successfully for the revocation of turmeric and basmati patents granted by United States Patent and Trademark Office (USPTO) and neem patent granted by European patent office (EPO), India initiated its project for the creation of a Traditional Knowledge Digital Library (TKDL) in 2001. The TKDL is a collaborative project between the Council of Scientific and Industrial Research (CSIR), Ministry of Science and Technology and the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy (AYUSH), Ministry of Health and Family Welfare of India and is being implemented at CSIR. The TKDL project invades documentation of the TK publicly available in the form of existing literature related to Ayurveda, Unani, Siddha and Yoga, in a digitized format in five international languages which are English, German, French, Japanese and Spanish. It now contains over 34 million pages. The TKDL provides

[19] *Ibid.*

information on traditional knowledge existing in the country, in languages and format understandable by patent examiners at International Patent Office's (IPOS) so as to prevent the granting of erroneous patents.[20]

The TKDL seeks to prevent the granting of patents over products developed utilizing TK where these has been little, if any, inventive step. The TKDL is intended to act as a bridge between information recorded in ancient Sanskrit and a patent examiner since the database provides information in a language and format understandable to patent examiners. By facilitating access to information not easily available to patent examiners, the TKDL minimizes the possibility of patenting *"inventions"* for minor/insignificant modifications. TKDL contains information for patent examiners on prior art which otherwise be available only in Sanskrit and other local languages in Indian libraries and it will precisely list the time, place and medium of publication for prior art search of patent examiners.

Access to TKDL database was granted to European Patent Office (EPO) in February 2004, the Indian Patent Office, Controller General of Patents Designs and Trademarks (CGPDTM) in July 2009, to the German Patent Office (DPMA) in October 2009, to United States Patent and Trademark Office (USPTO) in November 2009, to the United Kingdom Patent and Trade mark office (UKPTO) in February 2010, to the Canadian Intellectual Property Office in September 2010 and to IP Australia in January 2011. These patent offices are allowed to utilize the TKDL for prior art searches and patent examinations. However, patent offices' cannot reveal the contents of the TKDL to any third party, to protect India's interest against any possible misuse.

Beginning in July 2009, TKDL team has identified 1155 Patent applications at international patent office's like USPTO, EPO, Canadian Intellectual Property Office (CIPO), German Patent and Trade Mark Office, UKPTO, IP Australia and CGPDTM, with respect to Indian Systems of Medicine and prior-art evidences from Traditional Knowledge Digital library have been filed at pre-grant stage under relevant provisions at these patent Offices in more than 1120 cases till Aug, 2014.Success has been achieved in 206 cases where the patent applications have either been withdrawn/cancelled/declared dead/terminated or have the claims amended by applicants or rejected by the Examiner(s) on the basis of TKDL submissions. Similar outcome is expected in the remaining cases also.[21] This could prevent engagement in legally complete and extremely expensive opposition processes, according to the CSIR.[22]

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[20]Available at http;//indigenouspeopleissues.com/index.php?option.com-contents and view article8=9532:India-wipo-and-india-paretners-to protect-traditional-knowledge-from misappropriation-judging (accessed on 19.04. 2016 at 18:31)

[21] Available at http://www.tkdl.res.in/tkdl/langdefault/common/TKDLOutcome.asp?GL=Eng, (accessed on 14.09.2016 at 13:24)

[22] *Supra note* 20.

The international conference on the utilization of the traditional knowledge digital library

The international conference on the utilization of the traditional knowledge digital library as a model for protection of traditional knowledge was organized by the World Intellectual Property Organization (WIPO) in co-operation with the CSIR in New Delhi India from March 22 to 24, 2011. In this conference WIPO's Director General Francis Gurry welcomed international co-operation in the fight against the misappropriation of TK. This was echoed by the then Minister of Science and Technology, Earth Sciences of India and Minister of Parliamentary Affairs, Pawan Kumar Bansal. Mr. Bansal said TKDL has been *"an immensely effective tool for the protection of Traditional Knowledge, a powerful weapon to fight bio piracy."*

Mr. Gurry described the TKDL approach as complementary to the work currently underway in WIPO's Inter-Governmental Committee (IGC) on Intellectual Property and Genetic Resources Traditional Knowledge and Folklore, where WIPO's 184 member states are negotiating an international legal instrument to ensure the effective protection of TK and traditional cultural expressions and to regulate the interface between IP and genetic resources.

The Indian TKDL project developed over a ten year period documented knowledge about traditional medical treatments and the curative properties of plants, which was contained in ancient texts and languages, and classified the information in a searchable database. By making this information available, via Access and Non-Disclosure Agreements to six major international patent offices, the TKDL, coupled with India's global bio piracy watch system, has, according to the CSIR achieved dramatic success in preventing the grant of erroneous patents at, minimal direct cost and in a matter of a few weeks.

Mr. Gurry said that India's TKDL could be a good model for others and that WIPO was ready to facilitate international collaboration for countries which, inspired by the Indian example, were interested in establishing their own TKDLs. The Director-General said WIPO is in consultations with the government to *"internationalize"* the TKDL to help make available the Indian government's TKDL experience and know-how to other countries which plan to create their own TKDLs. He said, *"WIPO is prepared to assist beneficiary countries, should they so wish, to conclude access and non-disclosure agreements with international patent offices. Beneficiary countries would own and control access to their own TKDLs."*

The then CSIR Director-General, Samir K. Brahmachari and Director of the TKDL V.K. Gupta reiterated Indias' willingness to work with countries interested in similar models to protect their TK. Mr. Brahmchari said that the challenge for the New Delhi Conference and beyond is to ensure that the great treasures represented in a nation's TK is to ensure this knowledge senses future generations.[23]

[23] *Supra note* 20.

Conclusion

The call for protection of traditional knowledge against misuse or misappropriation raises deep policy questions and practical challenges alike. The changing social environment and the sense of historical dislocation, that currently affect many communities may actually strengthen resolve to safeguard traditional knowledge for the benefit of future generations. Just as the technological value of TK is increasingly recognized and its potential realized the challenges is to ensure that the intellectual and cultural contribution of traditional communities is appropriately recognized. This meant taking greater account of the needs and expectations of TK holding communities concerning the intellectual property system. Its traditional qualities and frequent close linkage with the natural environment meant that TK can form the basis of a sustainable and appropriate tool for locally-based development. It also provides a potential avenue for developing countries.

The actions that could be taken to ensure the effective protection of TK and conservation of biodiversity are that in the emerging regime of international and national laws and policy regulations, it is necessary that the community level knowledge holders are appropriately educated so that they are made aware of their right and responsibilities with regards to safeguarding their TK. National and international enforcement mechanism in the IP system that ensure legal access to genetic resources and traditional knowledge should be fully developed and used. Indigenous and other local communities should have a broad and effective participation in all discussions and negotiations on genetic resources and TK. Leaders, experts and innovations in TK in various fields should be recognized by providing incentives. Thus, indigenous bio and other resources associated with traditional knowledge i.e. traditional health care food veterinary products crafts etc. should be properly conserved and promoted for sustainable development.

Intellectually Disabled: Persons with Disabilities Act and its Comparison with U.S. and U.K. Law

Sangeetha Abraham*

The Indian Act could have borrowed from enactments in other countries such as the US *Individuals with Disabilities Education Act (IDEA).* Before the Act was passed, children with disabilities were segregated into separate schools designed to meet their needs. Disabled children were kept separate from other children. In these special schools, children were treated like disabled children but not included in activities in which other children were able to participate.[1]

The newly authorized *Individuals with Disability Education Act* in US, addresses issues relating to provision of education to students with disabilities, educational services to children and youth, federal state relationships, the rights of parents of children with disabilities, pedagogy, ways of conceptionalising disability and civil and human rights.

The two essential principles the law enunciated are:

- Children with disability were to be treated as individuals worthy of respect (i.e., capable of benefiting from education) and
- They are to be part of the larger society (i.e., they were not to be segregated from their non disabled peers).

In keeping with the principle of treatment of each as an individual the law provided that, "*each child was to be individually assessed as to whether he or she was handicapped and in need of special education services*" and for that an individually designed programme was to be developed for each child, which was to be documented in an *Individual Education Plan (IEP).* The IEP is compiled with a team of administrators and guardians who evaluate goals for the child and determine what needs to be done in order for those goals to be met.[2]

Research Scholar, University of Delhi, Delhi.

[1] Mike, Cole, *Education, Equality and Human Rights*, New York, Routledge, 2006.

[2] Brizuela, Gabriela, "Making an "IDEA" a Reality: Providing a Free and Appropriate Public Education for Children with Disabilities under the Individuals with Disabilities Education Act", *Valparaiso University Law Review*, 2011.

The Act provides a comprehensive scheme for ensuring two basic substantive rights of eligible children with disabilities while the body of law delineates a fine procedural framework to ensure these two substantive rights:

a. The Right to a Free Appropriate Public Education (FAPE): The Central feature of the law is a rights formulation viz., that all children with handicapping conditions are entitled to a 'free appropriate public education'. This is so called 'Zero Reject' principle. The courts also endorsed the law that no child with a disability was to be excluded from the law's scope[3].
b. The Right to Education in the Least Restrictive Environments (LRE): This includes the requirements that a programme be created to meet the children's individual needs to the maximum extent possible that students with disabilities be educated in general education environment with necessary supplemental aids and support services[4].

In as much as the *IDEA* provides that states receiving funding under the Act must ensure that children with disabilities are educated in regular classrooms with non-disabled children to the 'maximum extent appropriate'. The expression of human rights in the education of students with disabilities is seen in the honouring of the principles of respect and belonging. Also it reiterates that for understanding disability and viewing it in a social context, the implementation of these principles requires not simply individual adaptation but also overall restructuring of schools.[5]

A seminal case defining "free and appropriate public education" is *Board of Education vs. Rowley*[6]. This case was decided under the *Education for All Handicapped Children Act* of 1975. Here the Supreme Court was called upon to interpret the meaning of the phrase *"free and appropriate public education"*. It held the Act expressly defined the phase to mean *'special education'* and *'related services'* which:

1. have been provided at public expense, under public supervision and direction, and without charge;
2. meet the standards of the state educational agency;
3. include an appropriate primary school, elementary or secondary school education in the state involved; and
4. Are provided in conformity with the individualised education program required under Section 14 (a) (5) of the Education for All Handicapped Children Act.

As per the *Rowley* Court, *"free and appropriate public education"* means educational instruction that is specifically designed to meet the needs of the disabled child, supported

[3] Felicity, Armstrong, Lan Barten, *Disability, Human Rights and Education- Cross Cultural Perspective*, Open University Press, Philedelphia, PA, USA, at p.110.
[4] *Ibid.*
[5] *Ibid* p.115.
[6] 458 U. S. 176 (1982).

by services that are necessary to permit the disabled child to benefit from such instruction. The Court also held the State meets such requirements by providing personalised instruction with sufficient support services to permit the child to benefit educationally from that instruction.

The U.S Supreme Court in *Curtis K. vs. Sioux City Community School District*[7], stated that in passing the *IDEA*, Congress goal was to ensure that all disabled children, have available to them, a free appropriate public education which emphazised special education and related services that are designed to meet their unique needs.

In *Henry Muller vs. Committee on Special Education*[8], the U.S Supreme Court decided the issue of whether a child with serious emotional disturbance was qualified for benefits under the IDEA reasoning that the record established the child was unable to learn and that the child's inability to learn was not explained merely by intellectual, sensory or health factors. The Court concluded that the child's inability to learn also stemmed in part from her emotional problem.

This inclusive education philosophy recognised by the U.S is an ideal one and could have been a good model for the Indian law as well. The Indian Act, however has only laid down the law to the extent of recognising the right of the disabled to be educated. Beyond this, it gives an impression of little understanding of executing the same in the minds of those who framed this law.

In U.K, *The Disability Discrimination Act*, passed by Parliament in 1995 and (amended in 2001 and 2005) made no provision for access to education for disabled people. However, Part IV of the Act was introduced pursuant to the Special Education Needs and Disability Act 2001 (SENDA). Under the Act it is unlawful for the schools to discriminate in the arrangements it makes for determining admission; in the terms in which it offers to admit a disabled person as a pupil; by refusing or deliberately omitting to accept an application for admission from a disabled person; in the education or associated services provided by the school; or in the school's exclusion of the disabled person from the school whether temporarily or permanently[9].

Again discrimination is either by way of less favourable treatment or a failure to make reasonable adjustments in relation to education and other associated services provided for or offered to pupils in such a way that the disabled is placed at a substantial disadvantage[10].

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[7] 895 F. Supp.1197 (1995).
[8] 145 F.3d 95 (1998).
[9] Section 28A of the Act.
[10] Section 28C (I) (a) and (b) of the Act, The duty is triggered by a "comparative substantial disadvantage". A number of factors are taken into account, including the dignity to and loss of opportunity for the disabled child (Code Clause 6.9-11).

A child is considered to have special educational needs if he has learning difficulty, which calls for special educational provision to be made for him[11]. Parents of such a child can choose to send him to an independent or non-maintained school, provided that the Local Education Authority is not funding the placement[12]. A child must be educated in a mainstream school (unless the parent prefers otherwise), provided that this is compatible with his receiving the special education provision his learning difficulty calls for; the provision of efficient education for the children with whom he will be educated; and the efficient use of resources[13].

In education there have been a few important cases concerning making adjustments in schools and universities, including requiring a university to provide accommodation on campus for someone with mental health-related difficulties in travelling[14]. In goods and services there have been limited successful legal challenges in housing (by stopping evictions) and insurance (by stopping blanket exclusion of people with mental health problems, though insurers will still generally only pay out for situations unrelated to pre-existing conditions or will load premiums)[15].

[11] Section 312 of the Education Act, 1996.

[12] Section 316A of the Education Act, 1996, inserted by the Special Education Needs and Disability Act 2001 in order to be compatible with the Human Rights Act, 1998.

[13] Section 316(2) of the Education Act, 1996.

[14] See<www.wlv.ac.uk/docs/staff-menthealth-guid.doc> and <www.york.ac.uk//helping_students_with_mental_health_difficulties.pdf> (accessed on 18.04.2016).

[15] See <http://83.137.212.42/sitearchive/DRC/index.html> (accessed on 27.08.2015 at 12: 11 pm.).

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For any information please contact:

Dr. Pradeep Kumar
Executive Editor & Managing Director:
E-mail: journalforlegalstudies@gmail.com
Contact No: +91-9450245771, +91-9026384771