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WHITEBLACKLEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

WHITE BLACK LEGAL: THE LAW JOURAL

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Advertising by Lawyers: Critical Analysis of Ethical Issues

-DIVYAM JHAVERI

Abstract

Legal advertising refers to legal professionals publishing the services provided by them through either the Court of Law or law firms or consultation or by any other means. The prohibition on advertisements by legal professionals has its origin in England, founded on the Victorian primitive notions developed during the British rule. The principal reason behind prohibition lies in the sense of unprofessionalism which it may create under the grab of commercialization and thereby the overall undermining effect which it may create on the profession. In India, the said concept is transplanted and thereby finds its place in Bar Council Rules governing the professional conduct of the lawyers.

In this paper, the author has analyzed the ethical issues governing the legal advertising from the pros and cons it outweighs in light of present need and societal set up. Furthermore, the author has attempted to critically analyze the reasons prohibiting the advertisements by legal professionals, the nature and extent of the prohibition, the constitutional validity of the prohibition and juristic comments on this ethical issue. Lastly, the author has attempted to provide the recommendations and suggestions for dealing with the ethical issues governing legal advertisement in context of present day need and societal set up.

Introduction

In India, the combined effect of the Advocates Act, the Rules of the Bar Council of India ('BCI') and other professional bodies is that lawyers are prohibited to advertise their services. Lawyers may not solicit clients and cannot do anything that might influence the decision of a potential litigant from engaging one or the other lawyer. The principal reason behind prohibition lies in the sense of unprofessionalism which it may create under the grab of commercialization and thereby the overall undermining effect which it may create on the profession. In India, the said concept is transplanted and thereby finds its place in Bar Council of India rules governing the professional conduct of the lawyers.

The said rule over the time has passed through various criticisms and judicial tests and thereby urged the stakeholders to ponder upon the need for such ban in present time. In the paper, the author has discussed the scheme of the rule and thereby also illustrated the advantages and disadvantages it encompasses. The overall attempt is to consider the ban in the light of present day need, societal set up and more importantly the need of such ban in dealing with the on-going degradation of standards of litigation as a profession.

Further, in the second part the author has analyzed the judicial approach with respect to this ban and thereby tries to put forth a detailed understanding of Indian Judiciary on the basis of varied instances involving the allegations of violation of this ban in one way or other. Lastly, the author based on the international understanding tried to suggest few recommendations which will try to carve a middle way out and thereby formulate a solution satisfying the need of both the sides and thereby in all facets help in the strengthening the ideals of advocacy.

Chapter 1: Understanding the Ban on Advertisement by Lawyers

Under the scheme of Advocates Act, the Bar Council of India (BCI) has the power to make rules in order design the professional code of conduct for the advocates and based on which it has formulated the BCI Rules. Rule 36 of the BCI rules reads as follows

"36. An advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, interviews not warranted by personal relations, furnishing or inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned. His sign-board or name-plate should be of a reasonable size. The sign-board or name-plate or stationery should not indicate that he is or has been President or Member of a Bar Council or of any Association or that he has been associated with any person or organization or with any particular cause or matter or that he specializes in any particular type of worker or that he has been a Judge or an Advocate General. That this Rule will not stand in the way of advocates furnishing website information as prescribed in the Schedule under intimation to and as approved by the Bar Council of India. Any additional other input in the particulars than approved by the Bar Council of India will be deemed to be violation of Rule 36 and such advocates are liable to be proceeded with misconduct under Section 35 of the Advocates Act, 1961If words less than copy paste Rule 36….."

In simple words as per the Rule 36 of the BCI Rules, an advocate is prohibited from soliciting work or advertising , either directly or indirectly, whether by circulars, advertisements, touts, personal communications, interviews not affected by personal relations, furnishing inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned.

The rule even brings in its ambit even the sign board, name plate or stationery of an advocate should reflect that he is or has been the President or Member of a Bar Council or of any Association or that he has been associated with any person or organization or up to that extent also if any particular cause or matter or that he has expertise in any particular type of work should not be covered

However, in 2008, this strict Rule was amended, pursuant thereto a resolution passed by the BCI and according to the amended Rule, advocates are allowed to furnish information on their websites, in conformity with the Schedule, as per which the following information can be furnished on their websites. The details allowed to be published on the website are as follows

1. Name
2. Address, telephone numbers, e –mail id's
3. Enrolment number, date of enrolment, name of the State Bar Council where originally enrolled, name of the State Bar Council on whose roll the y currently stand, name of the B are Association of which the advocate is a member
4. Professional and academic qualifications
5. Areas of practice.

Now, need for this rule is based on the following justifications

1. *Negative Reflection on professionalism:* Advertising will bring about commercialization, which will highly compromise the lawyer's sense of dignity and self-worth. Advertising will also have far reaching consequences as it will erode the client's trust in his attorney as once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client's welfare will highly be jeopardized.

2. *Nature of advertising:* Advertisements, is popular technique for trying and selling an image or product. The ultimate and ulterior purpose of any advertising is really to lure buyers rather than to facilitate consumers to make a well- informed choice. The proposed clients being carried away by the seeming advantages of advertising would tend to provide misleading information, making their practice look more attractive and successful than that of the lawyer next door and cumulatively act in commercialization only.

2. *Increase in Litigation:* Advertising of legal services would tend to encourage people to litigate, rather than just informing them of their rights and duties. The already over-burdened Indian Judiciary would only further lead to acceleration of frivolous litigation encouraged by advertisements and thereby igniting the will of people to approach lawyers to solve practically every problem that they face in life.

2. *Increase in cost of the profession:* Advertising by legal professionals would further guide to an unhealthy as well as unfair competition. Practices in form of such as price (or fees) undercutting, making misleading statements, making references to other lawyers and other related issue would creep into the profession and strike at the core value of the

profession. Further, lawyers would be compelled to spend even increasing amounts on advertising rather than on acquiring improved legal tools and thereby degrade the quality in lieu of increased desire to practice and earn monetary advantages.

2. *On Field difficulties:* In practicality, it would be next to impossible to regulate all advertisements that are put out by lawyers; given the fact that India has the second largest number of registered lawyers in the world after the USA. Further even an independent authority created for this sole purpose would hardly be in a position to screen each and every advertisement.

The cumulative understanding as developed from the analysis of the rule made for banning the practice of advertisement by lawyers at its root try to aim at the fact that advertising would turn the profession into a competition for greater marketing capabilities rather than of greater legal acumen. The jeopardizing of legal acumen and issue of public policy is at the core of its reasoning and lawyers being the officers of the court are the foremost stakeholders in the line for preventing the cause of legal profession and in no sense this pious duty shall be compromised upon.

Chapter 2: Ban on Advertisement by Lawyers: Judicial Approach

The Indian Judicial approach to the issue on hand has primarily focused upon the need for regulation of legal profession and the mode of restricting the advertisement by lawyer is always upheld by the Indian Judiciary. The Madras High Court in *CD Sekkizhar* v. *Secretary Bar Council* for the initial time held that advertisements by lawyers is regarded as reprehensible conduct as the standards which lawyers jealously develop and set up for themselves are unbecoming to the honour, dignity and position of the noble profession. Further, the court observed that in a country like India, wherein a large segment of the population is illiterate the unregulated commercialization of legal profession will foster a situation whereby unscrupulous lawyers may exploit the public and thereby strike at the legal profession which is aimed to serve the goal of public service.

The Indian judiciary over the time has made significant contributions to uphold the dignity of the legal profession and thereby ensured unfettered performance of lawyers' duties towards the Court and to the profession as whole. In the case of *R. N Sharma, Advocate* v. *State of Haryana,* it has been held that an advocate is an officer of the Court, and the court in strict sense observed that the legal profession is not a trade or a business; it is a noble profession and advocates have to strive to secure justice for their clients within legally permissible limits.

Now a significant question as to what frames up the word advertisement in the legal profession needs to be seen. The BCI rules fail to precisely comment upon the and therefore the same has been enunciated under various judgments of the Indian Courts.

In the case of *Government Pleader v. S. A Pleader,* it was held that a lawyer sending a post card for merely providing his address, name and description would amount to advertisement on his part and accordingly he would be deemed to have violated professional standards of conduct of advocates.

Further, in the case of *In Re: (Thirteen) Advocates* v. *Unknown,* it was held that publishing articles in newspapers and wherein the writer describes himself as an advocate practicing in

Courts is a cheap way of endorsing one's services and further it is totally violative of the professional code of conduct.

Later in *S. K. Naicker* v. *Authorised Officer,* the Madras High Court has held that a sign board or a name plate of an advocate should be of a moderate size and that writing articles for publication in newspaper under an advocate's signature is a direct breach of professional etiquette as both the actions amount to unauthorized legal advertising.

In another case, of *C.V. Sekkizhar* v. *Secretary, Bar Council, Madras,* the Madras High Court has gone up to that extent that even under the name of election manifestos, an advocate cannot propagate his name and advertise in the form of announcements and canvassing.

In the one illustrative case of *J.N. Gupta* v. *D.C. Singhania & J.K. Gupta,* the respondent advocates had issued two advertisements in a newspaper; the first one depicted a change of address on account of fire in the building where they were practicing and the second was for time for shifting back to the building where their old office was located. Subsequently, they also published their name and address in the International Bar Directory under the headings "Singhania & Company", "Firms Major Cases" and "Representative Clients". The Court in clear terms held that there was no violation of the rule against advertisement with respect to the publication in the newspaper as the same was made on account of the fire, which required urgent notice of change in address to be given to existing clients. Apart from this with regard to the publication in the International Bar Directory, it was held that publication in any manner, either in National or International Bar Directory would not constitute a violation of Rule 36 if it is done with the purpose of giving information of address or telephone numbers of advocates. However, in the instant case, it was found that the publication was made to give publicity to the fact that the law firm had dealt with important cases and had eminent clients; hence, was being used to advertise the firm itself.

Now, the important judicial approach lies in the assessing the rule banning the advertisement of lawyers under the tenants of Article 19(1) (a) and Article 19(1) (g) of the part III of the Indian Constitution.

Article 19(1)(a) of the Constitution of India guarantees the freedom of speech and expression, the only exceptions being in the interest of sovereignty, integrity and security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of Court, defamation or incitement of an offence items.

In this regard, The Court in the *Tata Yellow Pages* case has indeed laid down that "commercial speech is a part of freedom of speech and expression". The Judges have while laying down this dictum reasoned that:

"'"Advertising is considered to be the cornerstone of our economic system. Low prices for consumers are dependent upon volume sales and volume sales are dependent on advertising"

The Court is justifying the protection to commercial speech based on the advantage to consumers and the importance of advertising in a free economy. This is so because professional services, especially the legal profession, cater to specific individual needs every single time a client approaches the professional; it is not similar to bulk production and sale of consumer.

The author submits that on a critical and minute analysis of Rule 36, it does not satisfy any of the conditions specified in Article 19(2). The ban on advertisements by lawyers is not constitutionally permissible, even on the ground of "public order" under Article 19(2) as the public order has been held to be synonymous with public peace, safety, tranquility and the like.

Further, Article 19(1)(g) of the Constitution of India confers every citizen the right to choose his own employment , trade or calling, having the same reasonable restrictions as Article 19(1)(a), which is often impregnated with an implied right for availing all the mechanisms and resources for effectively carrying on the trade or occupation, including advertisement, provided it is not contrary to public interest.

The Rule 36, on merits is also violative of Article 19(1) (g) as reasonable restrictions on prohibiting advertisement would only exist where the advertisement is against public interest i.e. when it is immoral, obscene or presents something which goes against public morality.

Hence, the author is of the opinion that the ban on legal advertising under Rule 36 is far-fetched in nature and unconstitutional, as the same is inconsistent with reasonable restrictions under Article 19(2) and needs to be re-visited in backdrop of need of consumers of legal profession along with healthy development of the profession.

Chapter 3: Solutions Suggested to the Problem

The solution to this issue needs varied angels of analysis and thereby in the opinion of the author, advertising *per se* ought not to be barred. Instead, as long as an advertisement promotes legal awareness and gives consumers i.e. clients and potential clients, an opportunity to evaluate the competence of a legal professional, it should be permitted by way of regulating it. The BCI should lay down specific rules as to the subject matter and kind of advertising that may be permitted. This will act as double edge sword as it will fulfill the need for advertising, while at the same time, sufficient checks and balances are provided for in order to prevent unscrupulous advertising. The advantage of such a mechanism is that it would enable the BCI to retain a regulatory role in preserving the high standards of the profession, and simultaneously provide a fair ground for advocates to publicize their services and for consumers to exercise their right to information.

One of the possible ways suggested is through permitting limited advertising, possibly through "infortising". The BCI can possibly lay down detail standards within which the lawyers may be allowed to advertise or publish information, which, apart from attracting new business for the lawyer, provides an opportunity for the practitioners to share information or legal analysis with prospective clients. Lawyers who have to their written articles, treatises or monographs on some aspects of the law or on specific judicial pronouncements in which they have made significant contributions or already enjoy the right to have them published in the journal sections of law reports. Sadly, these scholarly pieces are rarely available to the public at large since these reports do not enjoy wide circulation amongst non-lawyers. Allowing lawyers to publish these articles and analyses in their in-house brochures, newsletters or on websites would be a healthy step and even thereby encourage worthy contributions to legal academia having backed by the flavor of pragmatic approach.

This will help to solve the issue of the majority of clients who are at the mercy of "friend of a friend" for their legal requirements and solutions. The legal profession works more by oral referrals than by any standardized criterion for grading lawyers. The issue of nepotism is also the obstacle and thereby the novice lawyer miserably fails in getting new clients as the system is so guarded by the already established players and who are further only driven to satisfy their pockets irrespective of the harm caused upon to the innocent new litigants. Litigants, who

are forced to enter the court system for the first time, seldom have any idea about the usual fees for similar cases either. Unlike many other legal systems, the Indian lawyers and law firms are disallowed from many measures that would greatly benefit the public at large. For example, a website by a family law specialist or a rent law barrister where essays or monographs about the law are published, or where the public at large can get relevant information would be classified simply as an advertisement and is thus proscribed.

However, in opinion of the author, BCI should by all means take care of the fact that advertising in name of fees charged is not at all allowed and only permissible advertising lies in information sharing but not covering legal fees. The regulations should expressly call for strict punitive action against the lawyers who have indulged into advertisements wherein fees i.e. per hour charge, consultation fees, comparative fee based advertisement etc is cited.

Thus, in all terms the need to re-visit this regulation is called for and the BCI after taking into confidence the majority of the stake holders who can help in shaping this regulations in the right spirit of the legal profession.

Conclusion

In the today's age of information and commercialization, the arguments based on the ground that law is a "noble" profession cannot be called for because the end users i.e. consumers of legal services are entitled to obtain the best value for their investment, similar to any other service. Every consumer seeking legal service in one way or other ought to be provided with a platform from where he can identify the most suitable legal professional.

The pros and cons of legitimate advertising keeps on being broadly talked about as the sum and assortment of advertising keeps on expanding every year. On the constructive side, lawyer's advertising makes the general population mindful of the legal professionals who can be contacted for solving their legal issues based on the expertise they possess. Lawyer's advertising additionally fills down the need of bridging the gap amongst the illuminating legal professionals and potential clients. On the negative side, the unfettered and unregulated right of advertisement can have shocking impact on the ideals of this legal profession.

Legal advertisements has both negative and positive aspects but in the globalized world there should be lawyers advertisement to get better services to the people of India so that disputes can be settled easily in India. The lawyers can be easily be available to everybody if there is advertisement for lawyers and it will help the legal profession to develop more in India.

Thus, the restriction on lawful commercials in India has not demonstrated in its colour profoundly for the Indian legal customers. The time we are in a need for change with the pattern. Consequently, there is a desire need to lift this boycott and to frame guidelines and strategy to screen and control legitimate publicizing of advertisements by lawyers in India.

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Witness Protection for Effective Legal Regime in India

-Yamini Bisht

ABSTRACT

Criminal Justice System protects certain fundamental rights and liberties of the people guaranteed under the Constitution by enforcing law and punishing the offender. The judicial framework followed in India for dispensation of criminal justice is the adversarial system of common law. Adversarial System clearly focuses on the role of witness in criminal cases as they play a vital guide in the criminal equity framework and for smooth running of criminal equity framework.

In the light of the interest of the witness and the recent examples of Unnao rape case incident, the purpose of this paper is to review the provisions and laws with respect to protection of a witness in India. Witness plays an important role for a fair trial to be conducted. A witness is no one but a person who is entitled to some human rights by the reason of him being a human. Protection of a witness from being harassed or tortured is very much necessary to bring any case to the end of Justice. In India the Apex Court has issued several guidelines w.r.t the same whereas Law Commission of India in its 14th & 154th reported emphasized on protection of witness where-as in it 174th report the Commission emphasized on the concern of any witness turning hostile which is again a reason for miscarriage of justice.

To sum up, one can say that the rule of law is a foundational feature of the Constitution and the right to obtain judicial redress is a feature of basic structure of the Constitution. Hence, the proper implementation of Witness Protection Scheme should be made to ensure the principles of Natural Justice and Rule of Law as conceived by our constitution, is maintained in its actual soul.

INTRODUCTION

Criminal Justice System protects certain fundamental rights and liberties of the people guaranteed under the Constitution by enforcing law and punishing the offender. In compatibility of this goal, the functionaries of criminal justice framework pursue the principal "Ensure the Good and Punish the Wicked." Succinctly, the criminal equity organization endeavors to diminish criminal conduct. The criminal justice system deals with the process of defining crime, prevention and detection of crime, process of determination of guilt and quantum of punishment and the rehabilitation of citizens punished for crimes, so that they may once again become useful members of the society.

Every Criminal Justice System of world is based on a set principle of Criminal Law and follows either Adversarial System or Inquisitorial System. The judicial framework followed in India for dispensation of criminal justice is the adversarial system of common law adopted from the British Judicial System. Adversarial System clearly focuses on the role of witness in criminal cases. Witness is the foundation on which the structure of justice and equity rests. He is therefore, inexorable and plays a significant role on which the fate of the case depends. He is the foundation of the trial, regardless of whether it is civil or criminal. No indictment case can be developed without the proof of witnesses. Witness is vital guide in the criminal equity framework and for smooth running of criminal equity framework it is necessitated that witnesses come forward and oust their testimony and statements in free and reasonable situation.

IMPORTANCE OF WITNESSES

The term “witness” refers to an individual who is familiar with the certainties and conditions, or is in control of any data or has learning, important with the end goal of examination, inquiry or trial of any crime including serious offense, and who is or might be required to give data or create an impression or produce any record during investigation, inquiry or trial of such case. The expression "witness" additionally incorporates a casualty of such gross offense. The expression "witness" varies from "whistle blower" as in, an informant is an individual who unveils any charge of debasement or willful abuse of intensity or willful abuse of attentiveness against any local official or public servant. The high Court of Delhi in the case of *Ms. Neelam Katara* v. *Union of India* defined witness in the following words: “Witness means a person whose statement has been recorded by the Investigating Officer under section 161 of the Cr.P.C., 1973pertaining to a crime punishable with death or life imprisonment”.

In the words of Jeremy Bentham, ‘Witnesses are eyes and ears of justice.’ An honest and truthful witness can render yeoman help to police during the trial of the crime and to the court during the trial of the case by giving honest record of what he thinks about the occurrence of the criminal incident. In search truth, he plays that scared role of sun which takes out the obscurity of numbness and enlightens the substance of equity, circled by fiends of mankind and empathy. Therefore, if the witnesses themselves are incapacitated from acting as eyes and ear of justice; the trial will get putrefied and paralyzed. So, in any jurisdiction witness requires a special treatment. One can aptly quote Justice Gita Mittal and Justice J.R. Mirdha of the High Court of Delhi in the case of *Mrs. Neelam Katara* v. *Union of India & Others* that

> The edifice of administration of justice is based upon witnesses coming forward and deposing without fear or favour, without intimidation or allurements in Court of law. If witnesses are deposing under fear or intimidation or for favour or allurement, the foundation of administration of justice not only gets weakened, but it may even get obliterated.’

The Hon’ble Supreme Court of India also held in State of Gujarat v. Anirudh Singh, “*It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence.”*

The witnesses plays an essential role especially in offenses relating security of state, sedate dealing, serious offenses like murder, rape, theft, dacoit wherein the punishment may stretch out to capital punishment.

Present Scenario of Witness in India

The condition of witnesses in the Indian Legal System can be coined as' highly pathetic'. Witness dithers as he faces wrath, pressure and threat to his life and existence from accused and because of which they end up turning hostile and giving testimony and statements in favour of the accused person. The position and status of a witness in India can be comprehended from the way that an individual on getting summon from the court, to act as witness begins trembling not on the grounds that he fears examination or cross examination in court but since of the dread that he probably won't be analyzed at all for a few days and on all such days he would be nailed to the precincts of the courts anticipating his opportunity of being examined. These witnesses neither have any legal remedy nor do they get suitably treated. The present legal system takes witnesses completely for granted.

The phenomenon of witness turning hostile has now turned into a reason for grave worry for judiciary in India. There are many incidences where the witnesses have given their testimony which is deliberately ambiguous and hence would be of no help in determining the guilt of the accused. The Supreme Court reiterated that *"legislative measures to emphasize prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day."*

One peculiar feature of most of high profile cases *viz*. *Jessica Laal Murder Case* and *B.M.W. Hit and Run Case,* etc. are that crucial witnesses have turned hostile not only due to threats, coercion, lures, monetary considerations but also fear of abduction and life. It hardly needs to be emphasized that one of the main reasons for witnesses to turn hostile is that they are not accorded appropriate protection by the State. People believe that Law is like a spider web, if some powerless thing falls into them, it is caught but the bigger one can break through and get away. A person typically turns into a witness since he has no alternative other than ending up so. For the most part people don't volunteer rather they are constrained to turn into a witness due to the situational causes and in such condition, it is anything but difficult to end up antagonistic so as to dispose of specific perils and bothers. In such situations how the main aim of criminal justice system, i.e., to capture and punish the offender be achieved?

The Supreme Court of India also expressed deep concern about the plight of witness in *Swaran Singh* v. *State of Punjab*in the following words:

> …A witness in a criminal trial may come from a far off place to find the case adjourned. He has to come to the Court many times and at what cost to his own self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. Witness is not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He has no place to sit and no place even to have a glass of water.

The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma.

It is highly appreciating that Hon'ble Supreme Court and High Courts have taken the issue of 'witness security' all around genuinely. There are few judgements of Courts visualizing the requirement for protection of victims and witnesses for the most part on account of serious offenses. In *Zahira Habibullah Sheikh* v. *State of Gujarat* Supreme Court expressed that the

witnesses were pressurized by the accused to go back on their earlier statements and the trial was totally vitiated.

The Supreme Court through Justice J.M. Panchal, in *Vikas Kumar Roorkewal v State Of Uttrakhand*, has clearly examined the role of witnesses in the criminal justice system. The court while giving his observation stated that *the Witnesses play an integral role in the dispensation of justice and protection of witnesses through legislative measures can go a long way in conducting a fair trial.*

Law Commission of India has paid attention to this issue seriously and attempted to give suggestions on this issue in its different reports. It was in the 14th Law Commission Report where the witness protection was considered for the first time in limited sense. The reference was made to lacking courses of action for witnesses in the courts, the sizes of travelling recompenses and daily allowance paid to witness for going to the court in response to summon and orders.

In its 154th Report, while discerning the plight of witnesses appearing on behalf of the State, Law Commission observed that the witnesses confronts not only bothers as well as hazard to their lives on account of offenders and Criminals. In this way, it made proposals to relieve different bothers and dilemmas. The Law Commission in its 178th Report again took up the issue of averting witnesses from turning hostile. The Report has likewise managed the issue of precautionary measure police should take at the stage of investigation to prevent fabrication by witnesses when they are examined later at the trial. After these reports the commission on reforms of Criminal Justice System under the chairmanship of Dr. Justice V.S. Malimath submitted its rather voluminous report containing as many as 158 recommendations. Some of these recommendations were made even in the 14th Report of the Law Commission about five decades ago, and yet there is little to show by way of any improvement in the quality of facilities available to a witness.

Committee on Reforms of Criminal Justice System while emphasizing importance of witness says:

"*By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth. It is because of this reason that the witness either takes an oath in the name of God or solemnly affirms to speak the truth, the whole of the truth and nothing but truth. He/She performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He submits himself to cross examination and cannot refuse to answer questions on the ground the answer will incriminate him*."

Generally speaking, witness security would suggest assurance to a witness from physical damage, yet it is fascinating to take note of that, in the Indian context, it has had to some degree confined importance. Before the 198thLaw Commission Report it has been comprehended to mean protection of witness from distress and burden and accordingly security has had reference just to the provision of facilities. The immediate importance of the subject of witness protection in our country motivated the Law Commission to take up the subject of 'Witness Anonymity' and 'Witness Protection' *suo-motto*. In its 198th Report Law Commission discussed these issues very widely.

Protection of witness is a pre-requisite for an efficient judicial system in a country which in turn is required for sustenance and proper functioning of state governed by rule of law. Prevailing feeling of fear in the country seriously impairs the right of the people of the country to live in a free society governed by rule of law. If one is unable to testify in courts due to threats or other pressures, then it is a clear violation of Article 21 of the Constitution. The right to life guaranteed to the people of this country also includes in its fold the right to live in a society, which is free from crime and fear and right of witnesses to testify in courts without fear or pressure.

Witness Protection Scheme, 2018

In a society, administered by a Rule of Law, it is imperative to ensure that investigation, prosecution and trial of criminal offences isn't preferential in light of dangers or terrorizing to witnesses. The need to protect witnesses has been emphasised by the Hon'ble Supreme Court of India in "Zahira Habibulla H. sheikh and Another v. State of Gujarat" 2004 (4) SCC 158 SC. While defining Fair Trial, the Hon'ble Supreme Court observed that "If the witnesses get threatened or are forced to give false evidence that also would not result in fair trial".

In complex cases, where cooperation by a witness is critical to successful prosecution of a powerful criminal group, extraordinary measures are required to ensure the witness's safety viz. anonymity, relocation of the witness under a new identity in a new, undisclosed place of residence.

At present there is no law/scheme holistically at the National level for protection of witnesses. Keeping in view the Hon'ble Supreme Court has approved India's First Witness Protection Scheme drafted by the union government. The Apex Court in the case of *Mahendra Chawla & Ors. Vs. Union of India & ors.* approved the Witness Protection Scheme, 2018 and has asked asked the Centre, states and Union Territories to enforce it in letter and spirit. It shall be the 'law' under Article 141/142 of the Constitution, till the enactment of suitable Parliamentary and/or State Legislations on the subject. The bench comprising of Justice A.K. Sikri and Justice S. Abdul Nazeer identified the rights of the witness to affirm inside the ambit of Article 21 of the Constitution and said "*The right to testify in courts in a free and fair manner without any pressure and threat whatsoever is under serious attack today. If one is unable to testify in courts due to threats or other pressures, then it is a clear violation of Article 21 of the Constitution*."

The aim and objective of the scheme are to ensure that the investigation, prosecution, and trial of criminal offenses is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal accusation. It plans to advance law requirement by encouraging the assurance of people who are indulge directly or indirectly in giving help to criminal law enforcement agencies and generally administration of Justice. The Scheme categorizes the witnesses in three classes dependent on the degree of peril to them and sets down point by point method for the security of the individual classifications.

The programme distinguishes three categories of witnesses as per threat perception:

Category A: Those cases where threat extends to the life of witness or family members during the investigation, trial or even thereafter.

Category B: Those cases where the threat extends to safety, reputation or property of the witness or family members during the investigation or trial.

Category C: Cases where the threat is moderate and extends to harassment or intimidation of the witness or his family members, reputation or property during the investigation, trial or thereafter.

State Witness Protection Fund has been proposed under the Scheme. The wellsprings of the State Witness Protection Fund are: Budgetary assignment made in the Annual Budget by the State Government; Receipt of measure of fines forced (under Section 357 of the CrPC) requested to be kept by the courts/councils in the Witness Protection Fund; Donations/commitments from International/National/Philanthropist/Charitable Institutions/Organizations and people allowed by Central/State Governments and Funds contributed under Corporate Social Responsibility.

CONCLUSION

Whittaker Chambers said that "*A witness is a man whose life and faith are so completely one that when the challenges come to step out and testify for his faith, he does so, disregarding all the risks, accepting all consequences.*" The role of witnesses in India throughout different time allotments has recaptured its significance and certainty in the criminal trials. In the current scenario, however the respect and dignity is lost in the process of the trials. Hence the Indian Legal system needs to reinstate that respect and dignity to the witnesses to ensure fair trials and victims being brought to justice in true sense.

In recent year's extremism, terrorism and organized crimes have grown and are becoming stronger and more diverse. In the investigation becoming and prosecution of such crimes, it is essential that witnesses, have trust in criminal justice system. Witness protection program and witness protection laws are just the need of great importance. Truth be told, it is the nonappearance of these laws that has helped in further reinforcing the criminals and offenders.

Witnesses need to have the confidence to come forward to assist law enforcement and prosecuting agencies .They should be guaranteed that they will get protection and security from intimidation and the harm that criminal groups might seek to inflict upon them in order to discourage them from co-operating with the law enforcement agencies and deposing before the court of law. Hence, it is high time that a scheme is put in place for addressing the issues of witness protection uniformly in the country.

The scheme is the first attempt at the national-level to holistically provide for the protection of the witnesses, which will go a long way in eliminating secondary victimization. This scheme attempts at ensuring that witnesses receive appropriate and adequate protection. It also strengthens the criminal justice system in the country and will consequently enhance national security scenario. Hence, the proper implementation should be made to ensure the principles of Natural Justice and Rule of Law as conceived by our constitution, is maintained in its actual soul.

JUDICIARY IN ENFORCING INDIAN HUMAN RIGHTS

Jeeva Kuralamudhu C S

Introduction

Judiciary in every country has an obligation to protect the human rights of its citizens. In India, Preamble and the Constitution mandate the superior courts namely the Supreme Court and High Court to protect the human rights of citizens. When it comes to the violation of human rights Hon'ble Supreme Court of India acts as a savior in the protection of the rights. The basic objective of the constitution mandates every organ of the state, judiciary, executive and the legislative to work harmoniously in order to achieve the Fundamental Rights and Directive Principles of State Policy.

The promotion and protection of human rights can only be achieved if the judiciary acts independently. The judiciary should adopt a creative way to interpret the interpretation of Fundamental rights which are enshrined in Part III of Indian Constitutional Law. The main study here would be the wide coverage of functional aspects regarding how far the Apex Court achieved success in protecting the Human Rights of its people. It is a well-established fact that violation of human rights will fall under article 21 of the Indian Constitution.

1.1 Writ jurisdiction of Supreme Court and High Court

It is true that a declaration of fundamental rights is meaningless unless there is an effective machinery for the enforcement of the rights. It is the remedy that makes the right real. If there is no remedy there is no right at all. It was, therefore, in the fitness of the rights that our constitutional-makers having incorporated a long list of fundamental rights have also provided for an effective remedy for the enforcement of these rights under Article 32 of the constitution. Article 32 is itself a fundamental right. Article 226 also empowers all the High Courts to issue writs for the enforcement of fundamental rights. This remedial fundamental right has been described as the "cornerstone of the democratic edifice" as the protector and guarantor of fundamental rights. It has been described as an integral part of the Basic Structure of the Indian Constitution.

Under Art. 32(1) the Supreme Court's power to enforce the fundamental right is widest. There is no limitation in regard to the kind of proceedings envisaged in Art. 32(1) except that proceeding must be "appropriate" and his requirement must be judged in the light of the purpose for which the proceeding is to be taken, namely, enforcement of fundamental rights. It is clear from Article 32(1) that whenever there is a violation of a fundamental right any person can move the Court for an appropriate remedy.

The Right to Constitutional remedy under Article 32 can be suspended as provided under Articles 32(4), 358 and 359 during the period of promulgation emergency. During the period of emergency, to enforce the fundamental right of a person he can't move to such courts. Article 359 empowers the President to suspend the rights to enforce fundamental rights guaranteed by Part III of the Constitution. It says while the proclamation of Emergency in operation, the President may by order declare that right to move any court for the enforcement of such fundamental rights as may be mentioned in the order.

Under Article 226 of the Constitution of India, the High Courts have concurrent jurisdiction with the Supreme Court in the matter of granting relief for the case of violation of fundamental rights. If any petition filed under 226 in a High Court the same has been dismissed after hearing the merits, the same cannot be filed under 32 of Indian Constitutional Law on the same and for the same relief by the same party will be bared by the rule of Res Judicata. The binding character of the judgment by the competent court is the part of the rule of law on which the administration of justice is founded. In the case of T.C. Basappa V. Nagappa, the Supreme Court held that Art. 226 is couched in comprehensive phraseology and it confines wide power on the High Court to remedy injustice whenever it is found.

Article 226 contemplates that notwithstanding anything contained in Art. 32, every High Court shall have the power to exercise its jurisdiction to any person or any authority or any government by issuing order or writ or direction in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-warranto and Certiorari for the enforcement of Fundamental Right guaranteed under Part III. The jurisdiction of High Courts are not only limited for the enforcement of Fundamental Rights but also for other legal rights as it is clearly expressed in the word “any other purpose”. In the case of Ramesh Thappar V. State of Madras, Hon’ble Supreme Court held that if a person alleges his fundamental rights have been the person can directly approach the Supreme Court. Art.226 doesn't mandate any person to approach the High Court and then the Supreme Court.

1.2 Rule of Locus Standi and Innovation of Public Interest Litigation

The traditional rule that the right to move to the Supreme Court is only available to that person whose fundamental rights have been violated. No other person who has an interest in the case has no locus standi to approach the court. In 1981, Justice P.N Bhagwati in S.P Gupta V. Union of India “where a legal wrong or legal injury is caused to a person or to a class of person or to a determinate class by poverty or by helplessness or disability or socially or economically backward, so concern person cannot able to approach the court for relief, any member of public

can file an application for direction or order by High Court under Art. 226 and in any case breach of a fundamental right for a person any public can file a petition under Art. 32 seeking judicial redress".

The Rule of Locus Standi has been relaxed and the person who is acting bonafide is allowed to file Public Interest Litigation and they can approach the court to wipe out the of fundamental rights and genuine infraction of the statutory provision. The Supreme Court should be very cautious in examining the nature of Public Interest Litigation, no PIL is admissible for personal gain or private profit or political motive or any oblique consideration. The court now permits public interest litigation or social interest litigation at the instance of 'public-spirited person' for the enforcement of any legal right of any person or any group of person who because of poverty or socially or economically disadvantaged position and unable to approach the court for relief. In the case of, Bihar Legal Support Society V. Chief Justice of India , the court made it clear the strategy of public interest litigation has been evolved by the court to bring justice to the person who can't able to approach the court and to the backward section of the society. By widening the ambit of Art. 32, the Supreme Court of India has jurisdiction to give appropriate remedy for the aggrieved persons. Protection of Pavement Dwellers in Bombay, Improvement of the condition in jails, Bihar blinding case, Flesh trade in the protective home at Agra, payment of minimum wages, Abolition of bonded laborers, Protection of Environment and Ecology are the instance where the court has issued appropriate order, direction on the basis of Public Interest Litigation.

In Bandhu Mukthi Morcha V. Union of India, the Apex court held that under Art.32 the Supreme Court has the power to appoint a commission and to inquire the violation of fundamental rights. The public interest litigation through a letter should be admissible but the court should examine in a cautious way so that, it might not be abused. It should be only entertained after verifying all the materials submitted by the petitioner, this is known as epistolary jurisdiction.

While expanding the scope of the 'locus standi' rules his Lordship Bhagwati, J. expressed a note of caution. He observed "But we must be very careful to see that the manner of the public, who approaches the court in case of this kind, is acting bona fide and not for personal or private gain or political motivation. The court must not allow its process to be abused by politicians and others".This observation is clear that His Lordship was aware that this liberal rule of locus standi might be misused. He, therefore made it clear in that case the court should not allow for remedy.

1.3 Role of Judiciary in protecting Human Rights

In recent times Indian Judiciary is very cautious against the encroachment of fundamental rights of the prisoners. According to Art. 21 "No person shall be deprived of his life and Personal Liberty except according to the provision established by law". The right to life and Personal Liberty is the backbone of Human Rights in India. The Judiciary served as an institution by rendering justice for the human rights violation cases. The Supreme Court of India, through the interpretation of Art. 21 has developed Human Rights jurisprudence for preservative and protection of prisoner's right to maintain dignity. In Francis Coralie Mullin V. The Administrator,

Union Territory of Delhi & others, the procedure established by law must be reasonable, fair and not just arbitrary, whimsical or fanciful.

In the following cases namely Maneka Gandhi, Sunil Batra, M.H Hoskot, Husaainara Khatoon has taken a view that part III should be given the widest interpretation. It has been held that protection of prisoners in jail from degrading, inhuman and barbarous treatment, right to live with dignity, right to livelihood, etc. though not specifically mentioned in Art. 21 of the Constitution. One of the most powerful dimensions of Public Interest Litigation is the Human Rights of the prisoners. Under the Seventh Schedule of the Constitution the prison administration, police, law, and order will be brought under the control of the state. The state will generally give low priority to prison administration. In fact, various judgment by Hon'ble Supreme Court was an eye-opener for the state and directed for the modernization of the prison.

Regarding the treatment of prisoners, Article 5 of Universal Declaration for Human Rights, 1948 says "No one shall be subjected to torture or cruel treatment, inhuman or degrading treatment or punishment". While Article 6 of Universal Declaration of Human Rights, 1948 says that "everyone has the right to recognition everywhere as a person before the law". Article 10(1) of the International Convention of Civil and Political Rights lay down that "All persons deprived of their liberty shall be treated with humanity and inherent dignity of the person".

The Indian Judiciary has developed Human Rights Jurisprudence for the protection of prisoner's right to Human Dignity. The various decision by the Supreme Court reflects the increase of concern regarding the protection and development of human rights. The decision of the Supreme Court in Sunil Batra was a milestone in the development of prisoner's jurisprudence in India.

1.4 Role of Judiciary in Environmental protection

The protection and improvement of the environment have become a prime concern for every country. A clean and healthy environment is the basic need for human existence. Due to various pollution in the environment which disturbs the ecological balance. The depletion ozone layer will cause cancer, cataracts, mutation, and loss of productivity. Environmental law acts as a tool to protect and improve the environment and to control or prevent any act or omission which causes pollution to the environment. The Constitutional Law of India is the first which mandates provision for protection of environment which are Article 21, 47, 48-A, 51(A)(g) and sections 227 and 228 of Indian Penal Code, sections 133 and 134 of Criminal Procedure Code, these provisions contains clear mandate of state and citizen to protect and improve the environment.

As India is a party to Stockholm Declaration, it initiated various legislative measures for the prevention of pollution of the environment by enacting certain specific legislation and also incorporated the principles of Stockholm by an amendment to the Constitution of India in 1976. It incorporated Article 48A and 51(A) (g). Though these provisions are not enforceable in a court of law, the provisions direct the state to enact legislation and frame laws towards the promotions and protection of the environment. Thus the state is under a moral duty to take measures in

protection of the environment. The Constitution also imposes a duty on the citizen to take steps to maintain the ecological balance. India has enacted various laws such as Water (prevention and control of pollution) Act, 1974, Air (prevention and control) Act, 1981, Environmental protection Act, 1986, Public Insurance Liability Act, 1991 and National Environmental Tribunal Act 1995. The Apex Court played as an activist in the protection of the environment against degradation. Most of the actions of environmental issues are brought under Article 32 and 226 of the Constitution.

In Shriram Food and Fertilizer case, after the leakage of gas in the plant resulting in the death of the person and causing hardships to workers and residents of the locality, this was caused by the negligence of the management. The case was brought before the court through Public Interest Litigation. The court also diluted the expectation in Rylan V. Fletcher "where an enterprise is engaged in the handling of hazardous goods or inherently dangerous goods and harm results to anyone on account of an accident in operation of such goods, for example, an escape of toxic gas from the enterprise is strictly and absolutely liable to pay compensation to all those who are affected and such liability is not subject to any exceptions". The Court directed the management to deposit a sum of Rs. 20 lacs by way of security for payment of compensation claims of the victims of Oleum gas leak with the registrar of the court. In addition, a bank guarantee of 15 lacs was also directed to be deposited which shall be encashed in case of any further incident occurs within a time period of three years from the date of judgment resulting in the death or injury to any workman or any person residing in the locality.

In M.C. Metha V. Union of India, the Supreme Court ordered the closure of tanneries at Jajmau near Kanpur, polluting Ganga. The matter was brought to the notice of the Court by the petitioner, a social worker, through Public Interest Litigation. The court held that notwithstanding the comprehensive provisions contained under Water (prevention and pollution) Act and Environmental (protection) Act, no effective steps were taken by the government in order to grave public nuisance caused by the tanneries at Jajmau in Kanpur. The court held that, unless the tanneries take steps to set up treatment of plant, the court is entitled to order for closure.

In another case M.C. Metha V. Union of India (pollution of Taj Mahal), a Public Interest Litigation was filed in order to draw the attention of the court towards degradation of the Taj Mahal caused various industries operating in Taj Trapezium Zone (TTZ) and requested the court to issue appropriate direction to the authorities to stop air pollution. "The Precautionary principle and Polluter Pays Principle" have been accepted as a "part of law of land". The court held that 292 polluting industries locally operating in the area are the main source of pollution and directed them to change over within a period of time, if they could not do so they must stop functioning beyond 31st December of 1997and must be relocated outside the Taj Trapezium Zone (TTZ). The Deputy Commissioner, Agra and the Superintendent of Police shall affect the closure of industries.

The expansive and creative judicial interpretation of the word "life" in Article 21 has to lead to the development of environmental jurisprudence in India. The term "right to life" refers to the

enjoyment of life without the pollution of water, air, and the environment. According to environmentalists and jurist "The latest and the most encouraging development in India is right to clean and wholesome environment and the right to clean, air and water". The boundaries of Article 21 are expanded elevating it, to a position of brooding omnipresence and converting it into a sanctum of human values for more environmental protection.

In Ratlam Municipality V. Vardhichand, the Apex court treated the issue so differently not as mere tort or public nuisance. The Apex court compelled the M.P Municipality to provide proper drainage and sanitation in spite of budget constraints, thereby enabling the poor to live with dignity. The court not only appreciated the petitioner for bringing the issue to the court and also awarded money to the petitioner. This development has paved the way for the Social Interest Litigation, Class Action Litigation, Common Cause Litigation and so on. The court made it clear and stated that the dynamics of the judicial process had a new enforcement dimension.

It is to be noted that the right to the environment is a comprehensive right like any other right at the National and International Level. The Judiciary had interpreted various Constitutional and Legal provisions relating to the environment in an appropriate direction by promoting ecological balance and sustainable development. The Judiciary reasserted the right to live in a pollution free environment as an integral part under Article 21 of the constitution. The growing menace of environmental pollution is a formidable challenge to the human race since it affects the millions of population across the world.

1.5 Role of Judiciary in promoting gender justice

It is very important to analyze the position of women in the ancient period to present the condition of women in society. It is also pertinent to note that there was a shift in the way of living of women before Vedic periods. During the early Vedic age, there were a lot of educated women in the society and there is a reference of women sages such as Maitrayi in our ancient text. But with the upcoming famous treatise of Manu i.e. Manusmriti, the status of women was relegated to a subordinate position to men.

All kinds of discriminatory practices were started to take place such as Child marriage, Sati, Devadhashipratha, nagarvadhu system, etc. Women's fundamental rights and Social rights were curtailed and they were made fully dependent upon the male member of the family. Their right to education, marriage are determined by the male members of the family.

The Constitution of India gives special protection to the women's such as Article 15 guarantees the right against discrimination. Article 16 guarantees equal opportunity in public employment irrespective of the sex of the person. Article 14 guarantees "equality before the law and equal protection of the law" to all citizens. Without equality gender, justice cannot be achieved. Indian Judiciary tended to prefer a classificatory approach to equality as more and more challenge to state action was brought under the equality clause. The emerging doctrine of ‘reasonable

classification', if the classification is based on ‘intelligible differentia' and it constitutes ‘rational nexus' was the object of the state action, it cannot be challenged before the court of law.

In Yamunabai V. Anant Rao, the Supreme Court even refused to admit a maintenance plea filed by the second wife under section 125 of CrPC on the ground that the marriage was void. No amount of social argument on the plight of such women couldn't change the traditional approach of the Supreme Court to gender inquiries in such a situation.

In the case of violation against women, the Court’s approach varied between strict and liberal interpretation. Initially, in rape cases, Court insisted for corroboration of the testimony of the prosecutrix, reduced the sentence of rapist including child rapist. Over the years, after venturing into the increase of violence against women, the judiciary and legislative tighten the laws and came to help sexual violence against women. Further Supreme Court held that minor variation in the testimony of female victims it doesn't enough for impeaching the testimony of the female victim in sexual offense.

On sexual harassment in the workplace, the Supreme Court advanced the cause of gender justice by going to the extent of drafting laws. The court felt that the absence of legislature should not be allowed to perpetrate sexual violence against women in the working place. This is the first where a Court drafted a law for the protection of women. In framing laws and guidelines, the Supreme Court placed reliance on Convention of Elimination of all Forms of Discrimination against women, adopted by the General Assembly of United Nations, 1979, in which India has signed and ratified. This is a milestone judgment in Indian Judicial history which paved the way for gender equality.

Providing maintenance is very challenging, in recent times the Supreme Court took a liberal approach. In one case, Court felt maintenance should encompass provisions for residing. In another case for the benefit of Muslim Women (protection and right to divorce) Act, 1986 should be interpreted beneficially for Muslim women on the lines of Shah Bano judgment. This was done even when a legislative took a regressive step in denying a section of women what a secular law has provided to avoid deprivation and exploitation.

Adding a feather to the crown, Andhra Pradesh High Court held that, education is a part of development for all people and particularly for women, it also observed that Article 15(3) is an exemption engrafted to Article 15(1). Thus, the right to reservation for women in Article 15(3) cannot be denied. In Padmaraj Samarendra V. State of Bihar, allotment of seats in medical college for women is challenged on the grounds it was solely based on sex. The Supreme Court justified the classification doesn't attract Article 14, and the classification falls under "reasonable classification". It cannot be said the discrimination is solely based on sex.

The Court took a more beneficial approach for the employment of women, in the case of Vijaylakshmi V. Punjab University, the appointment of lady principle in women's college therein, cannot be held to be a violation of Article 14 and 16. To substantiate the statement the court held

that as there is an “intelligible classification and it has a nexus with object to be achieved”, moreover it is a precautionary, preventive based on public morals.

In a plethora of cases Randhir Singh V. Union of India, Sanjith Roy V. State of Rajasthan, Uttarakhand Mahila Kalyan Parishad V. State of Uttar Pradesh, Mackinnon Mackenzie and Co. Ltd. V. Andrey D’ Costa, in these cases, Supreme Court held "equal pay for equal work" which is guaranteed under Article 39(a) which implicit in Article 14 and 16 of the Constitution, No violation will be tolerated by the Court.

The Supreme Court will not tolerate any offense against women and it won't be a mere spectator any act which abridges the privacy and fundamental rights of the women. In the case of Lillu @ Rajesh & other V. State of Haryana , the Court realized the agony and the amount of trauma which has been undergone by the victim to go through two fingers test given to her character as a certificate after analyzing various precedents held that it is an invasion to her right to privacy and dignity. The court held that medical procedure cannot be carried out in a manner which cruel, inhuman, degrading treatment and health should be paramount consideration while dealing with gender-based violence. Proper measures should be taken to ensure their safety and privacy and there should be nothing arbitrary.

In India, there are so many laws by legislatures, rules by administrators and judicial pronouncements and more importantly, as an individual and as an organization's women's are striving hard to protect their rights. Still, we can able to find various offenses and heinous crimes against women in society, this is due to a lack of awareness and un-interest among women and people in society. It is the need of the hour to protect women's rights by educating them, an empowered woman will not only protect herself, but she will also strive hard to protect society. Women's should come forward to fight for her place in a male-dominated society. The mindset and the patriarchal views that have engulfed Indian people mindset since ages should be changed then only the real fruits of laws will be enjoyed by the women.

1.6 Conclusion

The right to enforce Human rights provided under the Constitution of India is Constitutionally protected. Article 32 and Article 226 empowers the Supreme and High Court to issue an order, direction regarding violation of the rights of a person. After the invention of Public Interest Litigation with an object to serve justice to poor and the disadvantageous sections of the society. In recent times the judges of both High Court and Supreme Court gave a far-reaching and innovative judgment to protect the Human Rights.

Public Interest Litigation has undoubtedly produced astonishing results in the past two decades. It acted as a savior in Prisoner's Rights, Gender Justice, Environmental Protection, Child, and Human rights violation and many others.

Various decisions by the Indian Judiciary regarding the protection of Human Rights indicate that the judiciary has played a significant and efficient role when the executive and legislative failed to address the problems of the people. The Supreme Court has come forward to take corrective measures and provide necessary directions to executive and legislative. It is the most important duty of the society and all of its organ to provide justice and correct institutional and human errors affecting the basic needs, dignity, liberty of human beings.

From the perusal of the above contribution by the judiciary, it is evident that the Indian Judiciary is so sensitive and alive to protect the rights of people. It has, through judicial activism devised new remedies for the purpose of vindicating most precious Human Right to Life and Personal Liberty.

Evolution of tax incentive schemes for industries with society

Suryaprava Basu

Abstract

In the year 1946, the incentive scheme was first introduced in India but the scheme is still in underdeveloped stage. Since then incentives are popular in our country. Tax incentive schemes are constantly changing and developing along with the requirements and developments of the society. There is no uniformity of incentive schemes. Every plant, company, firms and establishments have adopted different schemes. There is no one scheme followed throughout the country. The schemes introduced by ILO are followed partially.

Incentive scheme is a formal scheme or an arrangement that is usually put to use when a company wishes to promote a certain kind of behaviour or action amongst its customers or when a company makes extra payments to employees to reward good performance. But it is time specific. This means that the scheme lasts for a fixed duration or time period only and then it expires or is terminated by the company. This can be done so while dealing with company workers as well as while dealing with customers that the Companies wish to attract in order to increase their sales. According to Milton L. Rock, incentives are defined as "*variable rewards granted according to variations in the achievement of specific results"*. According to K. N. Subramaniam, *"incentive is system of payment emphasizing the point of*

motivation, that is, the imparting of incentives to workers for higher production and productivity".

Introduction

An incentive is a contingent motivator. The effectiveness of traditional incentives has changed as the needs of Western society have evolved. According to International Labour Organization (ILO), the incentives are "payment by results" and referred to as the "incentive system of payment" since it lays more importance on encouragement and motivation. Incentives are imparted to the workers for their outstanding performances. Therefore, the workers are encouraged and motivated to earn more by increasing their productivity.

Advantages of incentive Plan:

- Incentive plans motivate and encourages workers for their higher efficiency which is proportional to productivity.
- It can improve the work-flow and work methods including new technical and mechanical introductions into the working system.
- Incentive plans make employees hardworking and innovative as they have a continuous urge to come up with new ideas.
- When employees are dedicated, supervision costs can be reduced.
- Incentive plans help establish positive response in an organization.
- Improving the standard and production of the firm will help workers improve their standard of living as well.
- The other benefits offered by incentive plans are reduced turnover, reduced absenteeism, and reduced lost time.

Before the introduction of GST on July 1, 2017, the states of India had their own respective incentive schemes for encouraging the development of Industrial projects of large and small-scale in the states. The incentive schemes designed for promotion of exports will continue even after the GST roll out from July 1. Deemed exports refer to the transactions in which the goods supplied do not leave the country and the payment for such supplies is received either in Indian currency or in free foreign exchange.

Incentive Scheme Structures

A study on the various incentive schemes taken up by and introduced in the states of India for promoting industrial business is given below :-

Serial Number	State Government	Scheme	Provisions
1.	Gujarat	New Scheme for incentives to Industries (General) 2016- 2021 – Modalities for reimbursement of SGST Incentives in place of VAT 2019	The reimbursement of net SGST in place of VAT shall be granted quarterly on provisional basis by the Industries Commissioner. The amount of net SGST reimbursement admissible for the year shall be computed at the end of the year. At the end of financial year, if it is found that the excess SGST reimbursement has been granted as against the total amount of SGST reimbursement actually admissible, such excess amount of SGST reimbursement shall be paid back to the Government immediately along with interest of eighteen per cent per annum from the date of such excess reimbursement. The amount of net SGST reimbursement in place of VAT in any case shall not exceed the amount of SGST paid in cash through adjustment of cash ledger as shown in the return furnished under the Act by such eligible unit.
2.	Maharashtra	Maharashtra New Industrial Policy, 2019	Fiscal Incentives to MSMEs and Small Industries in particular SGST – Investment promotion subsidy of SGST paid by the unit on the first scale of eligible products billed and delivered to the same entity within Maharashtra.

			Fiscal Incentives to LSIs and Small Industries in particular SGST – Investment promotion subsidy of SGST for first sale within the state and billed and delivered to the same entity. This shall be provided on first-cum-first serve basis.
3.	Punjab	Detailed Schemes and Operational Guidelines, 2018 for availing Fiscal Incentives under Industrial and Business Development Policy 2017 .	Scheme for Investment Subsidy by Way of Reimbursement of VAT/SGST - (i) Micro, Small and Medium Enterprises - 100% of SGST net paid on intra state sale for first 7 years from the date of commencement of commercial production with a cap of 100% of fixed capital investment. (ii) Large Units - 75% of SGST net paid on intra state sale for first 7 years from the date of commencement of commercial production with a cap of 100% of fixed capital investment
4.	Uttar Pradesh	Industrial Investment and Employment Promotion Policy of Uttar Pradesh 2017	Reimbursement of net VAT and CST or the net amount deposited in State's account vis-a-vis share of the state under GST as follows which will not be more than the amount deposited annually :- a. 90% for Small Industries for 5 years. b. 60% for Medium Industries for 5 years. c. 60% for Large Industries for 5 years. 70% for Mega/ Mega Plus/ Super Mega

			category for 10 years.
5.	Telangana	Telangana Industrial Policy	Reimbursement of 75% net VAT/CST or State Goods and Services Tax (SGST) for a period of 7 years from the date of commencement of commercial production for Medium Scale Enterprises or up torealization of 100% fixed capital investment, whichever is earlier. Reimbursement of 50% net VAT/CST or State Goods and Services Tax (SGST) for a period of 7 years from the date of commencement of commercial production for Large Scale Industries or up to realization of 100% fixed capital investment, whichever is earlier.
6.	Tripura	Tripura Industrial Investment Promotion Incentives Scheme, 2017	All the eligible enterprises shall be entitled to an Industrial Promotion Subsidy equal to the net amount of the Tripura Value Added Tax (TVAT), Central Sales Tax (CST) and any other commodity tax actually paid by them to the State Government on sale of finished goods, subject to the following conditions: a) The subsidy shall be equal to the amount of VAT, CST and any other commodity tax actually paid by the enterprise to the State Government and shall be subject to overall ceiling of Rs. 60 lakhs per enterprise per annum. b) The aggregating limit of entitlement of an enterprise for 5 years shall not exceed to the

			100% value of investment made in plant and machinery by the enterprise. An enterprise shall be ceased to avail benefit of Industrial Promotion Subsidy as and when the aggregating reimbursement amount reaches to the investment limit during the spread of 5 year period. c) The subsidy shall be given to the eligible enterprises commencing commercial production on or after the first day of April, 2017 but before or on 31st day of March, 2022 for a period of 5 years from the date of commercial production. Government of India is in the process of introducing uniform Goods and Service Tax (GST) regime throughout the country. In case GST becomes effective, the tax related benefit will be suitably modified.
7.	Meghalaya	Meghalaya Industrial and Investment Promotion Scheme, 2016	Refund of CST for Micro/ Small Enterprises - 100 % subsidy on the amount of CST actually paid on purchases of such machinery and equipments which are genuinely required as is installed upto the date of commissioning of the unit subject to a ceiling of 25.00 lakh. In case GST becoming applicable during the tenure of this Policy, the above said concession shall be extended to State GST only. The State Government shall provide 99 % Sales Tax (MVAT) remission to eligible industrial units on sale of finished goods/by products within the State for a period of 7 (seven) years from the date of commencement of commercial production. Accordingly, the unit shall pay 1 % of the tax amount payable in accordance

			with tax return under MVAT to the State Government. Refund of CST for Medium/Large/Mega Large/Ultra Large Enterprises - Subsidy @ 100 % on the amount of CST actually paid on purchases of such machinery and equipments which are genuinely required as is installed upto the date of commissioning of the unit subject to a ceiling of 100.00 lakh. In case GST becoming applicable during the tenure of this Policy, the above said concession shall be extended to State GST only. The State Government shall provide 99 % Sales Tax (MVAT) remission to eligible industrial units on sale of goods/by products within the State for a period of 7 (seven) years from the date of commencement of commercial production. Accordingly, the unit shall pay 1 % of the tax amount payable in accordance with tax return under MVAT to the State Government. In case GST becoming applicable during the tenure of this Policy, the above said concession shall be extended to State GST only.
8.	Himachal Pradesh	Chief Minister's Startup/Innovation Projects/New Industries Scheme	New startups/new industries/Innovation Projects engaged in processing of primary agriculture/horticulture or herbal produce (other than flour mills/rice sheller) will be exempted from payment of VAT/CST for a period of 3 years or till they reach a turnover of Rs. 2.0 crore per year whichever is earlier. All new industrial unit(s) shall be exempted as follows from payment of State

			taxes (excluding levies in the shape of cess, fees, royalties etc.) for a period of 7 years from the date of commencement of commercial production or the date of notification by the concerned Department(s), whichever is later. The total amount to be so exempted shall be limited to 80% and 60% of the total fixed capital investment tribal areas and backward panchayats respectively. These incentives shall be recast after coming into force of GST.
9.	Bihar	Bihar Industrial Investment Promotion Policy, 2016	All new units will be entitled to avail 80% reimbursement against the admitted VAT/ CST/ Entry Tax deposited in the account of the State Government (excluding strictly any tax paid by them arising out of a purely trading business), for a period of 5 years from the date of commencement of commercial production. The VAT/Entry Tax/CST reimbursement shall be applicable only to the net tax payable, after adjustment of input tax credit against the output tax liability. Government of India is in the process of introducing a uniform Goods & Services Tax (GST) regime throughout the country. In case GST becomes effective, the tax related benefits will be suitably modified.
10.	Assam	The Assam Industries (Tax Reimbursement for Eligible Units) Scheme, 2017.	The reimbursement of State Goods and Services Tax (SGST) and the limit of tax exemption for the following are :- a. Medium and Large Units - For a

			maximum period of 15 years and 150% of Fixed Capital Investment. b. Mega Units - For a maximum period of 15 years and 200% of Fixed Capital Investment. The eligible unit shall be entitled to tax reimbursement of SGST portion paid in cash after adjustment of SGST input tax credit and IGST credit.
11.	Andhra Pradesh	Andhra Pradesh Industrial Incentive Scheme	Reimbursement of Tax for :- a. Micro Enterprises - 100% subsidy for VAT or State Goods and Services Tax (SGST) will be reimbursed for 5 years from the date of commencement of business. b. Small Enterprises - 50% VAT/CST or State Goods and Services Tax (SGST) will be reimbursed for 5 years from the date of start of business. Medium Enterprises and Large Industries - the subsidy of 25% VAT or State Goods and Services Tax (SGST) will be reimbursed for 5 years from the date of commencement of business.
12.	Manipur	Draft Industrial And Investment Policy Of Manipur, 2017.	All new units will be eligible for tax incentives eligible under State GST for a period of seven years. In case of existing units, they will be eligible for seven years from the date of commencement of commercial production. The industrial units will be eligible to avail the above mentioned incentive under the Policy provided that they

			have not availed similar incentives under any policy of the Government of India.
13.	Nagaland	Nagaland Start-Up Policy, 2019.	Start-ups selected under this policy shall be eligible for annual reimbursement of state GST paid in sales of goods for a period of 3 years up to a maximum of INR 5 Lakhs per Start-up per year.
14.	Haryana	Scheme of "Investment Subsidy on VAT/ SGST	Major fiscal incentive of investment subsidy on VAT/ SGST are as follows :- a. Ultra Mega Projects - The Ultra Mega Projects shall be offered special package of incentives by Haryana Enterprises Promotion Board. The quantum of investment subsidy on VAT/ SGST shall be decided by the Haryana Enterprises Promotion Board. b. Mega projects - 75% of VAT/SGST net paid for first 5 years, 35% for next 3 years in 'D' category blocks; 50% for first 5 years, 25% for next 3 years in 'C' category blocks; 30% for first 5 years, 15% for next 3 years in 'B' category blocks from the date of commencement of commercial production with cap of 100% of new fixed capital investment. c. Large units - 75% of VAT/SGST net paid for first 7 years, 35% for next 3 years in 'D' category blocks; 50% for first 5 years, 25% for next 3 years in

			‘C’ category blocks from the date of commencement of commercial production with cap of 100% of new fixed capital investment for new enterprises. Micro, Small and Medium Enterprises- 75% of VAT/SGST net paid for first 7 years, 35% for next 3 years in ‘C’ & ‘D’ category blocks; 50% for first 5 years, 25% for next 3 years in ‘B’ category blocks from the date of commencement of commercial production with cap of 100% of new fixed capital investment for new enterprises.

Conclusion

Incentive Schemes are a must and should be available to industries in India. It promotes the growth of Industrial business in all states. Incentive Schemes had always been in existence. But after introduction of GST few states have not yet revised their pre-GST incentive schemes and other states have already come up with their respective new incentive schemes for industries as mentioned in the above table. The states which have not yet come up with new incentive schemes should be coming up with them soon.

Circuit Bench of the Supreme Court : A great need for an integrated India

- Indrajeet Dey

Often one would come up and say that India is a country of diversity. The statement assumes much more importance in places like the North East, the Southern Region and even parts of Central India. The North East in particular, suffers from issues like poorly integrated railway network. Taking the road, is often not the most preferred way for travelers, while Airways is not the most affordable system. South and central India, maybe well connected by railways, but have you ever wondered that a trip to Delhi may just mean spending two days on a train.

The Constitution of India is often regarded as the ideal constitution, but what is the use of giving people a Fundamental Right like Art 32, and a Constitutional Right under Art 136, in order to invoke the inherent powers of the Supreme Court, if the average person is not given access to such Courts. On an average a person may have to spend about seven days, simply to approach the Supreme Court, arrange a lawyer or seek legal aid, and file his case. The problem amplifies much more for the middleclass and the poor. Arranging food and shelter would become a daunting task for them. Legal Aid, merely helps the poor, simply by reducing the cost of litigation but in order to avail legal aid, one must visit the NCR region and co ordinate for atleast two to three days, before they are allotted a lawyer. This hindrance ensures that a large number of people would not approach the Top most Court of the Country. To add to the problem, one must keep in mind that Delhi would predominantly have either English speaking or Hindi Speaking persons. For a vast majority of the country, who are unable to speak in either of these languages, communication would become impossible.

In fact, the High Courts often remains the Highest Court for a vast majority of Indians. The NALSA however has tried to co-ordinate with many central prisons, so that their case may be

taken up to the Top Court. However, not all litigants are languishing in prison, while all prisons do not co ordinate with the NALSA as well.

A practice that has emerged is something that would perhaps threaten the future of practice of law in our Country. It is the systems of taking help of brokers. People often approach these brokers even at the District Courts when they are in search of a lawyer, however, the problem reaches a whole new level if they are to reach the top Court. The brokers often demand heavy money in order to accompany litigants to the NCR, in order to introduce them to a lawyer. In many cases, people are even cheated where they pay a handsome sum of money and no applications are moved.

A peculiar problem that often comes into light, is that the rich often use the Hon'ble Apex Court as an instrument of threatening poor and helpless litigants. A simple notice issued, may seem to very well comply with the rule of Audi Alteram Partem, but it is often an empty formality. If a person, receives a notice and is unable to approach the Court, that is certainly a travesty of justice. Hence, simply owing to the fear that the matter may reach the Supreme Court, litigants try to evade coming to Court in the first place.

The setting up of the circuit Bench has certainly proved to be a very effective move in many states. Maharashtra, Uttar Pradesh, Madhya Pradesh, West Bengal etc. have shown that the circuit benches ensure that more people approach the High Courts. Similarly, setting up Circuit Benches of the Hon'ble Supreme Court would improve the accessibility to a great extent.

By having Circuit Bench, one would not dilute the powers of the Apex Court but rather it would be amplified owing to it's omnipresence. The Judiciary effects the lives of every person and thus it is essential that it would make it self available to every person.

Even if the Circuit Bench, would limit itself to hearing only applications under Art 32 and the admission of an application under Art 136, a lot of people would stand to benefit. Once, leave is granted in an SLP, the parties would not have the face the difficulties associated with filing of an application. There is also no need of the Bench to be sitting on each and every day of the month. Sitting for one week in a month would itself come as a great relief for many. Though such time is short, yet it compensates for the other associated difficulties that one has to face while going to the Supreme Court.

The following places may be best suitable for the Circuit Bench of the Hon'ble Supreme Court :

1. Mumbai- The financial capital of the Country would certainly ensure that people from one of the most populated state along with some neighboring states like Madhya Pradesh, would approach the Court.
2. Chennai and/or Bangalore- Ideally having a circuit Bench on both states would be able cater to the need of the people. However, even if one of these places were to have a Bench, many people from the South would be able to save a lot of time and money.
3. Kolkata- This would be perhaps the most important Bench, owing to the fact that states like Orrissa, Jharkand, Chattisgarh, Bihar and of course the North Easter states would be able to approach this Bench.

If Justice must on just be done but must seen to be done, then the Circuit Bench may just be the best example. In view of the fact that the number of Judges in the Apex Court might increase in the near future, the idea of the Circuit Bench may be more feasible.

A Circuit Bench would not divide the Country but it would rather cause a far greater degree of integration. Even for the legal profession, it would be a welcome step as more litigants would come forward.

The Need for Gender Neutral Rape Laws

By Natasha Menon

Abstract

On 6th September 2018 a landmark judgment was passed that acknowledged and recognized the existence of many genders amidst the Indian society. Yet, India still has gender specific rape laws. This article reflects the growing need for gender neutral rape laws and explores the battle between law and society in order to attain the same. The amendment in section 377 did change the face of Indian society but there is still a long way to go. This article covers the history and the journey of section 377(Unnatural Offenses) and 375(Rape). It captures the problems faced by the society and the steps taken by the authorities in lieu of the social needs in order to ultimately answer the pertinent question 'Is there a need for gender neutral rape laws?'

Introduction

For the longest time India has been battling to take a proper stand regarding sexual orientation. This in turn raises a question on the validity of section 377 of the Indian Penal Code. It talks about 'Unnatural Offenses', where whoever has sexual intercourse with any man, woman or animal, against the order of nature will be punished with imprisonment for life or imprisonment that may extend up to 10 years along with fine. Section 377 punishes people who have carnal intercourse against the order of nature, because the natural order of carnal intercourse is that

there should be a possibility of conception of a human being, which in this case of coitus in not possible. Thus homosexuality, sodomy and oral sex was criminalized. This section is based on the provisions of English Law that criminalized sodomy and sexual encounters between the same sexes. But this law was reformed in Britain by introducing Sexual Offenses Act, 1967 which de-criminalized acts of sodomy and homosexuality between consenting adults (above 21 years of age). However it took India 41 years since then, to do the same in response to the modern society. It is now when India is recognizing and permitting coitus among various genders then isn't it appropriate to amend the provisions in our rape laws as well? Women were given provisions to protect themselves from sexual offenses because they were considered a minority. Now, more than two genders exist apart from the binary genders, people who belong to the 'others' category have assumed the status of minority. Aren't they more susceptible to the same sexual offenses? Shouldn't they have a platform to address violation of their private bodies? India did great with amending laws and giving recognition to the many genders that were hiding in the closet for the longest time, but it has a long way to go towards actually recognize their rights to the fullest when it comes to sexual offenses.

The Journey of Decriminalization of Section 377

In 2001, it was Naz Foundation that took the first step towards decriminalization of the section by filling a writ petition in the Delhi High Court, questioning the validity of section 377 on the grounds that it violates Article 14, 15, 19 and 21 of the Constitution of India. The reason for filing the petition was that homosexuals are also vulnerable to HIV or AIDS, because of the section, their options to seek help becomes extremely bleak if not nonexistent because if they confess of having sexual encounters with the same gender, they will be liable under section 377 as consent is not a defense for the same. Hearing the plea and the side of the petitioner, the High Court passed a judgment in favour of Naz Foundation. Later, in 2013 the Supreme Court overturned the decision of the Delhi High Court in the case of Suresh Kumar Kaushal v Naz Foundation. The Court held that the amending or repealing the section is in the hands of the Parliament and not the Judiciary thus section 377 was re-criminalized. It was actually in 2018 in the case of Navtej Singh Johar v Union of India, where the Supreme Court decided to reanalyze the past decision and finally overrule the decision made in 2013 on the grounds that Section 377 is discriminatory in nature and not only infringes the right to privacy, but also the right to equality. The Court held that LGBTQ are entitled to all the rights in the Constitution especially the Fundamental Rights. Thus, currently section 377 of the India Penal Code stands repealed to the extent where it penalized homosexuality and sodomy and recognized it as sexual perversity.

Provisions of Rape in the Indian Penal Code

Section 375 defines the term 'Rape' and section 376 prescribes the punishment for rape. The term 'Rape' in IPC wasn't well defined thus, many rape victims have faced a severe miscarriage of justice when men took advantages of the loopholes it contained. Rape in laymen's terms is ravishment of a woman by a man without her consent. This specifically mentions four things. First there must be sexual intercourse; second that only a woman can be a victim; third only a

man can be accused, a woman can only be an abettor and four, there must be lack of consent. The Indian Penal Code witnessed two landmark amendments in the sections concerned with rape to make it well defined and be able to serve justice to all women kind who were violated of their personal body.

Mathura Rape Case:

Mathura was a young adivasi girl who had gone to the police station with her brother to follow up on a complaint they had made earlier. The two policemen that were on duty that day asked her to stay while her relatives were asked to wait outside. She was taken to a room and raped by both the policemen. The Sessions Court held that since Mathura was sexually active, she could have enticed the officers and thus her consent was voluntary. However the Bombay High Court overturned this decision and held both the officers guilty on the grounds that consent was acquired by inducing fear. The officers were acquitted later when the matter went to the Supreme Court stating that her relatives were right outside and yet she didn't cry for help. Further, there were no signs of resistance to the act on her body which could only mean that she was consenting to the act.

The aftermath of the decision created a havoc. Many eminent law professors wrote letters to the Supreme Court stating that consent and submission are two different things. There were widespread protests and demonstrations by women organizations highlighting the ignorance of the Apex Court. This created tremendous pressure which finally led to the amendment of the rape law by the legislature. The Criminal Law Amendment Act 1983 inserted new provisions of custodial rape and in-camera trials. The burden of proof shifted from the victim to the accused. Furthermore, if the victim holds that she didn't provide her consent, then the court shall presume that she is telling the truth and that there was no consent for sexual intercourse. However, no provision was made where by men could file rape cases as victims as section 377 wasn't decriminalized by that time. Thus if there was an act of sexual intercourse, both the parties would be held liable.

Nirbhaya Rape Case:

The victim was a 23 year old young female who was traveling in a bus along with a male friend. Apart from them, there were 6 other men in the bus each of whom tortured, beat and raped the victim. The male friend was also brutally beaten up. An iron rod was inserted into her private parts. She sustained grievous injuries and was rushed to the hospital. She was sent to Singapore for further treatment but unfortunately succumbed to her injuries. Since, the victim's name couldn't be used in India, this case attracted a lot worldwide attraction in the name of Nirbhaya Rape Case, nirbhaya means fearless. Among the six accused, one of them allegedly committed suicide within custody and one of the remaining 5 was a juvenile. There was massive outrage with regard to the case because of the sheer amount of brutality involved. The Delhi High Court seconded the decision of the fast-track court that awarded a death sentence to the accused and the juvenile was awarded with an imprisonment of 3 years.

Due to massive outrage by the public, a judicial committee was set up that came to a conclusion that the government and the police were ill equipped with dealing with rape cases and thus Criminal Law Ordinance was promulgated by the President in 2013. An amendment was made in the Juvenile Justice Act, where juveniles will be awarded the same sentence as an adult for heinous crimes. A number of new fast-track courts were established to hear and dispose rape cases quickly and ensure there is no failure to provide justice due to delay on the part of Judiciary. The biggest amendment of them all was the amendment brought in within the definition of the term 'Rape'. The term became more acutely defined. Various instances of consent and will were laid down. Non penetrative sexual encounters were also recognized as rape. Different instances of possible rapes were incorporated which includes gang rape, rape by a public servant, police officer, member of the armed force, rape of a women in vegetative state, rape of a minor, rape by person in authority, rape of wife by husband when they are separated, rape that causes death or results in vegetative state of the victim and rape by repeat offenders. This definition of rape prior to the amendment did not include use of other body parts or foreign objects by the offender upon the victim's body. Such offences were classified as "use of criminal force to outrage the modesty of a woman".

It should be noted that before the public demonstrations and the huge outcry of people, a step was taken towards acquiring gender neutral rape laws. The Supreme Court made a proposal to the Law Commission in 1999 to review the laws on rape. The Law Commission in its 172nd report dated 25th March 2000 made a recommendation to widen the meaning of rape by substituting 'Rape' with 'Sexual Assault' as an offense. It further recognized that there was an increase in the assault against boys. Thus it made a recommendation towards making rape an offense wherein both men and women could be victims and perpetrators. An amendment on these recommendation still awaits. However these amendments would only recognize two genders as the victim and the perpetrator. The term 'any man' and 'any woman' should be changed to 'any person', this way minority genders would also be shielded against instances of sexual assault that they are more prone to face being a minority and thus are at a greater risk of being bullied by means of sexual assault. Another report was submitted by the Law Commission on the basis of which The Draft of Criminal Law Amendment Bill was drafted which defined the term 'sexual assault' as penetration of the vagina, the anus or urethra or mouth of any woman, by a man, with (i) any part of his body; or (ii) any object manipulated by such man under the following circumstances: (a) against the will of the woman; (b) without her consent; (c) under duress; (d) consent obtained by fraud; (e) consent obtained by reason of unsoundness of mind or intoxication; and (f) when the woman is below the age of 18.

The real problem

For a long time women were considered a minority and were given special provisions against sexual offenses in order to protect their modesty. Given the circumstances then, recognizing and incorporating such offenses for the sake of women was mandatory. Eventually as time and circumstances changed, more offenses were recognized. It is true that the womankind face exploitation of their bodies and have continued to witness growing sexual crimes. The Judiciary

and the Parliament have taken enormous steps by providing a platform to seek justice at the instance of such heinous crimes. There are provisions against rape, attempt to rape, assault on women to outrage her modesty, sexual harassment, assault to disrobe a woman, voyeurism, stalking, and importation of girls. These provisions are only available to women and women alone, no other gender could file a case under any of these sections and no woman could be held liable under these sections. Most of the offenses here in a way outrage a woman's modesty. The Supreme Court defined modesty as the essence of a woman's sex. The act of pulling a woman, removing her saree, request for sexual intercourse would be an outrage to her modesty. In today's society, where more than one minority of gender exists steps should be taken to recognize them as the victims as well as give provisions to punish women if need be. Gender neutrality means that the same section is available to all the genders to the same extent and manner. This means any gender other than woman can be a victim and any gender other than man can be the accused. Anyone can outrage the modesty of a Trans person in the same manner the modesty of a woman is outraged. By asking for sexual favors, pulling the saree, inappropriate touching and what not. The only difference is that they don't have a platform for seeking justice against such acts. They don't have provisions like women. They along with other members of the LGBT community as well as men can be raped, stalked, sexually touched, molested but they can't take any actions against it. Further, if it is in fact a woman who sexually assaults a person who recognize themselves as 'others', then she would only be an abettor and not the accused. It is fair? Decriminalizing was the first step to bask under the rainbow of the pride colors, but providing gender neutrality to sexual offenses is also a necessary step to let 'others' enjoy their newly acquired freedom to the fullest. We can't deny the fact we live in a society where the patriarchal mindset still prevails or male domination is openly accepted. There are many people who deny the existence of a third category of gender, they see it as unnatural and believe it to be a psychological disorder. Many such people can scare the LGBT community by bullying them in order to express their domination. Such kind of bullying more often than not is sexual in nature. The fact that the same heinous crimes can happen with them cannot be denied and the absence of any provision to protect them cannot be ignored. They are humans as well and they suffer the same way as a woman does when she is being raped.

Delhi High Court in a recent case declared section 354A (outraging a woman's modesty) as gender neutral post the NALSA judgment by the Supreme Court in which the court recognized transgender as a third gender. However it in unclear if gay men and or men in general can seek shelter under this section and whether a woman can be placed in the position of being the accused. When a plea was made in the Supreme Court to make rape laws gender neutral, making a woman also punishable for the crime; the court dismissed the plea on the grounds that no instances have been witnessed or recorded where woman would perform any sexual offenses and held that the laws are affirmative provisions to protect a woman. Furthermore, it is the power of the Parliament to amend the laws according to social needs and the Judiciary cannot overstep on it.

Due to the Nirbhaya outrage and the amendments brought soon after, the changes in favour of gender neutrality as recommended by the Law Commission couldn't follow. In July 2019, lawyer

and Parliamentarian KTS Tulsi introduced a private bill in the Parliament before the Rajya Sabha to bring necessary amendments for the same. The bill extends to protect the people belonging to any gender. The bill also calls for inserting a new offense of ‘touching’ without penetration in the genitalia. It calls for the insertion of S375A in the IPC, to punish "sexual assault" defined as "intentionally touches the genitals, anus or breast of the person or makes the person touch the vagina, penis, anus or breast of that person or any other person, without the other person's consent except where such touching is carried out for proper hygienic or medical purposes". The main object of the bill is to protect every gender from being vulnerable to rape and sexual assault. It would facilitate the Constitutional rights guaranteed to every individual.

Conclusion

Laws and crimes are genderless. Sexual offenses can happen against any gender. Gender specific laws were necessary at a certain point of time but now that the times have changed, they too need to evolve and change accordingly. The law books must equip themselves to this change to ensure that no particular section of the society is left vulnerable. What is available to every woman must be available to every transgender and every man. Similarly punishment for a man should be available to women alike. The law can’t be ignorant and blindly believe that woman can’t commit sexual offenses and men can’t experience similar offenses. Countless cases have been registered but no permanent action has been taken for the same. The Delhi High Court does consider section 354A as gender neutral but it is only a persuasive precedent and not an authoritative precedent. What about the other states? Further, it doesn’t specify if it will be available to men or if women can be held liable for such offenses. If Parliament has the power to change laws according to the social needs. It can’t be oblivious of the misery of men and the Trans people. There is a glaring problem in the face of society and India needs gender neutral rape laws at the earliest. When this happens only then will the judgment of section 377 be truly upheld by considering all genders equal in the eye of the law.

498A-'A boon or a bane'

The basic objective for the introduction of the section was for the protection of married women from the harassment of the husband or the husbands' family. In is a well known phenomenon that India as a country is rustic wherever customs and traditions come into play. This harassment has stemmed from the inception of the dowry system. Dowry in its traditional meaning was given for the protection and the initial standard of living for the newly wedded couple. In the ancient times the norm practiced at that time was that until marriage the woman, as of now, the daughter was protected and shielded by the father. However, after marriage upon becoming the wife of the husband, the duty to protect and shield was now upon the husband. Therefore, as a last parting gift, the father would acknowledge the partition by showering the bride and groom with gifts. The practice was completely innocent without any such ramifications. The dowry or gifts were accepted gracefully by the husband and he knew very well that the gifts were voluntarily given by his father in law. However, as time moved on the thought process moved on and once what was an innocent voluntary practice had now become a tradition which everybody was forced to follow because of the societal stigma that had now been attached to it. It had now reached the stage wherein the husband or the family of the husband would demand dowry and the marriage would be considered upon the amount of dowry that could have been given. Therefore, women who had a higher amount of dowry would have a higher chance at marriage than a woman who could afford lees amount of dowry. As a result of this, families who had a girl child would start saving from the very birth of the child until the last day before her marriage. This was the best of what families in rural areas would predominantly do. As a result of the extreme pressure imposed upon a family who gave birth to a girl child another practice of female in foeticide arose and drastically took centre stage as one of the worst crimes that could ever be in practice. In order to match the dowry amount that had been demanded by the husband and his family, the family of the girl would take loans, would sell their jewellery or would fall to the need of moneylenders. The worst part about this practice is that it is still prevalent in India. Until the 21st century the practice of the dowry system is prevalent. The reason why this is so shocking is because of the number of laws that are in place for the prohibition of such acts. The Dowry Prohibition Act has been passed with the sole reasoning to prevent the transactional aspect of the dowry system. However, the success or the failure of the act is not the core of the paper and therefore it would not be dealt with. However, what will be dealt with is the effect of the dowry system, not only to the newly wedded wife but also upon the husband and his family.

Section 498A in the Indian Penal Code

Husband or relative of husband of a woman subjecting her to cruelty. Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation. For the purpose of this section, cruelty means:

(a). any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b). harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

The research hypothesis is-

1. Whether section 498A IPC is not misused against the husband by the wife?

The alternate hypothesis would be-

2. Whether section 498A IPC is misused by the wife against the husband?

In order to understand what section 498A embarks itself upon, it is first pertinent to understand what the meaning of cruelty is. In the case of Kaliyeperumal v State of Tamil Nadu the court held that cruelty is a common essential in section 304B and 498A. A person acquitted under section 304B can still be convicted under section 498A. The difference between section 304B and 498A is that in section 304A the meaning of cruelty has not been defined. In section 498A cruelty by itself is a crime. For the prior, it specifically relates to dowry death and the death has to have been caused within 7 years of the marriage. In the case of Inder Raj Malik v Sunita Malik, it was held that the word 'cruelty' is defined in the explanation which says that harassment of a woman with a view to coerce her or any related persons to meet any unlawful demand for any property or any valuable security is cruelty.

Sec. 113A- Presumption as to dowry death- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

The presumption as per this section arises from the introduction of 498A into the IPC in the Statement and Objects of Reasons in the Criminal Second Amendment. The entire ideology behind the introduction of this section was to protect women from committing suicide as a result of the amount of burden placed upon her by the demands of dowry from her husband and his family. It is a necessitated mandate that section 113A of The Evidence Act relates to offences committed under section 498A of the Indian Penal Code and section 113B of the Indian Evidence Act relates to offences committed under section 498A of the Indian Penal Code. However, under

section 113B and 498A the prosecution has to produce material evidence to show that the woman was subjected to cruelty soon before her death took place. The lacunae within this which has been pointed out for innumerable times is that the term 'soon before' has not been established. Therefore the question that arises would be, whether the demand for dowry 2 days before the death of the woman would attract Sections 304B and 498A? Additionally the question that would arise would be whether the demand for dowry one week prior to the death of the woman would attract Sections 304B and 498A? There has been no conclusive proof as to the time limit. However, in the case of Hadu v State the court had held that in order to prove 'soon before' or 'immediately after' would have to be understood in relation to proximity of time, proximity of place, continuity of time and continuity of design. Furthermore, in the case of Kansraj v State of Punjab the court explained the terms 'soon after' and 'immediately before'. The court held that a woman complaining to her mother or her father about the demand for dowry and after that dying under mysterious circumstances would attract section 304B as on account of dowry death. Any sudden change in the actions of the individual after the commission of a crime would amount to 'immediately after'.

As a result of this the constitutional validity of section 498A was called into question by mens rights activists. They contended that the section 498A was ultra vires to the Constitution of India on the grounds that it was in violation of Article 14 and Article 20 (2) as 498A already had a remedy under section 4 Dowry Prohibition Act. However, the Delhi High Court held that it would not be violative as it is not double jeopardy. Section 4 of the Dowry Prohibition Act deals with dowry in specific and cruelty is not an essential while a section 498A deal with cruelty and dowry is not specific. For a clearer understanding, in the case of Wazir Chand v State of Haryana, there was no proof of murder or abetment to suicide and therefore the in laws were let off. They were though charged with harassment for dowry as it was proved that there was a continuous demand for dowry right until the death of the woman.

The Indian courts use this section not only to protect women but to specifically protect women that are recently married. The most common cause for newly wedded women to commit suicide is because of the enormous amount of dowry that is demanded by the in laws. The demand for dowry does not only stop after marriage but in fact it continues and keeps increasing as time passes. It is claimed that 9 out of 10 cases are always related to dowry death. In the case of Ram Kishan Jain and Others v State of Madhya Pradesh the wife was given calmpose tablets and then she killed herself after cutting both her wrists. The times it is not dowry death it is the fact of the harassment on the grounds of her complexion, education or even to the extent of her inability to cook. In the case of Surajmal Banthia and Another v State of West Bengal, the wife was tortured and ill-treated for many days. There were days that she was not even given food to eat and in addition to that her father in law used to misbehave with her. All this culminated and caused her to commit suicide. Women are indeed treated this way in their matrimonial home and therefore the burden falls upon the court to protect these women and punish the abusers. This is an extremely important function of the court and it works for the benefit of not only women but in also bettering the society as long as this section is not misused by the women. This is a trend that has been catching on and if not checked, it could lead to devastating consequences. The court

have on several times failed to understand that physical cruelty is not the only kind of cruelty meted out towards women and that mental cruelty affects women even more. In the case of Ramesh Dalaji Godad v State of Gujrat the court went right up to the extent to hold that even ignoring a woman or not talking to her or even denying her of her conjugal rights would amount to cruelty. in the case of Ashok Batra & Ors v State even though letters of the deceased stating that harassment had taken place was present, the court did not treat them as strong evidence and gave the appellants the benefit of doubt without ordering for a further investigation into the matter is wrong. The judges have at times taken a very narrow interpretation of this section and understood it in only the context of unlawful demands of dowry. In the case of State of Maharshtra v Jaiprakash Krishna Mangaonkar & Ors the court had held that mere chastising of the woman was not a cruelty, however what the court failed to understand was that chastising the woman on a daily basis would amount to mental cruelty.

It has been brought to light that sometimes even when the woman has not been harmed, due to other reasons would put the charge of section 498A on her husband and her in laws. A violation of this section is on the rise with the woman frivolously making false allegations against their husbands with the purpose of getting rid of them or simply hurting the family. The abuse of this section is rapidly increasing and the women often well- educated know that this section is both cognizable and non-bailable and impromptu works on the complaint of the woman and placing the man behind bars. As a result innocent individuals could land up in jail under the ambit of this section. Women activists justify this issue of section 498A by stating that all sections have the ability to be misused and therefore this section should not be made special. However, this justification was acceptable until the misuse of this section rose extremely high and it had become apparent on the face of it. Like in the case of Savitri Devi v Ramesh Chand & Ors. The court held that the misuse of this section was on the rise and that the law makers should analyze and comprehend this section to prevent it as it affects the sanctity of marriage which is one of the foundations required for society. This section was made with the intention to protect women and the reverse trend was noticed in the case of Saritha v Ramachandran where the court asked the parliament to make the offence a non cognizable and bailable section to protect the men from false claims. The Indian courts have recently come to the understanding of the misuse of this section because this section entails that as soon as an FIR is lodged against the husband, the entire family of the husband gets roped into the case. In the case of Jasbir Kaur v State of Hayana, the court held that an estranged wife could go to any extent to prove the husband and his family for an offence that never even occurred. Further the court held in the case of Kansraj v State of Punjab, “for the fault of the husband the in-laws or other relatives cannot in all cases be held to be involved. The acts attributed to such persons have to be proved beyond reasonable doubt and they cannot be held responsible by mere conjectures and implications. The tendency to rope in relatives of the husband as accused has to be curbed.” The Karnataka High Court in the case of State v Srikanth held that roping in of the family of the husband should only be allowed when there is sufficient proof that there was harassment from their side. Otherwise the forcing of the relatives to come down from abroad in order to attend the proceedings of the case becomes completely useless if the case would be proved to be false and frivolous. Again in the case of Mohd. Hoshan v State of A.P. the court held that the impact of complaints, accusations and taunts

on an individual is a question of fact and would differ from individual to individual and would depend on external factors such as their upbringing, sensitivity, social background. It was also held that each case should be decided on its own facts as to whether cruelty had been meted out or not. In the most recent case of Sushil Kumar Sharma v Union of India, the Supreme Court held that if the misuse of the section carries on to such an extent that it becomes unbearable by the courts, the entire objective of the section would fall through because of the extreme misuse. The court further held that after a woman accuses her husband and his relatives under section 498A officially, it is not necessary that if the case is proved to be false or frivolous, the husband will live a normal life after that. If the media coverage over that case is extreme the husband is tainted with a bad reputation for the rest of his life. This would hamper the life of the husband and his relatives forever now and there would be no turning back from once a case is registered under section 498A against the husband and his relatives.

It cannot be denied that section 498A is a very important section in India for the protection of the newly wedded women. The section was established to protect women from their in laws. However, as good as the section maybe, the misuse of this section has lifted many eye brows. The effect of this misuse has been seen in many cases. The misuse is done by mostly educated women and not the rural women. Bail for the husband and his relatives can be applied for, but which court would grant bail to an individual, if the wife is afraid of losing her life. Furthermore, the educated women would file the case against the husband on a Friday night because for this section there is no investigation or verification for arrest. Anyone whose name has been incorporated in the FIR is arrested and because there is no possibility for the application of bail over the weekend which results in two days behind bars. In the year of 2012 statistics were brought about to show that one fourth of the arrested individuals in accordance with this section were females and that in 93% of the cases charge sheets were filed. However the alarming thought is that in only 15% of these cases were their convictions. All the other cases led to acquittals. A union ministry circular stated that section 498A was being used as a weapon rather than a shield. In the case of Rakesh Sharma & Ors. v State of UP, Justice Goel had created a mechanism for the purpose of prevention of the misuse. He had held for the formation of a Family Welfare Committee, where a preliminary investigation would happen before the arrest. Upon the finality of the investigation would the arrest occur. This was not the first time that the court had issued guidelines for the prevention of the misuse of the section 498A. In the cases of Sushil Kumar Sharma v UOI, Preeti Gupta v State of Jharkand and Ramgopal v State of Madhya Pradesh guidelines were also laid down. In 2014, the Supreme Court, in Arnesh Kumar v. State of Bihar, observed the casual manner in which the husband and his family members had been arrayed in the case, and directed that the police should not automatically arrest the husband or his relatives on the lodging of a complaint under S. 498A. Further, Magistrates should not authorize further detention in a callous or mechanical manner. Failure to adhere to these directions could provoke departmental action against both the actors. However the Supreme Court has removed all the guidelines and maintained the bare section in itself.

In my opinion the Family Welfare Committee should have remained in place and it should have been given more time to work. The Family Welfare Committee would have been under the supervision of the Legal Services Authority. It would comprise of 5 members. They would include a currently working married woman, a retired individual, an individual with legal experience, an elderly individual of the community and a currently working man. This would not only maintain the balance of genders but would also act as a check on the misuse of section 498A. The basic function of this Family Welfare Committee would be to conduct a speedy preliminary investigation for all the cases within their jurisdiction pertaining to section 498A. Upon the report and only upon their report should anyone at all be arrested. This would firstly protect the husband and the family of the husband from frivolous cases and secondly would prevent the relatives of the husband for being arrested for a crime that not only did they not commit but had no idea about. Under this mechanism not only would women have the protection of section 498A but men would also have the protection against the misuse of section 498A.

Hitesh N. Dave

Transformative Constitutionalism: Judicial Interpretation or Judicial Overreach – A Critique

Abstract:

The Indian Constitution is the longest written constitution of any sovereign country in world. Judges interpret ideology of the provisions of the Constitution and its rights. Judiciary has been empowered with the power to interpret the Constitution. Supreme Court of India has in recent past given very historic judgments on the issues of decriminalising homosexuality, untouchability, human rights. Judiciary's role is revolutionary. Dilemmas of the constitution have been interpreted and considering social, political and economic values of the human being, the Court delivers the judgments. Be that as it Justice, Liberty, Equality the visible Transformation has been achieved by such judicial intervention. The Constitution of a country is adjectival rather than substantive as it does not prescribe what should be done, but, how the authority of government should be exercised. Avoidance of strict legal and judicial methodology in order to achieve Social Transformation is considered to be the Social and Transformative Constitution. Practice which may not be immoral by societal standards cannot be thrusted upon the society as immoral by the State with its own notion of morality and thereby exercise 'social control'. This Article discusses the recent trend of the Indian Judiciary by evaluating the pronouncements of Supreme Court of India and discusses the Judicial Activism vis-à-vis Social Transformation and aftermath of the pronouncements.

Key Words : Judicial Activism, Transformative Constitution, Judicial Overreach, Role of Supreme Court of India, Aftermath of Judgments

Introduction :

"Discretion means, when it is said that something is to be done with the discretion of the authorities, that that discretion is to be done according to the rules of reason and justice, not according to private opinion : according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself." That the Indian

Constitution has the salient features which includes (i) A Written Constitution which establishes its supremacy over any Institution created under it, (ii) Distribution of powers amongst three organs of the State, (iii) The co-equal status alongwith the Co-Ordinating Powers of each of the three Organs. So far as essence of Doctrine of Separation of Powers and Courts are concerned it has the two propositions, namely (a) That none of the three organs of Government, Legislative Executive and Judicial can exercise any power which properly belongs to the either of the two, (b) That the Legislature cannot delegate its power. Therefore, the Constitution of India envisages a system of Governance based on the Separation of Powers, even though Constitution does not expressly mention it and therefore, what we commonly refer is that the Judges make the Law or interpret the law, it depends upon the discretion used by the Judge while interpreting the Provisions of the Constitution of India. By the passage of time, it is seen that the Role of Judiciary enlarged by Judicial Review and Accountability of the Judges have been increased. Philosopher of the Constitution have developed the name as The Transformative Constitutionalism, as it is derived from the judicial process.

Constitutionalism in this richer sense of the term is the idea that Government should be limited in its powers and that its authority depends on its observing these limitations.

"If the Legislative and Executive Authorities are one Institution, there will be no freedom. There won't be freedom anyway if the Judiciary Body is not separated from the Legislative and Executive Authorities" The author has further described that "Constitutionalism" has both descriptive and prescriptive connotations. Used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people's rights to 'consent' and certain other rights, freedoms and privileges. Used prescriptively its meaning incorporates those features of Government seen as the essential elements of the constitution". Montesquieu while sharing the idea of Separation of Powers, he has further stated that there is no liberty at all, when only one branch has too much power. He came up with this idea of Equally Dividing the Power so that the Government would avoid placing too much power with one Individual or group of people and with the same analogy the three branches i.e. Executive, Legislative and Judiciary have been empowered separately in the Constitution of India, so that no one could start to enact Tyrannical Law, as it could be have the check and balance function. Evolving Role of a Judges one ought to have consider the recent developments in the legal sphere. Justice S.B. Sinha has stated on the issue of Modern Understanding of Separation of Power, "Separation of power in one sense is a limit of active jurisdiction of each organ. But it has another deeper and more relevant purpose, to act as check and balance over the activities of the other organs". Thus, the objectives of the function of the judiciary include, (a) to ensure that all persons are able to live securely under the Rule of Law, (b) to promote, within the proper limits of the judicial function, the observance and the attainment of Human Rights, and (c) to administer the law impartially amongst persons and between persons and the State. That is how the Judges have to interpret the Law. That is called the Judicial Activism and it cannot be clubbed with the Judicial Restraint. Sometimes, the philosopher of the Constitution does believe that in some of the cases, the Courts have overreached the function of the Legislation, however, with the recent development and when we are going towards the modern era Judges have to interrupt and interpret the Provisions of the Constitution of India within the realm of the Constitution.

The Judiciary has the twin role of upholding constitutional values by creatively interpreting the text while remaining within the ambit and respecting the constitutionality mandated separation of powers without overreaching its jurisdiction and venturing into forbidden fields.

II. Constitutional Provisions and Judicial Process :

Constitution of India and certain Articles puts kind of restrictions on Parliament, such as, no discussion shall take place in Parliament with respect to the conduct of any Judge of Supreme Court or of a High Court in discharge of its Duty and similarly the Courts are also restricted not to inquire into the proceedings of Parliament and Legislature. Article mentioned below of the Constitution of India provides the kind of Restrictions, on each organ and also provides the liberty and by that way gives widest power to the Judges to interpret the Provisions of Law :

2.1) Article 122: Courts not to inquire into the proceedings of Parliament;
Article 212: Courts not to inquire into proceedings of the Legislature;
Above two Articles of the Constitution, the Courts have been prohibited from inquiring into the proceedings of the Parliament and Legislature respectively.
Article 361 of the Constitution grants a kind of Immunity to the President or the Governor. Its states that the President or the Governor shall not be answerable to any Court for the exercise and performance of the power and duties of his Office, in addition to it, Article 74(2) of the Constitution mandates that the question whether any, and if so, what advice was tendered by Ministers to the Presidents shall not be inquired into by any Court. Therefore, the makers of the Constitution have taken enough care and all possible measures for separation of power and thereby upholding the independence of each organ of the State, whilst, at the same time, keeping the mechanism of 'Checks and Balances' intact so as to uphold the Rule of Law and to maintain the Supremacy of the Constitution.

2.2) In recent times, the Doctrine of Separation of Powers has strong place in the Constitutional Jurisprudence and Interpretation in India. "It is trite that in the Constitutional Scheme adopted in India, besides supremacy of the Constitution, Separation of Power between the Legislature, the Executive and the Judiciary constitutes the basic features of the Constitution".

2.3) Judge's Role is most crucial while interpreting the Constitutional Provisions. Justice Kapadia, while writing the judgment for the Constitutional Bench, observed, " The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adopted to the various crisis of human affairs. A Constitutional Provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet newly emerges problems and challenges".

2.4) Concept of Judicial Review is required to be discussed by citing the celebrated decision of Marbury V Madison, wherein the concept of Judicial Review was established for the first time in the American Constitutional Jurisprudence, the Province of the Court is, solely, to decide on the rights of Individuals, not to inquire how the executive or Executive Officers perform duties in which they have discretion. Questions in their natural political or which

are by the Constitution and Laws submitted to the executive can never be made in this Court". Indian Constitution does take care of the Powers of Judges which is referred to as the Judicial Review in Articles 13, 32, 226, 141, 142 and 144, amongst all, the Article 32, 226 and 142 aptly justify power of Judicial Review, which is evolved in the recent times by the Supreme Court of India, so as (i) to ensure fairness in Legislature cum Administrative Action, thus it is certain that Judicial Review lies only against the decision making procedure and not against the decision itself, (ii) to protect the Constitutionality guaranteed fundamental rights of citizens, and (iii) to Rule on questions of Legislative Competence between the Centre and the States – i.e. and attribute of another cardinal principle of Constitutionalism.

2.5) The Judges are accountable while delivering the judgments, in the words of Sir Alladi Krishnaswamy Iyer :- "The doctrine of independence is not to be raised to the level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super-executive". Therefore, it is argued that the idea of "Living Constitution" is an organic document which grows by the passage of time through amendments and judicial interpretation and the power of legislature to amend the Constitution is not unlimited but it throws more power to higher judiciary for smooth functioning of three organs.

III. Judicial Activism vis-à-vis Judicial Overreach :

3.1) One of the best features of the Constitution is that the Judiciary alone has been entrusted with the power and duty to test the Constitutional validity of the Legislative Provisions and the validity of the Administrative Actions. The Courts are empowered to decide and declare any of the Statute either the intra-virus or ultra-virus and thereby capable of being nullify an action of executive as unconstitutional. These are the powers refer to as the Judicial Activism. In fact, the definition by the name 'Judicial Activism' is not defined per-se in our Constitution, however, the reference can be found from the Article written by Arthur Schelesinger Jr. in : "The Supreme Court : 1947", published in Fortune Magazine in 1947 who has defined the function of Judiciary, which represents its active role in promoting justice. Judicial Activism, in general, is the assumption of an active role on the part of the Judiciary.

3.2) Judicial Activism envisages changes in the interpretation of the Constitutional and Statutory Provisions in consonance with dynamics and uncertainties of human affairs and relations. Court must apply the law in a way that makes sense of the temporal nature. Justice Bhagwati while delivering lecture at University of Wisconsin, Madison said : Once it is recognised that the Judges do make law, though not in same manner as the Legislature, it will immediately become apparent why Judges can and should adopt an activist approach. There is no need for Judges to feel shy or apologetic about the law creating roles".

3.3) To keep the balance of socio economic justice system the accountability is castigated on the Judiciary and Judiciary is empowered to achieve the Constitutional Objectives by evaluating the provisions of law. Courts of Law are creatures of the Constitutions and can act only within the sphere of the Constitution and that can be seen in a Constitution right from Magna Carta, wherein the due process of law was given the primacy. Later on, the invention of the Public Interest Litigation has evolved yet another round of Transformative Constitutionalism.

3.4) Judiciary occupies a crucial role while giving effect to the Provisions of Law, while interpreting it, as it has to ensure that it should not overreach the statute and at the same time has to see that the Legislature intent or executive powers are not exceeded. In case of violation of any of the Provisions of the Constitution, be it guaranteed under the nature of Fundamental Right or any substantive reliefs, which is either not guaranteed under the Constitution or if the action of the Government doesn't take care of provisions of the Constitution, judiciary has to helm its affairs under Article 226 or 32 of the Constitution of India.

IV. Recent Trends and Judicial Approach emerges as Transformative Constitution

4.1) In fact the Transformation to the Constitution of India has taken place soon after the Introduction of the Constitution of India and by the passage of time the Supreme Court of India has evolved the celebrated Judgments from time to time. As this Article discusses the recent trends of judicial process vis-à-vis transformative constitutionalism, discussion is based on the recent trends of judicial process in India, we should not forget the celebrated judgments of the recent past delivered by the Supreme Court of India in the case of Kalpana Mehta Versus Union of India which is also referred to as the Parliament Standing Committee Case, which discusses horizontal separation of power. A visionary Judge in the recent times amongst the others, who has discussed transformative constitution in the judgment, emphasised on the interpretation of the Article 105 of the Constitution of India and stated that "In finding an answer to the questions in reference, this Court must of necessity travel from a literal and perhaps superficial approach, to an understanding of the essence of what the Constitution seeks to achieve. At one level our Constitution has overseen the transfer of political power from a colonial regime to a regime under law of a democratic republic. Legitimizing the transfer of political power if one, but only one facet of the Constitution. To focus upon it alone is to miss a significant element of the constitutional vision. That vision is of about achieving a social transformation. This transformation which the Constitution seeks to achieve is by placing the individual at the forefront of its endeavours. Crucial to that transformation is the need to reverse the philosophy of the colonial regime, which was founded on the subordination of the individual to the state. Liberty, freedom, dignity and autonomy have meaning because it is to the individual to whom the Constitution holds out an assurance of protecting fundamental human rights. The Constitution is about empowerment. The democratic transformation to which it aspires places the individual at the core of the concerns of governance. For a colonial regime individuals were subordinate to the law. Individuals were subject to the authority of the state and their well being was governed by the acceptance of a destiny wedded to its power. Those assumptions which lay at the foundation of colonial rule have undergone a fundamental transformation for a nation of individuals governed by the Constitution. The Constitution recognises their rights and entitlements. Empowerment of individuals through the enforcement of their rights is the essence of the constitutional purpose. Hence, in understating the issues which have arisen before the Court in the present reference, it is well to remind ourselves that since the Constitution is about transformation and its vision is about empowerment, our reading of precepts drawn from a colonial past, including parliamentary privilege, must be subjected to a nuance that facilitates the assertion of rights and access to justice. We no longer live

in a political culture based on the subordination of individuals to the authority of the State. Our interpretation of the Constitution must reflect a keen sense of awareness of the basic change which the Constitution has made to the polity and to its governance".

4.2) Even, we look at the year 2018, it was treated as the celebrated year so far as the Reforms are concerned. Many judgments on the Transformative Constitutionalism have been delivered by the Hon'ble Apex Court of India, in the year 2018 and in recent past, out of which few judgments where in entire trend has been changed and old age tradition and/or belief of the society was transformed. Therefore, the constitution is always referred as the 'living constitution', as it is really proved by the Judiciary through Judicial Activism that our Constitution is not a 'static' but a 'Transformative Constitutionalism'.

4.2.1) Sabarimala case : Devotion cannot be subjected to gender discrimination, women entry allowed in Sabarimala.

4.2.2) Homosexuality : 157 Year Old Law on Criminalising consensual Homo-sexual Acts between Adults struck down, Section 377 of the IPC held un-constitutional.

4.2.3) Aadhaar : Section 33(2), 47 & 57 of Aadhaar Act struck down, National Security Exception gone, private entities cannot demand Aadhaar Data.

4.2.4) Adultery : Husband is not the master of wife, 158 Year old Adultery under the Section 497 of IPC Struck down.

4.2.5) Euthanasia : Right to Die with dignity a Fundamental Right, Passive Euthanasia and Living Will Allowed, Guidelines Issued.

4.2.6) SC / ST Reservation in Promotions : No need to collect quantifiable data of backwardness to give reservation in promotions for SC/STs.

4.2.7) Misuse of Section 498A : SC Modifies the earlier directions issued to prevent misuse of 498A of IPC, ways no to 'welfare committee.

4.2.8) Live Streaming of SC Proceedings : Sunlight is the best disinfectant.
Live Streaming of Court Proceedings in larger public interest allowed.

4.2.9) Rafale Probe : Petitions seeking probe in to Rafale Deal Dismissed.

4.2.10) Mob Lynching : Horrendous Acts of Mobocracy can't be allowed become new norm. Lynching Incidents condemned and various directions are issued.

4.2.11) Firecrackers : Complete Ban on Sale of Firecrackers refused, online sale banned. Direction for bursting crackers fixed.

4.2.12) Lt. General's Interference : Lieutenant-General cannot interfere in each and every decision of the Delhi Government.

4.2.13) No Bungalows for Chief Ministers : Ex- Chief Ministers not entitled to Government Bungalows.

4.2.14) Foreign Law Firm Set up in India : Foreign Law Firms can't set up office in India. Foreign Lawyers can advice clients on 'fly in and fly out' basis.

4.2.15) Professional Court Manager : Directions issued for appointment of Professionally qualified Court Manager in all Principal District and Sessions Court for Better Court Administration.

The above judgments are few of the examples of judicial activism passed by the Apex Court in recent past.

4.3) Of course, there shall be criticism of all the transformation, so the above judgments are also not exception to the criticism from the society at large and besides, the critics received from all angle of the society, the judiciary has proved its role as transformative judiciary.

V. Conclusion:

Courts by using the tool of Judicial Activism pronounce certain enactments ultra-vires, sometimes, struck-down administrative action and some times imposes restrictions, guidelines, directions etc.. However, despite, issuing guidelines, its compliances was not taken up seriously by the Courts, like, say for one of the example, what is seen in Vishakha's case in the year 1997, it was not followed, as the directives / guidelines has seen the colour of law/statute only after 16 years as the Criminal Law (Amendment Act), 2013 was passed wherein the provision pertains to combating harassment at workplaces were introduced. Similarly, in the case of D. K. Basu's directions were not complied in strictu-sensu, as there were ample cases seen by the Courts violating the guidelines and punishing police and punitive actions were taken. At the same time, it would not be out of place to state that certain regional, socio-economic, financial, religious issues, like Water Treaty between two States, sale of liquor on Highways, Dance Bar Case, Ganga River Pollution case, Bursting of Firecracker, Uploading of FIRs on Website, non-interference in the GST Act, Noteban case, Playing of Folkdance (Garba) in Gujarat, Sabarimala Case, Triple Talaque Case, Jallikattu, Ban of Dahi Handi, are the examples wherein judiciary has acted pro-actively. However, while abolishing the Adultery laws, pendency of such cases in various courts etc., post-directions issues and the sentimental and societal effect, for which judiciary ought to have taken care while passing the judgments and incorporating inherent and in-built mechanism of compliance and enforcement of it, was forgotten. Sometime, it is also difficult to comply the said directions, as the Special Courts or separate machinery is not created, so the Courts ought to have taken care of the issues, while passing directions, guidelines, making the provisions ultra-vires and even while upholding the constitutional validity or vires of the Act etc. In yet another example, on the subject of no automatic arrest given in the case of Arnesh Kumar, so far as the case of Registration of First Information Report (FIR) issued in the case of Lalita Kumari, registration of FIR was made mandatory in case the offence is declared of cognizable and non-bailable in nature, however, Judgment passed by the Apex Court in the case of Social Action Forum for Manav Adhika & Anr, the petition filed under Article 32 of the Constitution of India focussing on 498-A of the IPC, it was considered by the Court that the judgments passed in Rajesh Sharma's case mandating constitution of Committee was required to be modified, as it was not the task of the Committee. So, all the directions issued by the Courts does not necessarily complied with peremptorily, as it would have many issues, like, association of religious belief, lack of proper infrastructure, police machinery is not

techno savvy, adequate staff to handle the cases and in absence of proper administrative action, sometimes it is seen that the directions remain the directions only.

So it the need of the hour that when such guidelines issued by the Supreme court of India, it may also take care of compliance and enforcement part and it has to be followed by the Executives, Legislature, without any second thought. There is no check and balance post-issuance of guidelines except filing of the cases in courts, which shall burden the court with further litigations.

There is an impact of the Judicial Activism, as the judges play very pivotal role in justice delivery system. Impact of the Judicial Activism is noticeable but it is always remained double-edged sword.

That Supreme Court of India in the case of reiterated its limitations by observing that "Judges must know their limits and must not try to run the Government. They must have modesty and humility and not behave like Emperors. There is broad separation of powers under the Constitution and each organ of the State – the legislature, the executive and the judiciary must have respect for the others and must not encroach into each other's domains".

So, it is not true to say that the Supreme Court in its Judicial Activism failed to respect the constitution, but are issuing directions only and not making the legislation. As it was aptly observed in the Rajesh Sharma's case "Function of this Court is not to legislate but only to interpret the law. No Doubt in doing so laying down of norms a sometimes un-avoidable".

So, following Challenges emerges which required to be curbed by the Judiciary while playing role of pro-active judiciary and these are the suggestions on the implementation issues, such are :

a. ignorance of past judgments (precedents);
b. implementation issues because of lack of infrastructure;
c. sentimental issues, custom, usage, religious belief associated with the society;
d. unnecessary interference in the policy matters of the government or non-interference where it required particularly where the decision of the government touches the mass and people at large have the effect of such legislature, executive notification;
e. issuance of directives without proper empirical data and scientific references;
f. aftermath of the judgment and impact on society, public violence, regional feelings;
g. While Struck-off the provisions, judiciary ought to take care, parliament should not nullify the direction or mould the ultra-vires provisions by bringing back in the form of amendment or new legislation so as to make it vires in the new statute, even if, it is done, the judiciary should take pro-active decision on such new statute, immediately;
h. Political manoeuvring and will of politics should not nullify the decision of the Courts for "personal interest" or interest of "few influential people";
i. Strict implementation, adjudication, compliance of directions so as to see that in case of reporting non-implementation or non-compliance strict action should be taken for non- implementation by an automated process, so as to lessen the burden on judiciary and such in-built mechanism be created in the judgment itself;
j. Establishment of Special Courts/Tribunals while delivering certain kind of dictum so as to yield and achieve effective result;

k. Constitutional Morality should not be compromised by the Executives and Parliament while obeying the directions and implementing the judgments;

So it is suggested that though, the year 2018 was celebrated year for the Judicial Activism, but, its compliances and aftermath which is an evitable things, could be possibly injuncted.

"INTRODUCTION OF INFORMATION AND COMMUNICATION TECHNOLOGY IN INDIAN JUDICIARY"

-ASWIN NANDA. A

INTRODUCTION

The Hon'ble Supreme Court of India, through its e-Committee, has taken e-Courts initiative in 2005 to implement Information and Communications Technologies (ICT) to speed up the process of deciding cases as well as to provide a more transparent and easy access to justice . The eCourts Integrated Mission Mode Project is one of the national eGovernance projects being implemented in High Courts and district/subordinate Courts of the Country. E-Committee of the Supreme Court of India formed for "National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary-2005".Main Objectives are To Provide designated services to litigants, lawyers and the judiciary by universal computerization of district and subordinate courts in the country and enhancement of ICT enablement of the Justice System. One of the reasons for pendency in Indian courts is high citizens to judge ratio.

PENDING CASES

"Justice delayed is justice denied." said the British Prime Minister William E. Gladstone. This statement is very much true for Indian Judiciary. Almost 27 million cases are pending in Indian courts, of which roughly 9% are lying for more than ten years. There is a very famous saying in India that the litigant dies but the case remains alive. There is no reason to take proud in such reputation and hence the Indian Judiciary has started, on the initiatives of the Hon'ble Supreme Court of India, various projects to take help of the Information and Communications Technologies (ICT) in the judicial sector to speed up the disposal of cases. As evident, it is important, to understand the potential reasons for the delay before seeking any solutions on the problem. Research needs to be conducted to find the current efficiency compared to some optimal benchmark. As of now, no such benchmark exists. One of the reasons for pendency in Indian courts is high citizens to judge ratio. According to a study, there is one judge per 73,000 citizens. The same study also reveals that in most of the High Courts of India, on an average a judge spends around 2.5 minutes to hear a case and about 6 minutes to decide a case. This clearly implies that human capacity is a bottleneck in the battle against slow justice as the judges are outnumbered by the number of cases that they have to handle. This puts a pressure on judges and is known to be one of the primary reasons for mental stress of judges. Indian judiciary is known to work hard and clear lots of cases per year but the sheer number is beyond the human capacity of judges. The judges are not super-humans and thus apart from appointing additional judges, more scientific ways of fast justice for common human of India are to be sought so that the cases can be decided in a timely manner.

SYSTEM WORKING OVERVIEW

ICT enablement will make the functioning of the courts more efficient and will help the judges in speedier disposal of cases, which will ultimately have a positive impact on the justice delivery

system. The following lists the services envisaged for various stakeholders under the e-court project

Laptops to Judicial Officers: Laptops have been provided to 14,309 judicial officers. Software: Case Information System (CIS) software - has been developed and made available for deployment at all computerised courts.

- Entry of data regarding past cases has been initiated, and data in respect of over 3 crore cases is available online.
- As part of the Change Management exercise, over 14,000 Judicial Officers have been trained in the use of UBUNTU-Linux OS and over 4000 court staff have been trained in CIS software.
- E-Committee has initiated the Process Reengineering (PR) exercise; PR Committees have been set up in all High Courts to study and suggest simplification in existing rules, processes, procedures and forms.

A Video Conferencing (VC) pilot has been launched in five districts under the supervision of e-Committee .Based on experience of pilot, VC will be rolled out in 500 locations across the country during Phase-I extension period. For the purpose service delivery, the national e-Courts portal (http://www.ecourts.gov.in) has become operational. The portal provides online services to litigants such as details of case registration, cause list, case status, daily orders, and final judgments. Currently, litigants can access case status information in respect of over 3 crore pending and decided cases in more than 10,000 courts. It also helps the judiciary in judicial monitoring and management and the Government to get data for policy purposes.

Enhancement of computer infrastructure in courts as compared to Phase I they Approved cost of Rs.935 crore. E-Committee of the Supreme Court approved Policy and Action Plan Document (hereafter 'Policy Document') for Phase II of the e-Courts Project.1+3 computers were provided to courts. But experience of Phase I has shown that this number was low for effective and optimum ICT enablement. Hardware be increased to from 1+3 to 2+6 per court Therefore,14,249 phase I Courts will be provided an additional 1+3 computers. Further, 8151 new courts which include (a) courts that were set up after the approval of Phase I courts and (b) courts expected to be set up in the first two years of Phase II, will receive hardware in the revised 2+6 configuration.

Strengthening the system of serving notices and summons, one of the main reasons for long drawn litigation is delays in serving notices and summons. This is proposed to be strengthened through provision of authentication devices for process servers at Court Complexes.

HARDWARE AND SERVICES

For the computer infrastructure, the Policy Document provides for procurement of either desktop with UPS or special configuration laptop depending upon suitability and economy. Hardware to District Legal Service Authorities and Taluk Legal Service Committees. The Legal Aid setup has become an integral part of the justice delivery system. The office of District Legal Service Authority (DLSA) and Taluk Legal Services Committee (TLSC) are required to work in tandem with the Court processes for holding of Lok Adalats, listing of cases in lok-adalats, the cause lists, proceedings, orders etc. in those cases. This requires the DLSA and TLSC office to be

integrated with rest of the Court complex ICT infrastructure. Computer infrastructure is therefore proposed to be provided to DLSAs and TLSCs.

Hardware for computer labs in State Judicial Academies: For sustainability of the efforts of ICT Training for Judicial Officers and Court Officials, there is a need of providing a full-fledged Computer Lab to State Judicial Academies (SJA). Phase II of the Project will provide the resources for providing ICT Infrastructure for setting up of a Computer Lab for every SJA. Central filing centres Development of Central Filing Centres with sufficient infrastructure: It has been proposed that Judicial Service Centres (JSC), which were envisaged primarily as filing counters in Phase I, will be utilised for a composite set of services

The libraries of the courts will be computerised. An Integrated Library Management System (ILMS) has been successfully implemented in the Supreme Court. The Policy Document proposes to equip all High Courts and District Courts with ILMS and a Digital Library

Video-conferencing of all court rooms with prisons: The phase I will cover 500 locations under Video Conferencing. Phase II will cover the balance courts and corresponding prisons, and will not only be used for remand of under trial prisoners but also to record evidence during such VC sessions where required by the presiding officer of the court.

ADMISSIBILITY OF ELECTRONIC RECORDS

In criminal proceedings, Sections 230-234 of the Code of Criminal Procedure (Cr PC) 1973 specify the procedure of collecting evidence and the Court has the power to compel the witness to appear before it to give evidence. In civil matters, the witnesses are summoned to appear before the court and adduce evidence under the provisions of s30, Order XVI and Order XVIII of the Code of Civil Procedure (CPC) 1908. Amendment in the Evidence Act and insertion of ss65A and 65B, a special provision as to evidence relating to electronic record and admissibility of electronic records had been introduced

In *State of Maharashtra v Dr Praful B Desai* [2003) when the Supreme Court upheld video conferencing as a vital tool for collecting evidence where the witness may not be conveniently or necessarily be examined in court Since *Praful B Desai*, there has been a significant rise in the trend to resort to video conferencing in civil proceedings, especially as a tool for collecting evidence from a witness who resides abroad.

Video conferencing has been used in several cases where the witness has been unable to attend the court proceedings, for instance in *Alcatel India Ltd v Koshika Telecom Ltd & ors* [2004] the Court allowed the witness to give evidence through video conferencing, as the witness was unhealthy.

The courts have on several occasions also resorted to using this technology, based on compelling facts and circumstances. For instance, examination of a victim who had been sexually exploited and/or was suffering from post-traumatic stress disorder was allowed to be done via video conferencing. The facility has also been used by the subordinate courts, where the judicial officer needs to record evidence of under-trial prisoners for security reasons *Liverpool and London Steamship Protection and Indemnity Association Ltd v MV 'Sea Success I' & anr* [2005][9], the Bombay High Court allowed the plea of the plaintiff to depose using Video conferencing, as the witness was staying in UK with her two minor children and was unable to come to India.

In the case of *Bodala Murali Krishna v Smt Badola Prathima* [2007], the Andhra Pradesh High Court similarly allowed diposition of a USA resident witness via video conferencing. The Court was of the view that there should not be any plausible objection for resorting to video

conferencing in civil cases as long as the necessary facilities along with assured accuracy co-exist.

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PROCEDURE OF SAFEGUARD

The Supreme Court in *Dr Kumar Saha v Dr Sukumar Mukherjee* [2011] While the courts have held that recording of evidence through video conferencing is permissible in law, they have also cautioned that necessary precautions must be taken both as to the identity of the witnesses and accuracy of the equipment used for the purpose. Certain guidelines have been indicated in the judgments discussed above, which are summarised below.

An officer would have to be deputed, either from India or from the consulate/embassy in the country where the evidence is being recorded, who would remain present and who will ensure that there is no other person in the room where the witness is sitting while the evidence is being recorded.

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- Fixing the time for recording evidence is always the duty of the officer who has been deputed to record evidencecatering to 30 trainees at a time
- The witness would be examined during working hours of Indian courts. A plea of any inconvenience on account of the time difference between India and another country would not be allowed
- An officer would have to be deputed, either from India or from the consulate/embassy in the country where the evidence is being recorded, who would remain present and who will ensure that there is no other person in the room where the witness is sitting while the evidence is being recorded.
- Fixing the time for recording evidence is always the duty of the officer who has been deputed to record evidence
- The witness would be examined during working hours of Indian courts. A plea of any inconvenience on account of the time difference between India and another country would not be allowed
- The respondent and their counsel would have to make it convenient to attend at the time fixed by the officer concerned. If they do not attend, the Magistrate would take action as provided in law, to compel attendance
- Before action of the witness under audio-video link starts, the witness would have to file an affidavit/undertaking duly verified before a judge/magistrate/notary that the person shown

as witness is the same person as who is going to depose with a copy of such affidavit to the other side

- The person who wishes to examine the witness on the screen would have to file an affidavit/undertaking
- As soon as identification is complete, oath would be administered as per the Oaths Act 1969 of India15, by an officer duly authorised to administer an oath.
- The officer would ensure that the witness is not coached/tutored/prompted.
- The officer deputed will ensure that the respondent, their counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that witness is not prevented from bringing into the studio the papers/documents which may be required by their counsel.
- The visual is to be recorded at both ends. The witness alone can be present at the time of video conference
- The officer concerned will ensure that once video conferencing commences, as far as practicable, it is proceeded without any interruption
- If the officer finds that the witness is not answering the questions, the officer will make a memo of the same. When the evidence is read in court, this is an aspect that will be taken into consideration
- The court/commissioner must record any remark as is material regarding the demur of the witness while on the screen and shall note the objections raised during the recording of the witness either manually or mechanically.
- Depositions of the witness, both in the question-answer form or in the narrative form, will have to be signed as early as possible before a magistrate or notary public and will thereafter form part of the record of the proceedings.
- Digital signature can be adopted in this process, and such a signature will be obtained immediately after day's deposition
- The expenses and the arrangements are to be borne by the applicant who wants to avail the facility of video conferencing.

POWER BACKUP AND DATA RECORDS

The UPS and DG sets for servers and judicial service centres have been installed in Phase I of the project, but there is no provision of power back-up for thin clients, printers and other hardware. The Policy Document proposes to utilise solar energy, as an alternate source, being environment friendly and easily available. It is proposed to initially cover 5% of the total court complexes.

Service delivery is proposed to be made through cloud computing, thus dispensing with the need for servers in individual court complexes and improving efficiency and scalability of the automation of courts. This will also reduce the need to deploy technical manpower at individual court complexes.

Optimum automation of case workflow and other improvements such as e-filing, automation of process service, computerised double entry system of book-keeping, administrative process automation including e-office facility and e-procurement.

Systems for timely and regular updation of data by laying down protocols for updation and improving connectivity to expedite data updation. Additional requirements for regular updation will be e-mails and digital signatures for court staff. The Policy Document proposes to promote

use of ICT for day-to-day activities by discontinuation of manual registers and Court Registers to be maintained only in e form.

Under phase-I of the project, a National Judicial Data Grid (NJDG) has been setup which is intended to be the national data warehouse for case data including orders/ judgements for Courts across the country. Phase-II of the project will aim at attaining the full coverage of case data of courts across the country with gradual shift to auto pull mechanism for state court cloud installations which will ensure smooth updation of data on NJDG.

The Policy Document envisages preparation of mobile phone applications on various mobile platforms for latest case related information, and an SMS Gateway based infrastructure to facilitate push and pull based SMS for litigants and lawyers

Case records, after weeding, will be scanned and digitised in Phase II of the project. These will be ported to a Document Management System for later retrieval, and will promote secure and systematic preservation of records. The cost of digitisation of all case records in Courts is proposed to be covered in Phase II of the project. The digitised documents/case records pertaining to a particular court will be automatically generated in the court at the time of hearing,

The Judicial Knowledge Management System (JKMS) [14] will comprise comprehensive suite of solutions and facilities such as Integrated Library Management Software for optimum use of resources available in various court libraries and as Digital Library accessible to beneficiaries online for easy access of Legal Research Documents, Case Laws etc.

Capacity building exercise to facilitate the human resources of the judicial system in efficient use of ICT infrastructure is required to be carried out on regular interval. In phase-I of the project, 14000 Judicial Officers and 4000 court staffs were trained and under Phase-II the same exercise will be continued for remaining officers and staffs. Also, refresher courses will be carried out every six months and the labs will be equipped for the facilities

RESULT

- Computerisation of around 8000 new courts
- Enhanced ICT enablement of existing 14,249 computerised courts with additional hardware.
- Connecting all courts in the country to the NJDG through WAN and additional redundant connectivity, equipped for eventual integration with the proposed interoperable criminal justice system (ICJS).
- Citizen centric facilities such as Centralised Filing Centres and touch screen based Kiosks in each Court Complex.
- Provision of laptops, printers, UPS and connectivity to Judicial Officers not covered under Phase I and replacement of obsolete hardware provided to Judicial Officers under Phase I.
- Installation of Video Conferencing facility at 2500 remaining Court Complexes and 800 remaining jails.
- Computerisation of SJAs, DLSAs and TLSCs not covered under Phase I.
- Creating a robust Court Management System through digitisation, document management, Judicial Knowledge Management and learning tools management.
- Installation of Cloud network and solar energy source at Court Complexes.

- Facilitating improved performance of courts through change management and process re-engineering as well as improvement in process servicing through hand-held devices. xi. Enhanced ICT enablement through e-filing, e-Payment and use of mobile applications. xii. Citizen centric service delivery

CONCLUSION

We have resented a state-of-the-art technique for introducing ICT in Indian courts for digitally preserving case files and visual information in chronological sequence. The design can be utilized to will help our judicial system to streamline and expedite their operation and case disposal rate in secure and cost effective manner.

Intellectual property rights and Human rights

-Srishti Roy Barman

Abstract

Intellectual property protection and human rights are two unmistakable fields that have generally advanced independently. Their relationship shall be reconsidered for various reasons. In the first place the effects of intellectual property rights on the acknowledgment of human rights for example the privilege of right to health have turned out to be more visible after the appropriation of the TRIPS agreement. Second, the expanding significance of Intellectual property rights has prompted the requirement of elucidating the extent of human rights arrangement ensuring equal commitment to both. Third, various new difficulties should be tended to concerning commitments to knowledge which cannot be secured under the intellectual property protection. Nevertheless, a number of links in between the two has been identified. Despite empirical credence of the conflict narrative, the coexistence or complementary thesis of the intellectual property and human rights interface has greater prospects for a meaningful and balanced rapprochement between the two.The question of recognition of a human right in intellectual property has been a topic of increasing debate after the adoption of the TRIPS agreement . This article focuses on the development in the realization of human rights through intellectual property law framework and various aspects of international covenants that is ICESCR, ICCPR in this regard after the adoption of TRIPS along with its interpretation. It dissects existing knowledge protection arrangements in human rights settlement.

Keywords: Human right, Intellectual property right, TRIPS, Traditional knowledge, ICESC.

Introduction

Human rights are commonly understood as being those rights which are inherent to human being. The concept of human rights acknowledges that every human being is entitled to enjoy his or her human rights without distinction as to color, sex, language, religion, political, or other opinion, national or social origin, property other status. The following are some of the most important characteristics of human rights human rights are founded on respect for the dignity and worth of each person; human rights are universal, meaning that they are applied equally and without discrimination to all people; human rights are inalienable, in that no one can have his or her human rights taken away other than in specific situations for example, the right to liberty can be restricted if a person is found guilty of a crime by a court of law; human rights are indivisible, interrelated and interdependent, for the reason that it is insufficient to respect some human rights and not others International human rights impose obligation on the government of different countries to act in certain ways or to refrain from doing certain acts so that human rights can be promoted as well as protected .

The formal expression of human rights has been initiated through international human rights law. A series of international human rights treaties and other instruments that have originated since 1945 conferring legal form on human rights. The creation of United Nations provides with an

ideal platform for the development and adoption of International human rights instruments. Most states have already adopted constitution and incorporated provisions for the recognition and protection of human rights. The Universal Declaration of Human rights was drafted by representatives of different legal and cultural backgrounds from all regions of the world. The declaration was proclaimed in Paris on 10 December, 1948. .

Louis B.Sohn has classified human rights into three categories-

1. The Human rights of the First generation- which includes civil and political rights such as the right to freedom of speech and expression , the right to freedom of religion and conscience , the right to property , the right to vote , the right to freedom of assembly , the right to privacy etc. It refers to person's right to participate in the civil and political affairs of their community without any kind of discrimination.

2. The Human rights of the Second generation - which includes economic , social and cultural rights such as the right to an adequate standard of living , the right to adequate food , water , housing and sanitation , the right to education etc. These rights relates to a person's right to grow and prosper and to take part in various social and cultural activities. The concept of social and economic rights was first given by the American President Roosevelt. In his opinion "freedom from want" formed the basis of the concept of economic and social rights. In his opinion "True individual freedom cannot exist without economic security and independence"

3. The Human rights of the third generation - It refers to collective rights . Collective rights are those rights which belongs to a group of people based on the fact of them being disadvantaged and marginalized throughout history and hence they need greater protection of their rights. It includes rights such as right to self-determination and also the right to participate in the benefits from the common heritage of mankind. It was seen in the case of "*Zee telefilms ltd .v. Union of India*"that the right to development in India is recognized as a Human right too. Human rights are legally guaranteed by human rights law, protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity.

Whereas, 'Intellectual property' is the product of an intellect and the term 'Intellectual property rights' refers to legal right covering Intellectual property.Intellectual property covers copyright and related rights, whereas industrial property means patents, trademarks, trade secrets, plant breeder's rights and so on. Intellectual property rights are exclusive rights over creations of the mind. These rights is conferred on the owner so that their intellectual creations, innovations can be exploited legally. It is a monopoly right. They are considered crucial to fostering innovation by providing a financial incentive to stimulate creativity, whereby businesses can reap the benefits from their inventions and will be more willing to invest in research and development.

Intellectual property is generally divided into two types, namely industrial property and copyright. Copyright protects literary, artistic, cinematographic, dramatic works. Industrial property protects on the other hand covers inventions, mainly patents, trademarks, industrial designs. These rights are safeguards given to creators, producers, industrialists, manufacturers for

a limited period of time so that they can use intellectual goods and services. Intellectual property laws allow creators of patents, copyrights, trademarks to take benefit from investment. These rights are outlined in Article 27 of Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary, artistic productions.

The need for the protection and promotion of Intellectual property-

1. An intellectual property can be an identification of a particular product, symbol of a production house, indication of certain qualified goods and services, a mark of quality, reputation, and goodwill. It covers different areas of Intellectual property laws. Companies are at risk today when their unique work gains popularity and is hence easily copied by other unauthorized users or organizations causing a threat to their business and economy.
2. One of the main subject matter of Intellectual property laws is 'protection of ideas'. Circumstances where an individual's right is concerned can be protected through patent, copyright whereas when collective right is concerned or communal rights can be through trademarks, geographical indications.
3. To prevent competitors from using their ideas and extracting profit out of it.
4. In the context of business, when small products attract consumers in the market, there is threat of identical products and as it is small business, reputation of such business can be easily targeted.
5. To prevent trade related discrimination in between developed and developing nations.
6. Legal protection of new ideas, innovations, creations encourage for further commitment of new inventions.
7. Creation of new opportunities, industries, new products for the benefit of public at large leading to economic growth.

About TRIPS agreement- Trade Related Intellectual Property Rights provide with minimum standards to protect intellectual property globally under World Trade Organization. It gives a set of procedures enumerated in provisions for a proper enforcement of intellectual property, its remedies, and domestic enactments. Member countries have to start with domestic legislation in order to implement TRIPs provisions. A breakthrough of the GATT signed in 1994 was that it brought TRIPs as a common standard for the protection of intellectual property globally. With TRIPS, World Trade Organization also stepped in to take responsibility to protect and promote intellectual property rights. WTO advocate necessary amendments to national laws to accommodate the TRIPs provisions. India after being a signatory of TRIPs agreement has made amendments in Patents Act, 1970 in 2005 in order to accommodate TRIPs provisions. In 2010, the Copyright Act. Was amended and enforced in 2012, amendments regarding Industrial Designs were also made. The TRIPS Agreement covers five broad areas:1. How general provisions and basic principles of the multilateral trading system apply to international intellectual property.2. What are the minimum standards of protection for intellectual property rights that members should provide .3. Which procedures members should provide for the enforcement of those rights in their own territories 4. How to settle disputes on intellectual property between members of the WTO.5. Special transitional arrangements for the implementation of TRIPS provisions.

Relation between human rights and intellectual property rights

Human rights and Intellectual property rights cover different fields that has evolved independently. On one hand, intellectual property rights are based on incentive and reward mechanism to encourage better innovation and creative works for a better prospect in technical and economic advancement of a country. On the other hand , human rights has achieved greater importance among nations with respect to legal rights essential for life , liberty and human dignity of the citizens. Human rights are fundamental rights of the people and state has the responsibility to protect and preserve it whereas Intellectual property rights are exclusive and monopoly rights granted for a specific period of time. However, there is a link between these two disciplines that has been identified by scholars, legal practitioners, legislators in due course of time. Intellectual property laws are crucial for the realization of human rights. It was observed that intellectual property laws also includes economic, social and moral rights which are the basic attributes of human rights also. The Universal Declaration on Human rights identified civil, cultural, political and social rights which suggests that intellectual property rights have a direct or indirect impact on human rights. After the adoption of TRIPS agreement that came into effect on 1st January, 1995, the link between human rights and intellectual property rights have been broadly discussed among countries. It is the most precise, accurate and comprehensive multilateral treaty on intellectual property adopted till date. The agreement sets standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. The agreement lays down procedures, rules for both civil and administrative proceedings, remedies, provisional measures, border measures with special requirements. The origins of WIPO go back to 1883 and 1886 when the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, respectively, were concluded. Both Conventions provided for the establishment of an "International Bureau". The two bureaus were united in 1893 and, in 1970, were replaced by the World Intellectual Property Organization, by virtue of the WIPO Convention.WIPO's two main objectives are (i) to promote the protection of intellectual property worldwide; and (ii) to ensure administrative cooperation among the intellectual property Unions established by the treaties that WIPO administers. It resembles a basic character of rights conferred through intellectual property laws in the form of patent laws, copyright laws and trademark laws. Therefore, Intellectual property rights is enshrined as human rights in the charter. Everyone has equal right over their culture and they have the right to promote and protect it, they have the right to enjoy and share benefits from scientific technological developments. The International Covenant on Economic, Social and Cultural Rights also recognized aspects of intellectual property rights as human rights. 1. This International Covenant provides an international obligation imposed upon the government of state parties that is to ensure the benefits of scientific progress is enjoyed by all. On the other hand it also provides a platform for protection of individualistic interests, it relates to an identification of an author and its innovative works. It is an indirect way of explaining the intention of the legislators for an ongoing realization of human rights through intellectual property rights instruments. Similarly, Article 19 of The International Covenant on Civil and Political Rights prescribes that: 1. everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order

(ordre public), or of public health or morals. State parties to both the covenants have to comply with and ensure that effective steps are taken to ensure enjoyment through intellectual property rights and freedom of expression. The Committee on Economic, Social and Cultural Rights emphasized more on the implementation and working of Covenants.

Conflict between intellectual property rights and human rights

Intellectual property rights and human rights have arrived to a point of intersection. There is a necessity of giving a different direction so that both remain and operate in their respective fields. Private property rights in human rights and intellectual property rights in the form of monopoly has attracted controversies. Property rights are able to foster security, protects an individual's autonomy, act as a fundamental tool, and also is part of right to privacy. On the contrary, it may become a tool of inequality as well and a source of illegitimate ownership. Hence, property rights can create unequal distribution of wealth. Property rights are brought under the ambit of human rights now. Nevertheless, human rights instruments tend to treat property rights and intellectual property differently. Human rights are fundamental in nature whereas intellectual property rights are based on contractual basis. Human rights can never be for a limited period of time, it is inherent. Intellectual property rights is granted for limited duration. Intellectual property rights can realize its potential and curtail the realization of human rights on various areas, one such is right to health. Though both cover similar subject matter at times, clashes are bound to happen. The most known conflict happens when a product or a process has been granted a patent to the property right holder and it curtails the access of the public which is largely beneficial for them and they have the right to know why they are not allowed to use. A balance is to be achieved; the most common objective of many known international Covenants and agreements but how it is to be done is still in question. Intellectual property rights give the property holder absolute freedom to exploit the fruits of his labor. On the other hand it creates a hurdle for others who are actually in need of it. If it falls under public domain, a property holder cannot exercise individualistic interests, as per the public domain theory of intellectual property protection. Hence we shall focus on various aspects of intellectual property rights which create a hurdle in effective exercise of basic human rights that has raised a global issue today.

Knowledge protection in Intellectual property laws and human rights

Traditional knowledge is knowledge of a particular community widespread in different countries. It is a method, way, knowhow of a particular mechanism prior to the era of technology. Every regional community has a right to protect and preserve traditional knowledge that is been passed from one generation to the other. It is owned by the people or group of people of that community. In the last few decades, there has been mass exploitation of traditional knowledge by the business houses for fast production and better products. This has led to the violation of rights of the people of the community. Such traditional communities are denied their economic, social and political rights. Further, these communities are denied the right to use their own knowledge. The problem is more aggravated when firms who exploit the traditional knowledge not only "neglect to ask permission to reproduce these items, but also fail to acknowledge the source and even pass off productions and works as authentic expressions and products which they are not". The International Covenant on Economic, Social and Cultural Rights recognizes the rights of communities to protect their tradition and culture. Under India's intellectual property rights regime, reputed and well known corporations are been granted patent on traditional knowledge. This is the point where the controversy starts. Traditional Knowledge per se that is the knowledge that has ancient roots and is often informal and oral, is not protected by conventional intellectual property protection system.

Bio piracy is a known threat to traditional knowledge, has increased in these years. It refers to commercial use of traditional knowledge or biological technique from developing countries without their permission. Violation of rights of indigenous people is violation of human rights vested upon them through human rights charter, international covenants, protocols, agreements.
Various Case studies on Traditional Knowledge, bio piracy, exploitation of the natural resources in India-

1. Basmati Controversy- A patent was granted to 'Ricetec' for a strain of Basmati rice- an aromatic rice grown in parts of India and Pakistan. Rice is a staple food of most parts of Asia. Farmers developed various methods and process to nurture, conserve varieties of rice for centuries. In 1997, Ricetec acknowledged the good quality Basmati rice originated from parts of India and Pakistan. However, the company has come up with "novel Basmati rice and grains" that will produce high quality with high yielding Basmati Rice. The US Patent Office granted a patent to 'Ricetec'. The Government of India claimed 3 out 20 claims made in the original patent application of Ricetec Inc. It cannot be ignored that WTO agreement does not require countries to provide patent protection to plant varieties. Though it sets provisions so that countries could make domestic legislations and protect plant varieties. The basic characteristics of Basmati as described by Ricetec was challenged through patent application. Three strains development by RiceTec are allowed patent protection and they are eligible to label its strain as "Superior Basmati Rice". Therefore, in Basmati case, RiceTec altered the strain through crossing with the Western strain of grain and successfully claimed it as their invention and the case is an example of problems illustrated in TRIPS with regards to patenting biotechnological processes.

2. Neem Patent- Neem is one of the traditional Indian trees that have numerous medicinal properties. It is used to protect agricultural plants from fungal infections. The tree has number of potent compounds especially a chemical compound named azadirachtin and it is this astringency that makes it useful in so many fields.The tree extracts are used to treat wide range of diseases such as, leprosy, diabetes, ulcers, skin disorders, and the oil extracted from the tree is used as a contraceptive.The tree is also used as a tooth brush in many Indian households and there are even tooth pastes available in the market named "neem". W.R. Grace filed the first patent application for neem. He was granted patent over neem extracts by the European Patent Office. Opposition was filed by New Delhi based Research Foundation for Science , Technology and Ecology in collaboration with International Federation of Organic Agriculture Movements and Magda Aelvoet , former green member of European Parliament. Then, the European Patent Office examined and found out that it lacked novelty, inventive step and hence revoked the patent.

3. Turmeric Patent- Turmeric is grown in east India. It is widely used as medicine, dye, food ingredient. It is used as a blood purifier, in treating the common cold, and as an anti-parasitic for many skin infections. The United Nations awarded patent on Turmeric to University of Mississippi medical center for wound healing. An exclusive right has been granted to sell and distribute. The Indian Council for Scientific and Industrial Research (CSIR) had objected to the patent granted and provided documented evidences of the prior art to USPTO. Though it was a known fact that the use of turmeric was known in every household since ages in India, it was a herculean task to find published information on the use of turmeric powder through oral as well as topical route for wound healing.

Knowledge protection and Transfer of technology-

Transfer of technology means transfer of innovation in the form of data, learning, aptitude or instrument from developed countries to developing countries or to the least developed countries for the fabrication of an item or the use of a procedure to create products or service of benefit. It includes the mechanism of joint ventures, subsidiaries, foreign direct investments, joint R & D arrangements etc. In the event the IP assurance is more grounded, the organizations might be at that stage slanted to exchange or offer the technology. However, Article 7 of TRIPS agreement, if interpreted would mean the spread of awareness through technology and dissemination of information. Patents on the other hand tend to reduce the possibility of absolute use of technology and its benefits. It is true that there is a need of protecting the traditional knowledge of a country but the very objective of Convention on Biological diversity will be in question. Article 10 (c) of the Convention states that one of the goal of the convention is sustainable development and protection, preservation of traditional knowledge.

Here, the author is of the opinion that the concept of TKDL was introduced as an initiative for the protection of traditional knowledge in India. Reports of TKDL expert group in 2005 suggest that around 2000 wrong patent were granted every year at the international level.

Right to benefit from science and patent in intellectual property rights

The first person who found resources in Alps, dictated property rights for mining, timbre, water. As competition increased, privileges were granted to creative works. In 1409, first patent was given to a German for a model mill. The first English patent was granted to John of Utynam for stained glass for 20 years. A patent was granted to Oliver Evans for a grain elevator in United States.

Hence, after turning the pages of history of patent system, it is observed that a patent is a symbol of scientific progress of one country. The more the patent is granted, the more a country's science and technology is secured and leads to further development .Patent is a shield of protection to new, unique, useful scientific inventions. As plomer writes "Scientific progress has been marred with dispute of ownership of the science by academic institutions and private companies and the obstructing impact of patents on scientist's access to essential data and research tools".

From the perspective of researchers, scientists, general public concern mainly on the right to access to science and its benefits, which is a universal and fundamental human right enshrined in article 17 of the Universal Declaration on Human rights and Article 15 of International Covenant on Economic, Social and Cultural Rights which is a legally binding document.

Plomer argues that while the principle captured in this fundamental human right is *prima facie* relevant to the determination of the nature and scope of legal intellectual property rights and patents in emerging fields of science such as genomics, the right has not been directly invoked or weighed in the reasoning of patent offices and courts.

The normative foundation of human rights links in substantive conception of human freedom, liberty, and reflection of human choice. They are equal human dignity of persons; self-realization; and substantive freedoms and democracy, which together encompass the claim that the right to enjoy the benefits of scientific progress "is a multidimensional right, which encompasses both individual self-development and enabling institutions that facilitate the advancement of science for the public good and benefit of all through free individual participation."

Article 15 of International Covenant on Economic, Social and Cultural Rights incorporates elements that prove that clause on the rights of artists, scientists and authors to their protection of

moral and material rights didn't include patent and copyright. The aim that the article seeks for which is access to science and its benefits has been misinterpreted by Corporations, pharmaceutical companies. In UNESCO's history regarding awareness and promotion of science and technology has always been difficult and caused tensions.

International Human rights obligation is itself incorporated in its Constitution of India. India is in tremendous pressure to give effective, strict, efficient intellectual property protection for patents. India also knows the fact that strong intellectual property regime will bring foreign investment in the country. India was required to provide for product patenting only by 2005 under the TRIPS arrangement. Arguably, for India, the need to use the flexibilities has not arisen yet. The flexibilities, however, like Compulsory Licensing are included in Indian Patent Laws. However, India has not clarified and confirmed the ones under the Doha agreement. It has not protected product patents on medicines in the last 35 years, since it enacted the first Patents Act in 1970.

There is a natural tendency to think of these rights as mutually supportive and, in particular, to see scientific progress—and the right of farmers to enjoy the benefits of its applications—as a condition of food security. In a trivial sense, this is obvious: without science, food cannot be produced. In order to achieve decisive victories in the fight against hunger and malnutrition, we must ask which form of scientific progress should be promoted and access to which kinds of knowledge and technologies should be facilitated. The development of a commercial sector has separately increased the need of protection of rights of farmers, breeders and inventions of biotechnology. The shift from agricultural research as a public good that provides farmers with seeds incorporating advanced traits to the granting of temporary monopoly privileges to plant breeders and patent-holders through the tools of intellectual property, is essentially defended as a means to reward, and thus incentivize, research and innovation in plant breeding. But it may also produce a number of undesirable consequences. Farmers cultivate patented seeds, they can't exercise any right of reproducing it, exchange seeds, sell them for profit without the permission from the patent holder. Patents are the most far-reaching form of protection that can be granted.

Patent and Right to Health-

Human rights law in particular, has made a major contribution to the codification of the human right to health through the Covenant on Economic, Social and Cultural rights. It has given rise to debates on patentability of drugs and access to medicines under Right to Health. In intellectual property rights mainly the patents are fulfilling a rationale of rewarding an invention for its contribution in science and development. Despite pharmaceutical companies' plea for patent protection, a number of countries put restrictions on the patentability of drugs on public policy grounds. Access to medicine is a basic component for a proper realization of human right to health. It is of specific importance in the context of Introduction of patent on drugs. There is a two way process as it will increase access, encourage incentive that will develop new drugs in the market.

Conclusion

India is a signatory to the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural rights (ICESCR) and TRIPS. It has adopted international human rights obligations in its Constitution. The Indian Constitution is one of the largest written constitutions in the world. It guarantees fundamental freedoms to every citizen including the right to life and personal liberty. India has been arguably one of the front runners in raising issues to TRIPS and developing countries.

The Supreme Court of India held that any enactment has administrative limit given to the governing body that they can't abrogate the basic human rights especially the privilege to life and individual freedom revered under Article 21 of the Constitution. Subsequent to passing the current Amendment Act, India met the due date of January 1, 2005 to conform to WTO necessities, as set out in the TRIPS. Be that as it may, the new change will have repercussions on access to medications to numerous who can't bear the cost of them. One news channel detailed that India has at last moved from cost driven attitude to a restrictive innovation driven mentality. The Amendment Act stretched out item licenses to items from all areas including pharmaceuticals products. India's commerce minister Murasoli Maran said, "With pointed gun at the temple, the developing countries have no other go but to fulfill the unreasonable obligations which they unwittingly undertook to perform during the Uruguay round." India was required to provide for product patenting only by 2005 under the TRIPS arrangement. Arguably, for India, the need to use the flexibilities has not arisen yet but Compulsory Licensing are included in patent laws as per sec 84(1) of the Act.

DELHI HIGH COURT RULES IN FAVOUR OF SUZUKI DECLARING IT TO BE A WELL-KNOWN MARK

-RUBY NAZ

On 19th July 2019, a Single Judge Bench namely, Justice J.R. Midha of Delhi High Court, ruled in favour of Suzuki Motor (Plaintiff) declaring SUZUKI to be a well-known trademark. A decree was passed under Order XII Rule 6 of the Code of Civil Procedure, 1908 against Suzuki (India) Limited (Defendant) as they specifically failed to deny the facts which was present in the plaint, thereby affirming the allegations.

Background

The Plaintiff had instituted the suit for permanent injunction so as to restrain the Defendants from infringing their trade mark SUZUKI. An interim order was passed on 12th December 2005, restraining the Defendants from using SUZUKI as part of their trade name. There were other co-defendants present who were removed in the trial stage as they were not necessary parties in the suit. The Plaintiff sought a decree under Order XII Rule 6 of the Code of Civil Procedure, 1908 against the Defendant, on the ground that there was no defence raised in the written statement. The territorial jurisdiction of the Court had been challenged as Defendant claimed of not having any office in Delhi. But it was later admitted by the Managing Director on oath before the Court that they have office in Delhi.

Contentions of Plaintiff

The Plaintiff had started its business in Japan in the year 1909, having SUZUKI as a part of its corporate name/trade name. It had registered SUZUKI as a trade mark around the world including India. Due to its global brand presence, it has created tremendous goodwill and reputation. The trade mark SUZUKI has become distinctive of the Plaintiff all over the world due to its continuous and substantial advertising.

In India, the Plaintiff registered its mark in the year 1972 and after that in the year 1982, it entered into a joint venture agreement with the Indian government. It licensed its technology to Maruti Suzuki India Limited (MSIL). The Plaintiff also allowed MSIL to use SUZUKI as its corporate name. Considerable publicity was made on the collaboration.

Around that time, the Defendant adopted the name SUZUKI INDIA LIMITED with deceptive and dishonest intention to encash upon the goodwill of the Plaintiff and to pass off its business as having some relation to the Plaintiff.

SUZUKI is a Japanese surname and there is no support on the part of the Defendant to use it as a corporate name. Also, SUZUKI is a family name of the founder of Plaintiff. Thus, it is not connected in any way with the Defendant. The explanation provided by the Defendant was not satisfactory, including the reason provided by the Managing Director who stated that his father knew someone by the name SUZUKI. This was not considered genuine.

Contentions of Defendant

The Defendant had been using SUZUKI as a part of its trade name since 1982 and it has earned goodwill and reputation due to its honest and concurrent use in relation to its finance and investment business.

The Plaintiff filed the present suit after 25 years. Therefore, the delay should be construed as acquiescence under The Trade Marks Act, 1999.

The Plaintiff has wallowed in ‘forum shopping’ as no part of cause of action has arisen in the jurisdiction of this Court. The place of business of defendant company is in Kolkata, hence the suit is barred by territorial jurisdiction of this Court.

The Plaintiff cannot claim monopoly over all classes of goods as it only uses its mark for automobiles. Therefore, there won't be any deception or confusion by the consumers with regard to the use of the name SUZUKI as the Defendant has no relation to automobiles.

The Defendant has not made any admission hence the suit is unwarranted under Order XII Rule 6 of the Code of Procedure.

Findings of Court

The Court observed that the Defendant did not deny that the adoption of the name SUZUKI was dishonest, malafide and intended to deceive the consumers. As the Defendant did not specifically denied those contentions, hence it is deemed to have been admitted.

The Defendant also failed to deny that it was fully aware of Plaintiff's reputation and goodwill, and that the use of the mark will mislead consumers thinking them to be licensed by Plaintiff which is not true.

There has been tarnishment of Plaintiff's goodwill and reputation and also dilution of the distinctive trade mark due to illegal use by the Defendant. This action has caused irreparable damage to the Plaintiff. This has not been denied by the Defendant.

As there was no specific denial by the Defendant, it had been deemed to be admitted. The Court observed that vague denials were sufficient to pass decree against the Defendant.

The Court stated that the Plaintiff is the registered proprietor of well-known trademark SUZUKI which has been registered with the Registrar of Trade Marks. The Plaintiff had provided to the Court sufficient evidences and material to show SUZUKI was a well-known mark since 1982 when the Defendant adopted the said name. Therefore, the adoption of the mark by the Defendant was fraudulent in nature with the intention to encash upon their goodwill.

The defence of the Defendant of not being aware of the Plaintiff's name and trademark since 1982 is rejected as there was enough record to prove its well-known nature. Also, the Defendant is deemed to have constructive notice of the Plaintiff's statutory and exclusive right to use the trade mark.

The Managing Director affirmed on oath that a consumer may get confused while dealing with Defendant company thinking it to be Japanese company. Hence, there is no just cause for the Defendant to use SUZUKI as part of corporate name, as the term is a Japanese surname and there is no association with Indian name, place, object or term.

SUZUKI has acquired distinctiveness and secondary meaning in the business circle and if anyone adopts the same name it would likely create the idea of a connection with the Plaintiff.

As there was dishonest intention to use the mark since the beginning, mere delay in bringing the action cannot be put as defence by the Defendant. By just being a concurrent user is not sufficient in law. There should be honest use.

The Defendant failed to prove its honesty and therefore the Court came to the conclusion that there has been infringement of Plaintiff's trade mark on account of statutory rights under Section 28 of The Trademarks Act, 1999. As the concept of passing off is changing, it is not necessary to allow both the Plaintiff and the Defendant to trade in same field.

The Defendant had also raised a false defence of territorial jurisdiction of having no office in Delhi. But the Managing director has admitted on oath on having an office at Delhi, hence there was no merit in the said objection.

Accordingly, the suit was decreed under Order XII Rule 6 of the Code of Procedure, 1908 against the Defendant. Also, the court observed that the suit warrants prosecution under Section 209 of Indian Penal Code, 1860 for raising false claims.

Nevertheless, in the interest of justice, Defendant had been granted three weeks time to file an unconditional apology.

Comments

The judgment emphasizes on the importance of vague denials in a suit. Also, it highlights the fact that presence of dishonesty will not cause the suit to be dropped off even though there had been delay in filing the suit. The judgment also stresses on the understanding of well-known mark and how passing off can occur even though the parties are in different business.

Insolvency and Bankruptcy – A way Forward

-Yashita Gulati

Insolvency and Bankruptcy Code – A way Forward

With the introduction of the Insolvency and Bankruptcy Code, 2016 ("IBC") there have been various challenges in the effective implementation of the Code. The Insolvency and Bankruptcy Board of India ("IBBI") which is the regulatory body and supervisory body in charge if IBC, upholds awareness and regulating the space proactively. With three years since the introduction of the IBC, 2016 there have been various challenges in the implementation of the Code. However, Constructive interpretation by the judiciary coupled with effective amendments to the Code have helped eliminating many of the issues. Nonetheless, with the amendments made in the

Code has triggered other legislations. This Article focuses on the recent laws which have been settled by the judicial pronouncements with case laws. The Article will primarily deal with (i) Claim verification under IBC provisions with regards to Limitation Act, (ii)Voting percentage to be calculated in different scenarios, (iii) Contract Act amendment vis-à-vis IBC (iv) Disparity in making payments to financial creditors.

i. Claim Verification

The SC in the case *BK Educational Services Private Limited v. Parag Gupta and Associates*, has interpreted section 238A of the IBC Code, 2016 and held that the provisions of the Limitation Act, 1963 are applicable to applications which are filed under section 7 and 9 of the Code from the inception of the Code.

Section 238A. Limitation.-

The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.

The issue before the SC was dealing with section 238A, which was inserted into the Code by an amendment which states that Limitation Act "*shall, as far as may be*," apply to the proceedings before the National Company Law Tribunal (NCLT). The issue that arose before the SC was whether the Limitation Act is applicable that are made under section 7 and/or Section 9 of the Code from its commencement on December 1, 2016 till June 6, 2018 i.e. the date on which the Amendment Act came into force.

The Court came to a conclusion that the Limitation Act would apply to the NCLT proceedings. As for section 238A, the Court said that it should be applied retrospectively, "otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation."

It was held, and the law was settled that "since the Limitation Act is applicable to applications filed under sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted." In effect, the Court held that section 238A of the Act would apply to applications filed under section 7 and/or 9 of the Code from its commencement on December 1, 2016.

However, the Court further states, "the right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in facts of the case, section 5 of the Limitation Act may be applied to condone the delay in filing such application.

ii. Voting Percentage in different scenarios.

Earlier, the decision to get approved from the CoC needed a percentage of 75%, implying approval of a decision. With the second amendment, this threshold has now lowered from 75% to 51%, subject to certain requirements-

Where the application is being admitted before the NCLT, for withdrawal of an insolvency application, 90% approval is required.

For the following categories, 66% approval is required for resolutions,

1. Approving extension of Corporate Insolvency Process ("CIRP") beyond 180 days;
2. Matters listed out under section 28 of the IBC;
3. Approval of a resolution plan;
4. Replacing a resolution Professional.

From the inception of the IBC, it is observed that there is no such regulation which lays down mandates which provides a basis for calculation of votes casted by the members in three different scenarios.

a. Members who are present in the meeting, but either by the virtue of video conferencing or audio/visual means.
   With regards to the first proposition, it is undisputed that the member's vote shall be casted and calculated, in the numerator against the number of votes in the denominator for the approval of a resolution.

b. Members who are not present in the CoC meeting.

In this regard, In this regard, reference is made to the judgment dated February 4, 2019 passed by the National Company Law Appellate Tribunal ("Hon'ble NCLAT") in the matter between *Tata Steel Limited v. Liberty House Group Pte. Ltd.& Ors* ("Liberty House Order"),

wherein it was observed that, *"If some members of the 'Committee of Creditors' having 2.88% voting shares remained absent, it cannot be held that they have considered the feasibility and viability and other requirements as specified by the Board, therefore, their shares should not have been counted for the purpose of counting the voting shares of the Committee of Creditors. In fact, 97.12% voting shares of members being Present in the meeting of the 'Committee of Creditors' and all of them have casted vote in favour of 'JSW Steel', we hold that the 'Resolution Plan' submitted by 'JSW Steel' has been approved with 100% voting shares."*

Further, vide order dated June 10, 2019 passed by the Hon'ble NCLAT in the matter between *IDBI Bank Limited v. Mr. Anuj Jain*, IRP, Jaypee Infratech Ltd. and Anr. (Company Appeal (AT) (Ins) No. 536 of 2019) ("Jaypee Order")

it was held that, *"We make it clear that if any of the 'Financial Creditor' remains absent from voting, their voting percentage should not be counted for the purpose of counting the voting shares, as also held by this Appellate Tribunal in 'Tata Steel Ltd. vs. Liberty House Group Pte. Limited & Ors.'"*

It is to be understood, from the Liberty House Order and the Jaypee Order that the votes of those Members who were absent from the CoC would not be taken into account for calculating the voting percentage and thereby, not included in the denominator.

Further, in terms of Regulation 25 (3) of the Regulations, *"The resolution professional shall take a vote of the members of the committee present in the meeting, on any item listed for voting after discussion on the same",* it appears that the Members Present in the CoC meeting can only vote.

It is to be understood that the Liberty House Order and the Jaypee Order revolved around the voting on the approval of resolution plans. The Liberty House Order seems to suggest that the Hon'ble NCLAT had made the above referred observation placing reliance on-

Section 30 (4) of *the* Code, which reads as, *"The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board."*

Further, the Supreme Court of India vide judgment dated February 5, 2019 in the matter between *K. Sashidhar v. Indian Overseas Bank & Ors.*(Civil Appeal No. 10673 of 2019) ("SC Judgment "), observed that, *"For that, the "percent of voting share of the financial creditors" approving vis à vis dissenting is required to be reckoned. It isnot on the basis of members present and voting as such. At any rate, the approving votes must fulfill the threshold percent of voting share of the financial creditors."* In view of the SC Judgment, inference may be drawn that the SC Judgment overrules the Liberty House Order and suggests that the percent of voting sharing is "not on the basis of members present and voting". However, the treatment of votes in the numerator and denominator basis the observation "not on the basis of members present and voting" is still not clear. At this juncture, it is pertinent to observe that the Jaypee Order was passed subsequent to the SC Judgment , however the Jaypee Order relies only upon the Liberty House Order and it can therefore be assumed that the Hon'ble NCLAT is of the view that the SC Judgment was limited to its facts.

It is to be concluded that the above cited judgment – *K. Shashidhar case,* it primarily dealt with the minimum threshold requirement of votes (which is clearly provided for in the Code), therefore, the observation "not on the basis of members present and voting" appears to be in relation to meeting the minimum threshold requirement which remains constant in terms of the Code. The SC Judgment appears to be explaining that the threshold requirement is unaffected by the members Present and voting.

c. Is present in the meeting, but is abstained from casting any vote.

With regards to the third proposition, where in this regard, reference is made to Regulation 25 (4) of the Regulations which provides that, *"At the conclusion of a vote at the meeting, the resolution professional shall announce the decision taken on items along with the names of the members of the committee who voted for or against the decision, or abstained from voting*" and Regulation 26(4) of the Regulations provides that, *"At the conclusion of a vote held under this Regulation, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision, or abstained from voting".*

In view of the above we understand that a Member may vote for or against a resolution or a Member may abstain from voting. However, this opens several questions, *firstly,* regarding the inclusion or exclusion of the votes of those who abstained from the numerator and the denominator for the purpose of calculation of votes when the Members who abstained were Present at the CoC. *Secondly,* regarding the inclusion or exclusion of the abstained votes from the numerator and the denominator for the purpose of calculation of votes when the Members who abstained were absent from the CoC.

As regarding the voting by authorized representatives, Section 25A (3) of the Code, stipulates that, "The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions [...] Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor." In view of this the Code seems to have envisaged this as the only situation in which there could be abstention from voting, namely, in cases wherein the authorized representative has not received instructions from the financial creditor, elsewhere in the Code and the Regulations, although the term abstained has been used, however, no circumstances for abstention from voting have been provided for. Therefore, thirdly,whether the "abstained from voting" is to be limited to cases in terms of Section 25A (3) of the Code.

Section 25A: Rights and duties of authorised representative of financial creditors:

(3) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.

In the order dated September 29, 2018 passed by the National Company Law Tribunal, Principal Bench in the matter between *Nikhil Mehta & sons (HUF) & Ors. v. M/s. AMR Infrastructure Ltd.*Looking at the AMR Order it was observed that, *"The facts reveal that out of total number of 'voting shares' of the financial creditors only, 52.78 percent concerning appointment of IRP as RP have actually voted and out of 52.78 percent only 32.56 percent voted in favour of appointing an interim resolution professional as resolution professional"* from the AMR Order, we understand that for the calculation of the total votes, in the denominator, the total voting shares was taken and not only those votes which were actually casted, further in the numerator only votes casted in favour of resolution was taken. Although, the AMR Order provides clarity that, for the calculation of total votes, in the denominator, majority vote is to be taken i.e. total share of votes whether actually casted or not, however the ambiguity regarding abstained votes persists that is, whether these were abstained by Members Present or absent or in the view of Section 25A (3) of the Code. It may be noted that the AMR Order has been challenged before the Hon'ble NCLAT, although on a different position of law.

However, with the judiciary settling out the laws, there is an immediate need for the authorities to provide clarity regarding the ambiguity which is posed from the recent judgements regarding the calculation of votes casted by the members.

iii. Contract Act Amendment vis-à-vis IBC (Claim Period or Limitation Period)

The Limitation Act, 1963, prescribes 30 years' time limit for the suits to be instituted by the government. Section 28 of the Indian Contract Act, 1872 stipulated that every agreement by which any party was restricted absolutely from enforcing its rights under or in respect of any

contract by the usual legal proceedings, which limits the time within which it enforce its rights will be void. Under the 1997 amendment, section 28(b) provided for agreements which extinguish the rights of any party, or discharge any party from any liability under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing its rights. In 2013, by way of amendment added exception 3 to section 28, which provides legitimacy to a term in a guarantee for extinguishment of the rights which is not less than one year from the date of occurring or non-occurring of a specified event.

This amendment brings confusion, andraises a question, where the limitation act prescribes a period for enforcement of rights is 30 years for government contracts, how will the exception 3 added in section 28 of the contract Act will regulate? Will it limit the limitation period from 30 to not less than a year?

In the case of *Kaushalya Rant v. Gopal Singh*, it can inferred that exception 3, is a special subject dealing with the matters of bank guarantee, confined to a specific branch. Exception 3 is a special law, and would prevail over the provisions of Limitation Act.

In the recent case, *Union of India v. M/s Indusland Bank Ltd Anr* , The SC has interpreted the same and held that "the stipulations like the present would pass muster after 2013 if the specified period is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of a party from liability."

It was also held that the restrictive clause in the bank guarantees within a stipulated period after expiry of bank guarantee violated section 28, but a clause in an agreement which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement would not violate section 28.

It could be inferred and observed that a clause in Bank Guarantee for the discharge of the bank's liability, where no claim is made, shall be within the claim period, and if at all the claim is made during the validity of the guarantee, not less than one year is provided for enforcement of the guarantee from a specified event, after which the bank shall be discharged of all its liabilities.

iv. No disparity in making payments to financial creditors

The IBC code is also silent on if there could be disparity in payments to financial creditors?In the case of *Binani Industries Limited v. Bank of Baroda & Another*, the issue before NCLAT for consideration was if the resolution plan submitted, was discriminatory and in contravention of the IBC. The emphasis, was laid down on the objective of the IBC-

The main objective of the Code is of *reorganisation* and insolvency resolution of corporate persons in a time bound manner for *maximisation of value of assets* of such persons to *promote entrepreneurship*, availability of credit and balancing the *interest of all stakeholders*.

The Insolvency and Bankruptcy Code defines resolution plan as a plan for insolvency resolution of the corporate debtor as a going concern. Therefore, a resolution plan is an affirmative step which must resolve insolvency i.e. should maximize entrepreneurship, availability of credit, and balance the interests of all the stakeholders.

In the case mentioned above, NCLAT clearly observed, "non-application of mind by the CoC and discriminatory behavior in approving the plan submitted by the 'Rajputana Properties Private

Limited' is apparent." Considering the observations and submissions,NCLAT held that the submission of resolution plan shall not make any discrimination between similarly placed creditors, any unintelligible discrimination shall invalidate the resolution plan.

Conclusion:

IBC was born out of necessity to ensure that there is a separate speedy resolution in matters concerning "default" of payments. Looking at the brighter side, this regulation is for the lenders to recover their amount even if they have to go overboard with their total exposures. With the inception of IBC, there have been amendments which have been introduced to the Code, for better regulation to cope up with the lacunae where there was ambiguity. IBC is floating a way forward; the judiciary has an imminent role to play bringing clarity to the areas which are still unsettled.

Relationship between Law and Information Technology

-Apoorva Chaudhary

Abstract

The impact of information that occurs in various regions in like manner occurs in law. Today, lawful consultants face more laws, more rules, more issues and more lawful and administrative bodies than some other time in late memory. The old strategies for working are lacking and he needs new gadgets. Most of the mechanical assemblies are here. Regardless, analysts and experts need to empower him to make sense of how to use these gadgets. The blend "Figuring and law" is commutative and as such even. By examining the association between information technology and law, it is quickly seen that there are two opposite associations. This segment discusses how new technology can be used in law and how the law applies to new technology. The present

legitimate instructors need to use information technology to record, orchestrate, separate, use and actualize the law. In addition, lawyers are logically excited about the usage of the standard law, which has created more than several years of experimentation, and present day statutory law, to the issues made by information technology. A couple of lawyers are going to PCs and present day numerical science to help deal with all of their issues, old and new. At the same time, the usage of PCs makes new genuine issues, which can best be lit up by a cognizance of PCs similarly as an understanding of set up legal norms. This part gives a survey of the activities happening at the interface between information technology and law and proposes the most huge issues from the point of view of the legitimate consultant, the courts and individuals as a rule in his view together.

Keywords – Information Technology, Law, Strategies, Gadgets, Commutative

INTRODUCTION

We are during a period of changing conditions of money related creation and human chance, a moment instigated by a movement of imaginative changes and, to a tremendous degree, directed by law. The law is presently and will continue being a vital region wherein the conditions of tomorrow are organized, anyway it can't be thought without perception the creative, money related and social setting in which it works and the chronicled moment at which it meets various requests. An exact guarantee to perceiving how technology impacts life and how law interfaces with technology is a basic for understanding the issues and repercussions of the institutional battles we are seeing today.

The organized PC reverses the capital structure of the age and exchange of information, which has been reality for more than one hundred and fifty years. Regardless of the way that the precise number is difficult to tie, somewhere in the range of 600,000,000 and one billion people by and large by and by have the essential physical capital expected to lessen information, learning and culture, and to check out overall economy that is focused on them.

That suggests that pretty much a billion people on the planet at present have the chance to convey information or culture basically because they need it - they starting at now approach physical solicitations and human sense, the sagacity and creative mind expected to do it. They needn't mess with a procedure to create programming that tends to their issues. In case they understand how to do it, they can form it and find other individuals who will work with them to improve it.

This is the basic affirmation of the colossal accomplishment of the improvement of free and open source programming. More than a million programming architects look into countless endeavours, the best thought about which are accountable for most of the basic components of Internet exchanges. Some have been grasped even with wild, regardless incapable, contention from corporate owners.

Thirty thousand people can join to make a free online reference book, for instance, Wikipedia, which may not override the encyclopaedia Britannica yet, yet is an exceptional substitute for most other online reference books. Models are by and by armed force and we have reasonably incredible financial models to explain why information creation reliant on the house, explicitly, and between companions, is viable, and why the two sorts of age are down to earth under ordinary conditions. a composed information condition.

In our overall population, laws are not just about overseeing our lead; they are in like manner about offering effect to social approaches. For example, a couple of laws give benefits when workers are hurt at work, human administrations, and credits to understudies who may some way or another or another not have the alternative to set off for college.

Another target of the law is esteem. This infers the law should see and guarantee certain urgent individual rights and openings, for instance, opportunity and value. The law furthermore intends to ensure that strong social affairs and individuals don't use their strong positions in the open eye to increment out of line advantage from the more delicate individuals.

Regardless, paying little mind to the best of desires, laws are sometimes made and as such saw as out of line or out of line. In a vote based society like Canada, laws are not scratched in stone yet rather should reflect the changing needs of society. In a vote based framework, any person who acknowledges that a particular law is defective has the alternative to stand up uninhibitedly and hope to change it by legitimate strategies.

The importance of the association among law and technology is twofold. On one side the law is called upon to coordinate technology, on the other the law uses progressions to look for after its very own destinations. Results: logically the law needs to fight to compensate for wasting time with the movements accomplished by new progressions, scoring simply inconspicuous results when it came to survey how the law handle enough the issue that it proposed to address. Since they look for after goals using the technologies available when they have been considered, lawful standards are unequivocally intertwined with the technologies that have encouraged and made possible their fundamental start. A change in technology may render obsolete both the benchmarks considered for the rule of the old technology and the standards which were relying upon the old technology to accomplish destinations looked for after by the law.

Since advancements are the consequence of the progress of science, in order to broaden the understanding of the association among law and technology it is unavoidable to develop a trade among law and various requests (science, prescription, neuroscience, programming building, planning, money related issues, estimations, thinking, human science, history). Results: it is basic to fabricate shared logical orders, or if nothing else to think about the eroticisms' of the lexicons of the various sciences, others than that that one has; it is silly to hope to investigate the association among law and technology without endeavouring to fathom the reason and the habits by which the technology under evaluation works; it is essential to consider instruments of learning depiction expected to ease and breath life into the cognizance of the major features of one field of data to laypersons and particularly to scientists and experts who work in other intelligent parts; the guidance and getting ready of a lawyer should enable the acquirement of inclinations for mind which could move the ability to pro assorted learning and transversal disciplinary procedures, while the lawyer ought to avoid tolerating an irrefutable vantage point or nature of prevalence when moving closer or coordinating with pros of various requests.

II. EXPLORING THE LAW AND TECHNOLOGY RELATIONSHIP

The benefit routinely needs to oversee propels, that is, human activities that, using advances in science, make new media, instruments, devices and systems that improve the individual fulfilment of people.

A couple of models:

- Law and maltreatment of normal resources (energies): energies can be abused appreciation to developments. The law coordinates the creation, change, course of energies and regular resources;

- Authorization and sustenance: the common lifestyle requires rule of sustenance related progressions to ensure, for example, selective desires for worth;

- Law and science: to give an authentic structure to restoratively helped proliferation or cloning, we have to oversee progressions that make it possible to get gametes, undifferentiated cells, crosses, daydreams;

- Law and medication: a couple of choices related to part of the course of action that have real criticalness depend upon restorative thoughts, for instance, mind destruction. A comparative thought of healing vigour must be stood out from open progressions

- Law and information technology: IT has made instruments, for instance, electronic chronicles and electronic imprints open. The law must arrangement with these progressions to control them or make them genuinely available.

The association among law and technology has a couple of consequences. We should focus on three of them.

A. Law and Technologies: Reciprocal Influences

From one perspective, the law is used for the rule of technology; on the other, the law uses headways to achieve its own one of kind targets.

a) Technology can change the substance of verified legitimate interests (as by virtue of the benefit to assurance, which has been changed by the climb of figuring power from the benefit to be dismissed to the other side to control information about the individual)

b) The ascent of new developments can change dug in circumstances. For example, the mix of headways in the media correspondences fragment has gathered up the characteristics that made communicate interchanges a trademark forcing plan of action, opening the market to an unbounded number of managers, in this way improving free challenge inside the portion. This is moreover legitimate for the separation that disappears between Articles 15 and 21 of the Italian Constitution. Generally, the past is associated at whatever point, for example, the chance and puzzle of individual correspondence is being referred to. The last ties down chance of verbalization to a gathering of individuals. Which of the two secured courses of action is required for the rule of wonders, for instance, pay-TV, talk lines, mailing records and exchange social events?

(c) The law can use new progressions to look for after targets looked for after by changed advancements previously: this is the circumstance of the electronic record, the electronic imprint, the portion of responsibilities by strategies for electronic money, the completion of understandings through the Internet, etc. In all of these models, new standards set the terms for the use of modernized developments to achieve some objective achieved through various headways;

d) The standards rising up out of progressions are encircled by the traits that depict them: for example, one thing is to have norms concerning matter (particles), another is to have leads about bits. Now and again this recommends the need to reformulate thoughts that by and large suggest

material things, (for instance, ownership and possession) or to draw on new thoughts, (for instance, title and validity for the circumstance dematerialized cash related instruments);

e) propels make new things: this was the circumstance in the past for the new worth made by the advancement of printing, close to the piece of the plan new copyright ascended after a long strategy. Of late this has occurred for information banks (e.g. human tissue, yet a couple of various models may be proposed). The law is perpetually looked with the need to coordinate new things that were dark already;

f) The modification in technology in like manner impacts the source and structure of the standards. At times, legitimate structures need to coordinate certain miracles by relying upon all inclusive instruments or authoritative models that are not remotely constrained (for example, sets of standards);

(g) technology may itself become the standard for the going with reasons: (I) it powers operational rules (for example: the rule of the propelled imprint); (ii) it melds the standard (see Article 3 of the Italian Data Protection Code, see furthermore the Commission Recommendation of 12 May 2009 on the execution of the principles of affirmation of security and information in applications supporting radiofrequency ID, iii) it ensures its application (eg mechanized rights the board);

(h) The models directing the use of new headways for the making of story verification are portrayed by high inventive substance, as conveyed by individuals with unequivocal aptitudes.

B. The Dialogue between Law and other branches of Knowledge.

Since advancements attempt advances in science, it is essential to set up a trade among law and various fields of learning (science, sedate, neuroscience, programming designing, building, money related perspectives, hypothesis) in order to broaden relations among law and technology, humanism, history).

Results:

a) It is basic to set up a run of the mill edge of reference or, in any occasion, to end up aware of the specificities of the language or jargon of various sciences;

b) It is hard to consider the association among law and technology if we don't grasp the basis and the working frameworks that underlie the technology we are taking a gander at;

(c) It is urgent to devise learning depiction mechanical assemblies expected to engage authorities in an offered science to adequately and quickly appreciate the outcomes of various sciences and the a different way;

d) The instructive strategies of each request should fuse the mission of making moods that empower understudies to pro one of a kind and transversal fields of learning.

C. The Dialogue between different branches of knowledge and the role of the Lawyer

In late decades, the pieces of information have turned out to be exponentially both quantitatively and abstractly: new prepares have been made, while standard branches have amazingly expanded their understanding base. The combination of the branches has moreover allowed the arrangement of logically propelled advancements: for example, in the field of symptomatic medication, the improvement of machines, for instance, the TAC or the ultrasound has been

upheld by the joint research of masters, physicists, modellers and PC analysts. Even more all things considered, we face bewildering and related issues that are considered under the umbrella of overall supportability, for instance,

(a) The confirmation of the earth;

(b) The measurement issue related with the developing of the quantity of occupants in explicit locale of the world;

(c) The creating enthusiasm for essentialness and fuel.

III. UTILIZATION OF TECHNOLOGY BY LAW

A. Technology can change the substance of guaranteed real interests, as by virtue of the benefit to security, which has been changed by the rising of information progressions. The alleged intermixing of advances in the communicate interchanges territory has gathered up the characteristics that made media correspondences a trademark forcing plan of action, opening the market to a possibly endless number of managers, in this manner redesigning free challenge inside the part.

This is furthermore legitimate for the separation that disappears between Articles 15 and 21 of the Italian Constitution. By and large, the past is associated at whatever point, for example, the chance and riddle of individual correspondence is being referred to. The last ties down chance of explanation to a gathering of individuals.

B. The law can similarly use new advancements to look for after past objectives: this is the circumstance of the electronic file, the electronic imprint, the portion of responsibilities by electronic money, the completion of understandings by methods for the Internet. etc. In these models, new standards portray the possible results of using propelled advances to achieve a particular goal achieved through various developments.

The principles got from advancements are described by the characteristics that depict them. For example, one thing is to have keeps running about issue (particles), another is to have leads about bits. On occasion this construes the need to reformulate thoughts that for the most part insinuate material things, (for instance, ownership and proprietorship) or to draw on new thoughts, (for instance, title and genuineness for the circumstance dematerialized money related instruments).

C. The activity of technology in making new things was once solid to the new worth made by the improvement of the printing press, from which the new copyright law was imagined. Starting late this has occurred for information banks (eg human tissue, anyway a couple of various models may be proposed). The law is continually looked with the need to coordinate new things that were dark already.

D. The improvement of advances also impacts the source and structure of norms. A portion of the time, legitimate structures like to deal with specific wonders by using worldwide instruments or managerial models that are not remotely constrained (for example, sets of standards).

E. Technology can now and again become the standard for the going with reasons:

I) It powers the standards of movement. For example- the rule of the modernized imprint.

ii) It organizes the standard.

(iii) It guarantees the display. For example-Digital Rights Management.

IV. THE COPYRIGHT ACT

The 1957 Copyright (Law No. 14 of 1957) manages copyright laws and rules in India. The copyright law in the country was spoken to by the Copyright Act of 1914, was fundamentally the extension of the UK copyright law from 1911 to India and was, all things considered, obtained to the new United Kingdom copyright law of 1956. All copyright laws are directed by the 1957 Copyright Act.

The Copyright Act today fits in with most worldwide shows and courses of action on copyright. India is a person from the Berne Convention of 1886 (as changed in Paris in 1971), the Universal Copyright Convention of 1951 and the Agreement on Intellectual (TRIPS) 1995. Notwithstanding the way that India isn't associated with the 1961 Rome Convention, the WIPO Copyright Treaty (WCT) and the WIPO Treaty on Intellectual Property (WIPO). Displays and Phonograms (WPPT), the Copyright Act agrees to it.

Various infringements have begun to occur, particularly in the field of programming designing, which has been assembled in the class of PC bad behaviours:

Cybercrime is a common exhibit executed by an informed PC customer, to a great extent suggested as a software engineer who unlawfully searches or takes mystery information from an association or an individual. On occasion, this individual or social affair of individuals may be dangerous and demolish or by and large degenerate the PC or information reports.

A couple of occurrences of PC infringement are:

1. Advanced terrorism - Hacking, risks and intimidation against an association or a person.

2. Tyke sensual excitement - Manufacture or scattering of tyke sex stimulation.

3. Cyber bully or Cyber-Harassment: Harassing others on the web.

4. Malware creation - Creation, creation and scattering of malware (for example, contaminations)

5. Refusal of Service Attack - Overload a structure with indistinguishable number of requesting from it can’t respond to normal sales.

6. Spying - Spying on an individual or a business.

7. Coercion - Manipulation of information, for example changing bank records to move money to a record.

8. Procuring: gathering of a record or other information relating to the records of various individuals.

9. Extortion - Pretending to be another person.

10. Authorized advancement Theft - Theft of shielded development from different people or associations.

11. Phishing - bamboozle individuals for individual or individual information about that person.

12. Salami Slicing - Steal restricted amounts of money at each trade.

13. Spamming - Unsolicited email passed on to tens or numerous different areas.

14. Ridiculing - Deceive a structure into tolerating that you are someone you genuinely are unquestionably not.

15. Unapproved Access - To get to the structures, you don't save the benefit to get to them.

16. E-tuning in - Connect a device to a telephone line to check out exchanges.

V. CASE

Satyam Infoway Ltd. v. Siffynet Solutions Pvt. Ltd.

BACKGROUND TO THE INDIAN SUPREME COURT DECISION

The prosecutor was the holder of two space names, siffynet.com and siffynet.net. The irritated party association, Satyam Infoway, participated in 1995, enrolled a couple of room names that consolidated the capricious word 'sify': sifynet.com, sifymall.com, sifyrealestate.com, etc. The resemblance between these names took a crack at 1999 and the two territory names of Siffynet Solutions (enrolled later in 2001), drove Satyam Infoway to record a suit in the City Civil Court of Bangalore on the reason that the respondent was going off its business and organizations by using its business name and space name.

The Court perceived that the outraged party was the prior customer of the trade name 'Sify' and that it had earned an average reputation in regards to Internet and PC benefits under this name. The Court communicated that Siffynet Solutions' zone names resembled the space names of the affronted party, and that chaos would be caused in the mind of the general populace by such deceptive likeness.

The Court was fulfilled to yield a temporary mandate for the outraged party. The case was brought under the watchful eye of the High Court, which allowed the interest. According to the High Court, the respondent was cooperating other than what was being done by the engaging party, so clients couldn't be misled nor misguided, and would not get dumbfounded.

The High Court similarly underscored the point that the irritated party association had an alternate trade name – Satyam Infoway – which it could use in case it were not permitted a solicitation for request. Since the complaint was recorded in order to verify a trade name, there could have been game plan to the UDRP procedure. Notwithstanding whether the UDRP has been proposed for harming enlistments of trademarks, it is up 'til now possible to get affirmation for a trade name under it, when it is viewed as indistinguishable from a trademark.[iv] This is despite the World Intellectual Property Organization (WIPO) not being decidedly masterminded towards this example.

All things considered, there is starting at now a point of reference of an Indian firm having misused this far reaching interpretation of the UDRP rules. However, here, since the irritated party brought the case under the watchful eye of a national court, it permitted to the Supreme Court of India to verbalize its first decision on space names. The Court's judgment offers a captivating perspective on space name discussions to the legal system in India and past. It portrays the territory name under two essential points of view – as "an area for PCs" and,

furthermore as a "business identifier" inferable from extended business development on the Internet.

As a result of the climb of Cybercrime all around and in light of the way that software engineers can abuse everything that is essentially available, India has attempted undertakings to guarantee data. They are Copyright Act, IT Act and Contract act from which two are starting at now referenced.

VI. FUTURE

The association among law and technology structures two undeniable locales for talk and discourse, yet the two are interrelated and no trade is done without seeing the other. In any discussion of things to happen to the legitimate calling, the activity of technology in framing and improving this future must be carefully considered. Additionally, any talk of technology must incorporate appropriate affirmation and thought of the legitimate framework in which it creates.

The use of new headways in law workplaces echoes what's happening in the more broad business economy, where the improvement of new progresses, new methods and computerization has incited interesting and testing changes. various focal points for clients and associations, yet likewise another propelled work structure. Generally suggested as the preoccupation economy, this joins a technique for working where fleeting positions are extraordinary, autonomous work is the standard, and affiliations go into contracts with transitory individuals.

VII. CONCLUSION

We can’t oversee such issues by using unequivocal topics. We should set up a trade between the different pieces of learning. When we handle issues of this size, our aptitudes must go about as a zoom on an image: we ought to have an overall vision and, all the while, the ability to go into nuances. The issue is to perceive how to set up the talk between the different branches.

Do the law and lawful guides accept an extraordinary activity in this technique?

The pieces of information must make sense of how to chat with each other. The law ought to go about as a contact or augmentation between different pieces of learning. From various perspectives, legitimate consultants are in the best position to set up the ground for talk between different topics (e.g., science and hypothesis), a fundamental for empowering the production of new information. The issue of acing the enormous learning totalled after some time and the affinity towards hyper-specialization makes it difficult to exhibit how such information can deal with consistently issues and improve life. Lawful advocates can progress both the dispersing of results procured by various pieces of learning and the show of the effects of different disclosures.

The rising of the orchestrated information economy and its duties to both happenstance and improvement give off an impression of being a brief and critical assurance of an effective examination of the law and inventive distinction by and by. Nevertheless, we are at the centre of a movement of huge changes in the way we produce information, learning and culture, and these segments of human information will be associated with improve the human condition.

The coming decades will offer more opportunities to settle on the correct choice and to not be correct. Holders will all things considered undertaking to improve order to verify their rents and strategies. In any case, to examine the possible favourable circumstances or costs of new practices and, in this manner, laws that will be proposed and revoked along the imperfections of these changes, an extraordinary legitimate reason is required to survey both the old and the new. the new and the issues of the advancement starting with one then onto the next. That is the reason the examination of law and technology will be at the centre of understanding human fulfilment, flourishing and open door for quite a while to come.

CIVIL LIBERTY POSING A THREAT TO NATIONAL SECURITY: STRIKING TOWARDS AN EQUILIBRIUM

NEHA GOYAL & SHRASTI AGARWAL

"Nathuram Godse was patriot" says Pragya Thakur (Member of Parliament from BJP) taking advantage of her individual liberty. For this act of Thakur, she was highly criticized by Prime Minister Narendra Modi saying he will not be able to forgive her.

Politicians takes advantage of Freedom of Speech to such an extent that it possess a threat to our national security and creates communal riots. Therefore, it is need of hour to establish equilibrium between individual liberty and national security.

Definition of individual liberty and national security

The liberty of those persons who are free from external restraint in the exercise of those rights which are considered to be outside the province of a government to control.

Through publically agreed laws that correspond to a common set of public restrictions, the 'people as a sovereign body' serves to protect against violations of individual liberty and

despotic power. Where no such common body exists, individuals are deprived of this protection. In such cases, individuals must obey without liberty, while those in power command under a state of license. Neoliberal theorists maintain that any common personality, with its corresponding set of public and arbitrary positive and negative restrictions on liberty, undermines individual liberty.

"National security then able to preserve the nation's physical integrity and territory; to maintain its economic relations with the rest of the world on reasonable terms; to preserve its nature, institution, and governance from disruption from outside and to control its borders."

It's a question to democracy itself: When does the cost of security become too high for a nation dedicated to protecting individual liberty?

There are few more crucial constitutional questions before the country today than the reconciliation of national security interests with our system of individual liberties. The issues go to the heart of the democratic process. They involve the application of the rule of law to the various measures being proposed and adopted in the name of national security. Yet the difficulties confronted in seeking a successful accommodation between the demands of national security and the maintenance of individual rights can hardly be overestimated.

Moreover, the subject of national security itself arouses an emotional response. Appeals to patriotism and especially expressions of alarm about the intentions of foreign enemies have always been used as techniques for rallying political support. The resulting tides of public opinion are likely to create a diversion from the real issues that must be resolved. Even our judicial institutions -The chief guardians of individual rights-may be affected by this influence.

Don’t get me wrong, individual liberty is very important, but it can only be practiced within a country. In order to preserve a country and allow individuals to demonstrate their freedom, national security is necessary. Sometimes some degree of individual liberty must be surrendered in order to maintain national security. There is no way around this. National security is more important than individual liberty because it influences a large amount of people. Your own personal security and liberty is very important to yourself only. As a whole, national security should be looked at as much more important than our own individual liberties.

There is a large threat to our security. The current level of international stress is likely to increase, leading to more and more vexation with American policies, which in turn may result in more terrorist storm. Obsolete terrorism has transformed into high intelligence networks of hard to hard terrorist cells. It is not possible to crackdown terrorism without curbing some of the rights of citizens.

Governments have a duty towards their citizens to protect their rights to security of person and freedom from fear. Laws designed to intensify security are not only passed by democratically elected governments, but also enjoy popular support as calculated by opinion polls and in the

outcomes of succeeding elections. Once the threat of terror has been dealt with, liberty can be given greater emphasis and security measures relaxed once again.

Another major source of difficulty is that government activities concerned with national security are most often shrouded in secrecy. This blanket of secrecy has tended to expand with the new technologies. Thus, there is an enormous and growing volume of material that is officially classified as secret or is otherwise inaccessible. The ordinary citizen is thereby deprived of the information, ideas, and discussions which are essential to make informed judgments on matters of public concern. And the watch-dog institutions of the society- The courts, Legislative committees, Internal mechanisms for supervision-are unable to perform the crucial task of oversight. The result is a crippling of the democratic process.

SOMETIMES INDIVIDUAL LIBERTY IS IMPORTANT AS:-

Governments are likely to take advantage of anti-terrorist frenzy and pluck the movement to nourish their dominion. Modern government bodies fighting terrorism are sophisticated enough to thwart terrorism with little use of 'draconian' measures. It is not acceptable to curb citizen rights because of isolated events. Furthermore, abuses of the system are likely to victimize certain minority groups in the same way that Japanese- Americans were persecuted in World War II, something about which Americans are now rightly ashamed.

The great increase in international travel requires faster and more efficient work from customs service's all over the world. Increased security measures make procedures slower and cause lots of disappointment among travelers, particularly those who are on business trip. There have been lots of cases when custom officers were not able to finish check in process prior to the scheduled time of the departure of an aircraft. As a result, flights were delayed or the clients were left behind. It is of course of a great inconvenience for travelers, but also costly for the air companies who changed the tickets.

Recently many new security devices have been introduced in an attempt to fight with terrorism. Terrorists and smugglers, however, are becoming more and more inventive and knowledgeable about how to carry through the prohibited materials to aboard without being detected to those machines. Security persons themselves recognize inefficiency of the devices they have introduced as a method of fighting with terrorism.

Governments are likely to use terror as a convenient excuse for tightening laws and restricting freedoms in order to crack down in areas such as immigration, drug smuggling, fraud, etc, with insufficient public debate. Such an erosion of liberties has a long-term impact and in practice, is unlikely ever to be reversed as it is not the nature of state bureaucracies ever to give up power. Democratic mandates are insufficient reason to erode liberties; a key purpose of civil liberties is to protect minorities from the tyranny of majority.

IN ORDER TO MAINTAIN A BALANCE BETWEEN LIBERTY AND SECURITY FOLLOWING RESOLUTIONS WERE PASSED BY UNION BOARD AFTER SEPTEMBER 11, 2001 ATTACKS ON THE WORLD TRADE CENTRE AND THE PENTAGAON:

1. Apply the following principles in assessing the proper balance between civil liberties and the measures required to combat terrorism:

    1. Investigation, prevention, and prosecution of terrorism by law enforcement agencies are urgent priorities, but must be conducted in ways that are consistent with fundamental principles of our justice system and Constitution, including due process, right to counsel and judicial review;

    2. The political climate must remain open and free. Public discourse regarding the appropriateness of governmental action in the war on terrorism must continue to be a valuable and respected part of American democracy;

    3. When government seeks to dilute existing privacy protections, at a minimum, there must be a substantial, public showing of the need for such measures to combat terrorism, the measures should impact on privacy rights as narrowly as reasonably possible and all such changes should contain sunset provisions;

    4. Evolving technologies and new understandings of the methods used by terrorist organizations require enhanced anti-terrorism investigative tools, such as roving wiretaps;

b. Maintain its longstanding commitment to the Constitutional principle of due process for citizens and non-citizens alike by:

    1. Opposing directives permitting surveillance of attorney-client communications without demonstration of probable cause to believe that such communications will be used to perpetrate criminal activity;

    2. Opposing administrative rulings that designate citizens as "enemy combatants" and thus not entitled to the full range of due process rights;

    3. Opposing indefinite detention;

    4. Opposing the use of military tribunals to try terrorism suspects without provision of due process protections;

5. Opposing the use of "secret evidence" and closed hearings absent compelling circumstances to be established on a case by case basis, with notice to the accused, an opportunity to be heard concerning the proposed closure, and judicial review.

6. Opposing measures that strip the power of immigration and federal judges to review decisions and exercise discretion regarding the status, detention, and deportation of non-citizens.

TORTURE AS AN INTERROGATION TOOL?

In *A and Others v Secretary of State for the Home Department* "The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.

Given this position, the use of torture as a State-sanctioned tool of interrogation sounds outlandish and improbable; yet it has of late been mooted by a leading Harvard academic,and the use of evidence obtained by torture has even been considered by the British government.

So not only is torture justifiable, no trial is necessary to decide whether an individual is a guilty terrorist, and by reason of the grant of immunity no presumption of innocence need apply. The privilege against self-incrimination has been clearly cast aside.

The international law on torture is worth bearing in mind as an intellectual reference point. The right not to be tortured, it must be remembered, is non-derogable, under any circumstances.

CONCLUSION

It is in times of emergency that civil liberties can be lost, and their non-appearance becomes normalised and accepted as a feature of the legal landscape. It is because of this process of normalisation that actions taken in the defence of the security of the State must be taken carefully. Cesar Becerra's advocacy of restraint in punishment applies equally to the civil liberty debate today:

"Thus it was necessity that forced men to give up a part of their liberty. It is certain that every individual would choose to put into the public stock the smallest portion possible, as much only as was sufficient to engage others to defend it. The aggregate of these, the smallest portions possible, forms the right of punishing; all that extends beyond this, is abuse not justice."

DOCTRINE OF "TRANS BORDER REPUTATION"&"WELL-KNOWN TRADEMARKS" IN INDIAN CONTEXT

-Mani Pratap Singh

ABSTRACT

Reputation is defined as character, fame, practice, recognition, repute or status. Reputation according to trademark law, involve some kind of knowledge, practice or recognition wherein it was known by a significant part of the public. With the growth of capitalism, the drive to sell goods on large scale has penetrated every corner of the world. This effort by entrepreneurs to expand business over various foreign territories given necessity to the concept of trans-border or in other words spill-over reputation as the protection of the same on foreign soil is also an important task. The word "trans-border reputation" itself indicates that a product has become so popular, reputed and famous that it has crossed the territorial boundary and reached the other jurisdiction on the globe.

The purpose of both the concepts is to protect the interest of the proprietor/owner/ manufacturer of a product on the soil of other country and also to restrained a person from using a name which is likely to cause confusion in the mind of a person who deals with such competing business. Although there is a thin difference between both the concepts, both can be used as synonymous or interchangeable to each other. The very basic concept of protection of a trademark is to protect a mark which is used or adopted first in point of time. A prior adopter of a trademark in any part of the world can successfully enforce its rights in India in this globalized world provided, there is a spill-over reputation. Both the concepts have been given meaning and relevance by the courts in its judgements and also by legislature while adopting it into our domestic laws. The Indian judiciary respects and upholds the right of prior user of trade mark anywhere in the world. The present position of trans-border reputation in Indian jurisprudence is largely a judicial creature to suit modern commercial requirements and its expediency. This article presents about the dynamism of the courts to protect the well-known trademarks under the concept of trans-border reputation and an insight of Indian legislature to incorporate international IP laws into our domestic laws for its better protection.

Keywords: Trans border reputation, Territorial Boundary, Prior adopter, Globalisation, Dynamism of the Court, Modern Commercial expediency etc.

REPUTATION & TRANSBORDER REPUTATION:

Reputation is defined [1] as character, fame, practice, recognition, repute or status. In the absence of statutory definition, acquisition of reputation depends upon the usage of a particular good or service with respect to business. The extent of the use of the mark depends upon the nature of the mark and of the business or goods concerned. The task of ascertaining whether a mark having reputation, has been dealt in the General Motor Corporation Case[2], where the court gave its own interpretation of reputation. Reputation according to this case, involved some kind of knowledge, wherein it was known by a significant part of the public concerned by the products or services covered by trademark. The court also made it clear that while reputation must exist in the member state, it need not exist throughout the territory. It is sufficient if the reputation exists in a substantial part of the territory. There is a line of disparity between reputation and goodwill though it seems to be same and overlapping. Goodwill is an asset as it is species of property, reputation is complex and manifested in various factors. It is impossible to have goodwill without reputation, but conversely is not true. Reputation is always associated with a person or a product whereas goodwill is not based upon such extraneous factor.

In this age of e-commerce, where physical boundaries between countries have become virtually redundant, brand recognition is considered the foundation for any successful business and probably its most valuable asset. Now a day, brands no longer serves just the basic function of guaranteeing the origin of a product or service but also indicates the attraction or affiliation due to the reputation they have.

[1] Compact oxford dictionary

[2] General Motors Corporation VsYplon, 1999, 3CMLR-427

Hence, protection of a brand from being misappropriated becomes highly imperative in this era of cut-throat competition. In order to combat misuse of their trademarks, foreign entities have to rely on their brand goodwill and prove, under an action of passing-off, that their mark's reputation has spilled over in the disputed territory. Broadly, an action of passing-off aims to restrict a party from misrepresenting its goods or services as that of another party in order to take advantage of the reputation. One of the essential ingredients for a successful passing-off action is that the foreign claimant must establish reputation in the marks under which it is selling its goods or offering services such that the consuming public associates those marks distinctly with its goods or services. To obviate the clearly undesirable scenario, the doctrine of trans-border reputation is invoked to aid the complainant in discharging the burden of establishing goodwill. With the advent of globalization, in particular its facets of increased international trade and spill-over effects of telecommunications and media across national borders, the Indian judiciary has recognized that the influence of companies ought not to be confined to the physical space in which they operate.

The concept of trans-border reputation or spill over reputation is the outcome of the modern policy of liberalisation adopted by various countries across the world. The essence of this concept is enshrined in our Trade Mark law [3] which restrain a person from using a name which is likely to cause confusion and divert the business of someone else to him or likely to cause confusion in the mind of the person likely to deal with such competing business. It is well

settled principle that no company or business or person is allowed to carry on business in any manner so as to generate a belief in the minds of public that is connected with the business of a reputed company.

[3] Section 35 of Trademark Act 1999.

TRANSBORDER REPUTATION IN INDIA

With huge development in communication technology and globalisation, every country can be a market place for traders of rest of the world who dreamsto expand his business and sell his product. Hence, it is of utmost importance for those who wants to spread their business across nations to have protection for their trademarks in those countries which are a prospective market for them. India is also one of the world's fastest-growing economies, having potential for modern development with so many opportunities. It has sound enforcement mechanisms, a progressive judiciary and a political will to keep pace with rest of the world. More significantly the Indian judiciary respects and upholds the rights of prior trademark users anywhere in the world. Some recent decisions involving the concepts of well-known marks and trans-border reputation serve to highlight the judicial activism and dynamism of the Indian courts.

The best way to protect a trademark is by registration. However, it might not be possible for every business concern to register its mark with trademark registry of every nation in the world. The alternate remedy available, for both registered as well as non-registered marks, is the common law remedy of 'passing off' action. However, this remedy has certain limitation in protecting trademark internationally. The traditionally accepted grounds for success in 'passing off' suit requires establishing 'prior use' of the product, as one of the most important criteria on deciding which party had got rightful claim over the trademark in question. Establishing 'prior use' of the product requires identifying the first person to 'use' the trademark. The term 'use' has been a bone of contention. Questions like whether the mark is considered to be 'used' only when actual sale of the product with the trademark had occurred and whether the 'use' must have happened in India or is it enough if the mark was 'used' anywhere in the world were discussed by Indian Courts in a series of cases. In the land mark case of *Whirpool Corporation*[4] the Supreme Court of India, held that despite observing that the Respondent Company Whirlpool did not had actual sale in India, had "acquired trans-border reputation in respect of the trade mark 'WHIRLPOOL' and has a right to protect the invasion thereof". The advertisements of the products by the company in international magazines which were circulated in India had aided as an evidence of reputation in India. The Apex Court also observed and commented[5]that even advertisement of trade mark without existence of goods in the market is also to be considered as use of the trade mark. This Whirlpool case was a ground-breaking decision in the Indian jurisprudence with respect to Intellectual Property Right, insofar as the Supreme Court confirmed that, advertising a trademark is considered to be 'use' and is sufficient to prove

'reputation and goodwill' in India, even when no goods are being sold on the market. After the decision in Whirlpool Case, parties with only trans-border reputation and no actual sales of goods in India have succeeded in passing-off cases on several occasions.

[4] *N.R. DongreVs. Whirpool Corporation, 1996 (16) SC583 PTC*

[5] Comment of Supreme Court: "The knowledge and awareness of a trade mark in respect of the goods of a trader is not necessarily restricted only to the people of the country where such goods are freely available but the knowledge and awareness of the same reaches even the shores of those countries where the goods have not been. When a product is launched and hits the market in one country, the cognizance of the same is also taken by the people in other countries almost at the same time by getting acquainted with it through advertisements in newspapers, magazines, television, video films, cinema etc. Even though there may not be availability of the product in those countries because of import restrictions or other factors. In today's world it cannot be said that a product and the trade mark under which it is sold abroad, does not have a reputation or goodwill in countries where it is not available. The knowledge and awareness of it and its critical evaluation and appraisal travels beyond the confines of the geographical area in which it is sold. This has been made possible by development of communication systems which transmit and disseminate the information as soon as it is sent or beamed from one place to another. Satellite Television is a major contributor of the information explosion. Dissemination of knowledge of a trade mark in respect of a product through advertisement in media amounts to use of the trade mark whether or not the advertisement is coupled with the actual existence of the product in the market."

This legal position was reinforced in the case of *MilmetOftho Industries* [6] wherein the Apex Court after establishing the trans-border reputation, stated that "The mere fact that the Respondents have not been using the mark in India would be irrelevant if they were first in the world market."

However, proving Trans-border reputation alone would not suffice to restrict an Indian company from using a similar mark, honestly adopted by them. Once Trans-border reputation is proved, the foreign entity is required to prove likelihood of confusion of origin, detriment or unfair advantage. Indian Courts have repeatedly held that a foreign entity claiming well-knownness must not be allowed to restrict the use of a similar mark, if the Indian company was the first in the Indian market, to honestly adopt the mark.

Again, in the *Blenders Pride case* [7] the Delhi High Court observed[8] that being the first to use the mark in India in not enough and added that "the Plaintiffs were first past the post worldwide and this is of crucial importance." The requirement to actually carry on business in India was considered unfair by the Court and ought not to be applied to the case of passing off. It was also held that the reputation of a person can transcend boundaries by virtue of its advertisement in the newspapers, media circulation, and all other relevant factors which connect one countries business with that of another"[9].

[6] *MilmetOftho Industries &OrsVs. Allergan Inc.2004 (28) SC 585.*

[7] *Austin Nichols & Co &Anr v. ArvindBehl and Anr 2006 (32) PTC 133 (Del)*

[8] Delhi High Court observation "merely being first past the post in India is not enough".

[9] The Royal Bank Of Scotland Group Plc V. Sharekhan Limited, Order Dated 7th November, 2014 in CS(OS) No.1023/2013

Further, Delhi High Court has observed that courts entertaining the cases of passing off can discount the localized existence of goodwill and the business in the territory specific if the substantial nature of reputation has been proved which has some kind of nexus in the territory.One of the interesting judgments with regard to protection of trans-border reputation came from Delhi High Court in the case of VOLVO [10] wherein the Court observed thatthe word VOLVO which stated to be a rare Latin word is both as a trademark and a trade/corporate name.

This name is stated to be an invented mark as it has neither obvious meaning nor is it found in any authoritative dictionary of the English language and the same has been registered in various countries. The court held that plaintiffs are the owners of the goodwill and reputation attached to this trade mark and are entitled to protection of their proprietary rights in the said trademark against infringement by other.

In the another recent verdict of the disputed Toyota [11]case,Supreme Court's stance on affirming the Delhi High Court's decision to grant the mark PRIUS to Prius Auto Industries has been heralded as the new path of the Trans-Border reputation doctrine.

However, it is to be noted that protection under common law is given only to those traders who intend to make their products available in Indian market. Multinational corporations, who have no intention of coming to India or introducing their product in India, will not be allowed to interfere anIndian Company by not permitting it to sell a product in India, if the

[10] Akteibolaget Volvo v VN Prasad (2006 (32) PTC (Del)

[11] Toyota Jidosha Kabushiki v M/S Prius AutoIndustries Ltd,(2017)SC(CA No. 5375-5377)

Indian Company has genuinely adopted the mark and developed the product and is first in the market[12]. In the recent case of *Jones Investment Co Vs. Vishnupriya Hosiery Mills*[13], the Intellectual Property Appellate Board (IPAB) had ruled against the notion of preventing Indian companies from using trademarks even though the MNCs have no intention to introduce their product in Indian market.

Therefore, the legal propositions regarding protection of Trademarks with trans-border reputation is more or less settled in India. The international players are no more required to prove that they are the prior users of the mark in India, if they had used the mark in some other market and the reputation of the same had echoed on Indian shores. Also, advertising the product and trademark in Indian market is considered as ‘use’ of trademark while ascertaining prior user of the mark.

EMERGENCE OF THE CONCEPT OF WELL KNOWN TRADEMARK & ITS PROTECTION:-

Trademarks are of generally National character and are governed by national laws. Some of the marks traverse national boundary and enjoy reputation and popularity in many countries. Although, they are governed by national laws and are dependent on them for enhanced protection.The enhanced protection to a category of marks called as well-known trademarks was envisioned for the first time in the year 1925

[12] *MilmetOftho Industries &Orsvs Allergan Inc, 2004 (28) PTC 585 SC*

[13] *Order (No.24 of 2014) , OA/48/2010/TM/CH & MP NO. 260/2010 IN*

OA/48/2010/TM/CH

whenArticle 6 bis[14] was added to the Paris Convention and majority of nationswere party to the said convention and incorporated in their domestic laws. Although there was no definition mentioned in the amended portion, there are deliberation and other literature has been produced after the year 1990 to explain elaborate the meaning of well-known marks.

Protection to well-known marks under Article 6 *bis* (1) is applicable for identical or similar goods in a country of non-registration or non-use. Well-known marks are deemed to have acquired goodwill and reputation. Although the protection envisaged in Article 6*bis* was required to be incorporated in national law by members, but the Paris Convention did not have teeth. If the legislation of any country did not offer protection in terms of Article 6*bis*, there was no obligation to enact laws to make available the protection desired in article 6*bis*. But this position changed when Article 6bis of the Paris Convention had to be enforced by virtue of TRIPS, w.e.f 01 Jan 2000 after availing transitional period. In addition, article 16 of TRIPS mandates the same and additional protection. In compliance with the above, the TMA, 1999 has enacted protection to well-known marks in section 11 and section 29.

[14] Article 6 bis :-

1. The countries of the union undertake, ex-officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

2. A period of at least five years from the date of the registration shall be allowed for requesting the cancellation of such a mark. The countries of the union may provide for a period within which the prohibition of use must be requested.
3. No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

The effect of this article is to extend the protection to a trademark that is well-known in a member country even though it is not registered or used in that country. The mark should be well-known and belonging to a person who is a national of one of the member countries or, in other words, is entitled to benefits of the Paris Convention.

PROTECTION OF WELL KNOWN MARKS IN TRADEMARK ACT 1999:-

As India is a party to the Paris convention, the provisions are incorporated in the Trademark Act 1999 which came into effect from 2003. As the provisions of TRIPS are also incorporated in India is under an obligation to provide protection to Well-known marks in their respective country or jurisdiction for different goods and services. In India protection of a well-known trademark is considered more important than that of an ordinary trademark.

In India the expression 'well-known' has mostly been used by the Courts, Authors and other experts as a matter of ordinary English usage, to refer to a trade mark which was comparatively better known amongst the traders or consumers, but as Indian courts and experts were not faced with technical meaning of the well-known marks, necessarily their use of the word reflected ordinary vocabulary in contracts to its use as a technical expression

In India well- known trademarks have been accorded extraordinary proprietary rights against registration of identical or deceptively similar marks as well as against their misuse. This special protection accorded to well- known trademarks is a consequence of precedents and pronouncements that have been judiciously evolved by the Courts in India. India has incorporated all the rights envisaged for well-known trademarks into its new legislation of 1999 effective 15 September, 2003 with prospective effect. The Indian Trademark Registry's website provides a comprehensive list of more than 81 trademarks declared as "well-known" by judicial and quasi-judicial authorities in India.

In the 1999 Act, India has divided the trademarks into two legally unequal types of marks (a) Trademarks as defined in Section 2(1)(zb), and (b) Well-known trademarks as defined in Section 2(1)(zg)[15]and the method of its identification in Section 11(6) to 11(9) which deals with the various matters concerning protection of well-known trademark. They are in the nature of explanations, which may arise in the context.

The law relating to well-known trademarks has been stated in Section 2(1)(zg), Section 9(1) Proviso, Section 11(2) opposition read with Section 9(2)(a), Section 11(1) and (3), Explanation (b) to Section 29(4), Section 11(6) to Section 11(9), Section 11(10), Section 11(11), Section 29(4) read with all other provisions of Section 29 and Section 33. It is to be noted that a well-known trade mark enjoys all the rights of an ordinary trade mark, and in addition it enjoys all the rights at Common law under the law of passing off. If a well-known mark is registered in India it will enjoy all the rights of a registered trade mark along with the rights of an unregistered mark and well known trade mark.

[15] statutory definition under Section 2(1)(zg) of Trademark Act 1999 ; *"well-known trade mark", in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services".*

In India, Sections 11(2), 11(3), 27, 29(2) of Trademark Act 1999 and Section 11(a), Section 27(2) and Section 32 of Trade and Mercantile Mark Act 1958 are the enabling provisions which may be resorted to for protecting well known mark which are defined in Section 2(1)(zg). The 1958 Act did not provide for removal of an already registered trademark which conflicts with a reputed mark only because of the reputation of well-known mark in India. Section 57 when read along with Section 9(2) Section 11(2) and Section 11(3), Section 11(10) and Section 33 provide removal/objection mechanism if the use of a conflicting mark is likely to cause confusion not only in relation to the same or similar goods but also in relation to different goods. For similar or different goods, relief could be given by courts alone under common law, but now statutory recognition is given to the same under Section 11(2) & (3) and Section 29(4).

An existing registered mark may be injected if a well-known mark prays for an injunction in India, provided its repute can be established by use or acts of advertising. If the objection is taken at the time of registration or fast enough, the court shall grant an injunction.While protecting such trademarks, the court have not dwelled on the theory of their being well-known as such and have said that their protection is justified on the ground that a trademark has acquired goodwill and a reputation. The registration or use of a confusingly similar trademark would, in most cases, be prejudicial to the interests of the public whose members would be misled by the use of conflicting trademarks from being used on goods of different description whereas Article *6bis* provides for measures only for identical or similar goods.

CONCLUSION:

It is evident from the recent judgements and decisions of Indian Judiciary that it respects the proprietorship of a prior user and upholds their rights irrespective of the use of the product geographically. It shows the dynamism of the Indian judiciary and judicial activism towards protection of well-known trademark under the concept of spill-over reputation or trans-border reputation. In Whirlpool case which was a storming decision in so far, the Supreme Court of India confirmed that advertising a trademark is considered to be "use" and is sufficient to prove 'reputation' and 'goodwill' in India, even when no goods are being sold in the Indian market.

The spill-over of reputation can be done through the internet, advertisement or through any means which provides the citizens of a country with sufficient knowledge regarding a brand and its products. In the another recent verdict of the disputed Toyota JidoshaKabushiki Vs M/S Prius Auto Industries Ltd, the Supreme Court's stance on affirming the Delhi High Court's decision to grant the mark PRIUS to Prius Auto Industries has been regarded as the new path to support the doctrine of Trans-Border reputation in India.

The contribution of the judiciary in the adoption and enforcement of the doctrine of trans-border reputation in India and the legislature to amend the Trademarks Act, 1999 and the incorporation of the concept of 'well-known marks' in consonance with international treaties such as the Paris Convention and the TRIPS Agreement in our domestic law are a welcome move. It also empowers the Registrar of Trademarks to reject applications for registration of marks on the grounds of similarity with existing marks enjoying widespread recognition consequently it could stem the volume of litigation at a later point in time.

A further amendment in the Trademarks Act which could provide real teeth to the provisions for protection of well-known marks would be to introduce the concept of a separate register for popular foreign trademarks. One of the essential factors for a mark to be considered well-known in India is its knowledge amongst the relevant section of public in India. Trademarks which may be well-known in multiple countries, may still struggle to find feet in India because of lack of knowledge amongst the relevant consumers in India. To this end, a separate register for popular foreign trademarks, maintained by all Trademark Offices in India, could prove to be highly effective. Foreign entities could then adduce evidence of the business activities associated with their marks abroad and proof of the well-known status of these marks in foreign jurisdictions and could then seek to have their famous marks enrolled on the said register. This could possibly assist a foreign claimant seeking to protect trans-border reputation in marks which have no exposure amongst Indian consumers, resulting in better protection of foreign trademarks in India.Additionally in a landmark judgement with respect to medicine of Milmetoftho Case,the apex court specifically heldthat medicines have an international character and the medical fraternity must keep abreast of the latest developments in medicine and its preparation worldwide.

At the outset it can surely said that these both concepts of well-known trademarks and trans-border reputation have been given relevance and importance in pith and substance by the courts in India, including implementation of the same in ground reality. Apart from this the legislature of this country has also shown its commitment and determination to incorporate the recent development of international laws into our domestic laws which will surely shape the Intellectual Property concepts and proved to be a milestone in the intellectual property law making in the near future. The Indian judiciary respects and upholds the right of prior user of trade mark anywhere in the world. The present position of trans-border reputation in Indian jurisprudence is largely a judicial creature to suit modern commercial requirements and its expediency.

MOB LYNCHING: RACISM REDEFINED?

AN ANALYSIS MOB LYNCHING IN INDIA AND USA

-Dibya Prakash Lahiri[1]

ABSTRACT

Mob Lynching is a pathway to glorify a religion or a class of people by oppressingand taking the laws into one's own hands. It involves taking one's life by attacking the person in groups.It is pre-dominantly foundin the northern part of the country and has its roots in USA. The rise in the phenomena of mob lynching India is as alarming as helplessness in terms of lack of availability of laws in the country. This paper focuses on the occurrences of cases of mob lynching in countries like the United States and India and to draw upon the similarities in the incidents across the two jurisdictions. Also, the paper focuses on the present laws in India and find solutions to counter the ongoing surge in the mob lynching cases.

INTRODUCTION

Mob lynching can be referred to as the socio-cultural ascendancy of one class/group of people on the basis of race, caste, religion, dominion and cultural differences by annexing over their personal rights and liberties by taking away one's life and liberty. Lynching as the term coined by Charles Lynch [2] was mainly based on the arrests of the Loyalist supporters of the British for up to one year during the war . The concept of lynching in near future took an alternate turn wherein it was used as a medium to kill the blacks during the American Civil War era as well as the domination of the whites over the other races as well. India, being a country on a different pedestal, has a different case in terms of lynching a person. The cases of mob lynching in India varies on different levels from communal to caste based to superstitious beliefs. The lynching that has occurred in recent times have shown a similar pattern in terms of possessing dominance of one over the another.

HISTORICAL DEVELOPMENT OF MOB LYNCHING

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2 Charles Lynch New York City: Oxford University Presss. p. 308.

The term lynching associated itself in early 18th century wherein the victims were the people who were the supporters of the British Government or the "Royalists" during the ongoing struggle.[3] Charles Lynch, a politician and a judge originally gave birth to the term which was later known to be the "lynch law". It was mainly referred to the killing of the people without being given a legal trial. The suspects were given a summary trial at an informal court; sentences handed down included whipping, property seizure, coerced pledges of allegiance, and conscription into the military services. [4]

The term lynching then further was affirmed by Captain William Lynch where the term was used to protect the sovereignty and independence of the state of Pennsylvania. However, mid-nineteenth century the term lynching averted itself from self asserted independence to as a device to racially prove its supremacy over people belonging to another race. Lynching itself was used on a humongous level to exploit the slaves who belonged to the African-American Origin and other races. Throughout the late 19th century racial tension grew throughout the United States. More of this tension was noticeable in the Southern parts of the United States. In the south, people were blaming their financial problems on the newly freed slaves that lived around them. Lynchings were becoming a popular way of resolving some of the anger that whites had in relation to the free blacks.From 1882-1968, 4,743 lynching occurred in the United States. Of these people that were lynched 3,446 were black. The blacks lynched accounted for 72.7% of the people lynched. These numbers seem large, but it is known that not all of the lynchings were ever recorded. Out of the 4,743 people lynched only 1,297 white people were lynched. That is only 27.3%. Many of the whites lynched were lynched for helping the black or being anti lynching and even for domestic crimes [5]. Most of the lynchings that took place happened in the South. A big reason for this was the end of the Civil War. Once black were given their freedom, many people felt that the freed blacks were getting away with too much freedom and felt they needed to be controlled. Mississippi had the highest lynchings from 1882-1968 with 581. Georgia was second with 531, and Texas was third with 493. 79% of lynching happened in the

3 Loyalist uprising South Western Virginia,1776.

4 Virginia Legislative Assembly, 1782

5www.naacp.org/history-of-lynching

South[6]. The lynchings of blacks epitomized itself during right after the Reconstruction[7] era, wherein the people of African-American origin were given the right to vote, have access to economic benefits and running for public office. Many whites (landowners and poor whites) felt threatened by this rise in black prominence. Foremost on their minds was a fear of sex between the races. Some whites espoused the idea that black men were sexual predators and wanted integration in order to be with white women. Lynchings were frequently committed with the most flagrant public display. Like executions by guillotine in medieval times, lynchings were often advertised in newspapers and drew large crowds of white families. They were a kind of vigilantism where Southern white men saw themselves as protectors of their way of life and their white women. By the early 20th century, famous writer Mark Twain had written an essay the United States of Lyncherdom based on the mass lynchings that took place in Missouri[8]. The main concept behind the lynchings of African-American origin that took place was on the basis of superiority complex and domination. Accordingly, the whites to counter the uprising of the African-American origin formed into groups and likewise decided to abuse and murder the people on a high scale. The Ku Klux Klan formed by the white supremacists of South intended to reduce the position of the African-American Origin to a mere slaves with no basic rights. The Klan attacked black members of the Loyal Leagues and intimidated Southern Republicans and Freedman's bureau workers. When they killed black political leaders, they also took heads of families, along with the leaders of churches and community groups, because these people had many roles in society. Agents of the Freedmen's Bureau reported weekly assaults and murders of blacks.

"Armed guerrilla warfare killed thousands of Negroes; political riots were staged; their causes or occasions were always obscure, their results always certain: ten to one hundred times as many Negroes were killed as whites." Masked men shot into houses and burned them, sometimes with the occupants still inside. They drove successful black farmers off their land. "Generally, it can be reported that in North and South Carolina, in 18 months ending in June 1867, there were 197 murders and 548 cases of aggravated assault."[9] The lynchings were orchestrated in a manner that

6 www.pbs.org/history

7 Reconstruction Act, 1867

8 United States of Lyncherdom, 1901, Mark Twain

9 Du Bois, *Black Reconstruction in America: 1860–1880* pp. 674–675.

was made easier and legal for the white supremacists. The murders reflected the tensions of labour and social changes, when the Whites introduced the Crow rules, the discrimination on the basis of legal segregation and white supremacy. The lynching is also an indicator long economic stress due to falling cotton prices even thoughthe 19th century. In the bottomlands of Mississippi bottomlands, for instance, lynchings rose when crops and other matters had to be settled. During the disenfranchisement period, a clear pattern to lynching existed on seasonal basis in quantum being winter the deadliest amongst them. As stated "From September through December, the cotton was picked, debts were revealed and profits(or losses) realised. Whether concluding old contracts or discussing arrangements, (landlords and tenants) frequently came into conflict in these months and sometimes fell to blows."[10] During the winter, murder was cited as a cause for lynching. During the winter, murder was most cited as a cause for lynching. After 1901, as economics shifted and more blacks became renters and sharecroppers in the Delta, with few exceptions, only African American were lynched. The frequency increased from 1901 to 1908 after African Americans were disenfranchised. "In the twentieth century Delta vigilantism finally became predictably joined to the white supremacy."[11] Researchers estimate that 597 Mexicans were lynched between 1848 and 1928. Mexicans were lynched at a rate of 27.4 per 100,000 of population between 1880 and 1930. This statistic was second only to that of the African American community, which endured an average of 37.1 per 100,000 of population during that period. Between 1848 and 1879, Mexicans were lynched at an unprecedented rate of 473 per 100,000 of population. [12]Lynchings were public demonstrations of white power and a means to exert social control. Racial tensions had an economic base. In attempting to reconstruct the plantation economy, planters were anxious to control labor. In addition, agricultural depression was widespread, and the price of cotton kept falling after the Civil War into the 1890s. A labor shortage occurred in many parts of the Deep South, most especially in the Mississippi Delta, which was being rapidly developed for agriculture. Southern attempts to recruit immigrant labor were unsuccessful, as immigrants would quickly leave field labor. Lynchings erupted when farmers tried to terrorize the laborers, especially when time came to settle and they were unable to pay wages, but tried to keep laborers from leaving.

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10 Willis, 2000 pp. 154-155

11 Willis, 2000 p.157

12Carrigan, William D. *The lynching of persons of Mexican origin or descent in the United States, 1848 to 1928*. Retrieved November 7, 2011.

RESISTANCE IN USA

Post the civil war, the African-American origins decided to stand up for their rights and resisted the suppression and dominance likewise resorted themselves into groups and protested against the oppression and the discrimination. Reports were published in various tribunes to show the incidents of mob lynching and other atrocious activities. Racial terrorism and intimidation of African Americans became characteristic of Southern democracy during the 1870s and prompted little action from federal observers. A proposal in Congress to discipline Georgia for the violence and corruption surrounding its 1870 election was defeated by a five-day filibuster in the Senate, and Northern support for federal intervention on behalf of black people living in the South diminished considerably. The Amnesty Act was passed over the objection of Congressman Jefferson Long. Born into slavery in 1836 and elected in 1870 as Georgia's first black representative in the United States Congress, Long became the first black person to speak on the House floor when he opposed amnesty. Long asked: "Do we, then, really propose here today, when the country is not ready for it, when those disloyal people still hate this government, when loyal men dare not carry the 'stars and stripes' through our streets, for if they do they will be turned out of employment, to relieve from political disability the very men who have committed these Kuklux outrages? I think that I am doing my duty to my constituents and my duty to my country when I vote against any such proposition. Mr. Speaker, I propose, as a man raised as a slave, my mother a slave before me, and my ancestry slaves as far back as I can trace them... If this House removes the disabilities of disloyal men by modifying the test-oath, I venture to prophesy you will again have trouble from the very same men who gave you trouble before."[13] Similarly, in Virginia, former Confederate General James L. Kemper was inaugurated as governor in 1874 and, that same year, delivered an address to the General Assembly outlining the racial regime he intended to create:

"Henceforth, let it be understood of all, that the political equality of the races is settled, and the social equality of the races is a settled impossibility. Let it be understood of all, that any organized attempt on the part of the weaker and relatively diminishing race to dominate the domestic governments, is the wildest chimera of political insanity. Let each race settle down in final

13Congressman Jefferson F. Long, Speech on Disorders in the South, CONGRESSIONAL GLOBE, 41st Congress, Third Session 881-882 (1872).

resignation to the lot to which the logic of events has inexorably consigned it."[14] An 1887 report by the Hinds County, Mississippi grand jury recorded that, six months after 204 convicts were leased to a man named McDonald, twenty were dead, nineteen had escaped, and twenty-three had been returned to the penitentiary disabled, ill, and near death. The penitentiary hospital was filled with sick and dying black men whose bodies bore "marks of the most inhuman and brutal treatment . . . so poor and emaciated that their bones almost come through the skin." Under this grotesquely cruel system that lasted decades, countless black men, women, and children lost their freedom—and often their lives. "Before convict leasing officially ended," writes historian David Oshinsky, "a generation of black prisoners would suffer and die under conditions far worse than anything they had ever experienced as slaves." Convict leasing demonstrated the way in which the criminal justice system would become the central institution for sustaining racial domination and hierarchy in America. It legitimized excessive punishment and abuse of African Americans and terrorized people of color. Accordingly, it can be seen as how the racism played a key role in lynching and as to how the Government of USA hardly took any measures which would subside this issue of racial discrimination.

SOLUTIONS TO COUNTER LYNCHING IN USA

The first appropriate step to make Lynching a federal crime was introduced in the Senate by the Republican SenatorLeonidas C. Dyer, a Republican from St. Louis, Missouri, in the United States House of Representatives as H.R. 11279.[15] The Dyer Anti-Lynching Bill was re-introduced in subsequent sessions of Congress and passed by the U.S. House of Representatives on January 26, 1922, but its passage was halted in the Senate by a filibuster by Southern Democrats, who formed a powerful block that exceeded their percentage of the population by having disenfranchised blacks. The NAACP supported the passage of this bill from 1919 onward; they had not done so initially, arguing that the bill was unconstitutional

14 Annual Message and Accompanying Documents of the Governor of Virginia to the General Assembly, December 2, 1874 29 (1874)

15 *Journal of the House of Representatives of the United States, Volume 65, Issue 2*. Washington DC: Government Printing Office. 1918. p. 297.

based on the recommendations of Moorfield Storey, a lawyer and the first president of the NAACP. Storey revised his position in 1918 and from 1919 onward the NAACP supported Dyer's anti-lynching legislation. The Dyer Bill was passed by the House of Representatives on the 26th of January 1922, and was given a favorable report by the Senate Committee assigned to report on it in July 1922, but its passage was halted by a filibuster in the Senate. Efforts to pass similar legislation were not taken up again until the 1930s with the Costigan-Wagner Bill. The Dyer Bill influenced the text of anti-lynching legislation promoted by the NAACP into the 1950s, including the Costigan-Wagner Bill.[16]

The bill classified lynching as a federal felony, which would have allowed the United States to prosecute cases, since states and local authorities seldom did. The bill prescribed punishments for perpetrators, specifically:

- (a) A maximum of 5 years in prison, $5,000 fine, or both, for any state or city official who had the power to protect a person in his jurisdiction but failed to do so *or* who had the power to prosecute those responsible and failed to do so.

- (b) A minimum of 5 years in prison for anyone who participated in a lynching, whether they were an ordinary citizen or the official responsible for keeping the victim safe.

- (c) $10,000 fine to be paid by the county in which the lynching took place, to be turned over to the victim's family or his parents, or to the United States government if the victim has no family. If the victim was seized in one county and killed in another, both counties were to be fined.

In addition, the law prescribed actions of special circumstances:

- (a) If officers fail to equally protect all citizens, they can be prosecuted in federal court.

- (b) Foreign visitors were not exempt from this law and were to be prosecuted within the laws of the state or territory, as well as protected by those same laws. [17]

16 https://www.naacp.org/naacp-history-dyer-anti-lynching-bill/

17 Anti-lynching bill,1918 Senator Dyer, *Section 1-8*

From 1882 to 1968, "...nearly 200 anti-lynching bills were introduced in Congress, and three passed the House. Seven presidents between 1890 and 1952 asked Congress to pass a federal law." [18] The laws passed in the Senate was never implemented further and was turned down by the Southern democrats with holding the power to implement the policy.

MOB LYNCHING IN INDIA

Mob lynching, as the term suggests, in India has been used as a weapon of suppression used for showing dominance over other people on the basis of religion, caste, skin colour, linguistic chauvinism etc. The concept of mob lynching in India in recent times has taken a turn and has been colourised with the inter communal dispute involving people belonging mainly from two communities i.e. Hinduism and Islam.The reason behind commission of an act of mob violence cannot be attributed to one factor as many factors can contribute towards such violence. The mostcommon reason is technology. In the last one year, 28 people across nine Indianstates have been lynched in separate incidents, which have been triggered byrumors spread on social media. Of these, more than 20 people were victimsof mob lynching in the last two months alone. One such incident occurred on15 July 2018 in Karnataka when a software engineer was beaten to death on the suspicion of being a kidnapper.[19]

The mob lynching concept in India for the first time was given the communal colours in 2012 in which first such attack occurred on June 10, in Joga town in Mansa district, Punjab, “after carcasses of about 25 cows were found” near a factory. Led by activists of the Vishwa Hindu Parishad and the Gowshala Sangh, villagers gathered in the morning and broke into the premises of the factory, where carcasses of cows were lying and some animals were alive. The mob went on the rampage damaging the factory and setting ablaze the houses of at least two of those running the unit, Ajaib Singh and Mewa Singh. Accordingly, the rate at which the lynching rose made a huge impact on the Indian society and harmony. The first case which comes in the eyes is the killing of 52-year-old Muslim man, Mohammad Akhlaq, who was along with his son dragged and was beaten to death by a mob for allegedly storing beef in his house. [20] On May 30, 2017, a PhD

18Lynching in the United States#cite note-AP-7

19 https://archive.indiaspend.com/cover-story/86-dead-in-cow-related-violence-since-2010-are-muslim-97-attacks-after-2014-2014

20 Mohammad Akhlaq, Dadri lynching, 2015

scholar in Indian Institute of Technology, Madras, was at one of the vegetarian messes on campus, when he was attacked allegedly for eating beef. An FIR was registered against the alleged attacker, while the scholar was booked based on a complaint by the alleged attacker who termed the incident a 'minor scuffle'.[21] The mob lynching in Indian society is not only confined to two religions, but it has gone beyond that. In April this year, 55-year-old Prakash Lakda, a member of a Christian tribe, was lynched by a mob of Hindu villagers who suspected him of slaughtering a cow in the central Indian state of Jharkhand. Three other tribals from his village were also attacked, leaving them grievously injured. Lakda, the victim was a butcher who used to work at a local meat shop was lynched on an allegeation which was not even proven. The mob lynching concept in Indian society has very well imbibed with cow vigilantism and with which the right winged organisations such as Bajrang Dal, Vishwa Hindu Parishad and others have used forces to attack people from other religions.

SIMILARITY IN LYNCHINGS IN INDIA AND UNITED STATES

Mob lynching significantly rose in the United States during the 19th century period where the blacks were lynched or killed to assert domination by the whites over them. The lynching process was done in such a way that the displaying was made with a pride and the act was done to protect the superficial honour of the white supremacists.

Similarly, in India, the dominance and supremacy of the dominant class and with the lack of availability of laws , the lynching process has taken the similar course of action and with addition of the cow vigilantism process, the mob lynching in India has taken a massive leap and with more agony, has resulted in a lot of communal tension and disharmony.

The supremacy of one over the another along with the characterization of the pre conceived notions has thus resulted and created an environment of stress which ultimately hinders the growth of the country in all the aspects.

LAWS IN INDIA FOR LYNCHING

The mob lynching laws in India per se have not been codified nor has it been defined. The Supreme Court, has on several occasions mentioned as to how the laws should be made and gave out various steps for the government to make laws according to it.

21 https://archive.indiaspend.com/cover-story/86-dead-in-cow-related-violence-since-2010-are-muslim-97-attacks-after-2014-2014

1. The state governments shall designate a senior police officer in each district for taking measures to prevent incidents of mob violence and lynching. [22]
2. The state governments shall immediately identify districts, sub-divisions and villages where instances of lynching and mob violence have been reported in the recent past.
3. The nodal officers shall bring to the notice of the DGP any inter-district co-ordination issues for devising a strategy to tackle lynching and mob violence related issues.
4. It shall be the duty of every police officer to cause a mob to disperse, which, in his opinion, has a tendency to cause violence in the disguise of vigilantism or otherwise.
5. Central and the state governments should broadcast on radio and television and other media platforms including the official websites that lynching and mob violence shall invite serious consequence.
6. Curb and stop dissemination of irresponsible and explosive messages, videos and other material on various social media platforms. Register FIR under relevant provisions of law against persons who disseminate such messages.
7. State governments shall prepare a lynching/mob violence victim compensation scheme.
8. Cases of lynching and mob violence shall be specifically tried by designated court/fast track courts earmarked for that purpose in each district. The trial shall preferably be concluded within six months.

The Supreme Court asked for an affirmative action when it comes to serve the victims of mob lynching and their family likewise. However, as such there has not been much development made in the field of making and implementing the laws related to anti-lynching by the Central Government till this date. However, Government of Rajasthan has successfully been able to pass the Anti-mob lynching Bill in the Legislative Assembly.[23]

SALIENT FEATURES OF THE BILL

The Act defines lynching as an act or series of acts of violence or those of aiding, abetting or attempting an act of violence, whether spontaneous or preplanned, by a mob on the grounds of

22 In the case of Mohammad Akhlaq, 2015

23 The Rajasthan Protection from Lynching Bill, 2019

religion, race, caste, sex, place of birth, language, dietary practices, sexual orientation, political affiliation or ethnicity.[24]

- The Bill defines mob as "two or more individuals." [25]
- The Bill also empowers the "State police chief to appoint a state coordinator of the rank of Inspector General of Police to prevent the incidents of lynching in the State with the district Superintendents of Police acting as the district's coordinator, to be assisted by a Deputy Superintendents of Police, for taking measures to prevent incidents of mob violence and lynching".
- The bill also proposes for the life time imprisonment of the convicts indulged in mob lynching leading to the death of the victim as well as a pecuniary value between Rupees 1-5 lakh.

Since the Act has been passed recently, only time will tell as to how well the Act has benefitted as well as the quantum of implementation in terms of success.

SOLUTIONS TO COUNTER THE SURGE IN THE MOB-LYNCHING

The concept of mob-lynching has increasingly been linked with the communal colours especially between the two communities. Likewise, the concept of mob lynching needs to be understood and should be made clear in terms of how the communalization can be stopped.

It needs to stated that Politics is the direct cause of these instances of violence in the two states of West Bengal and Kerala while the lynching of beef-eaters and meat traders in other parts of the country underlines the fascist trait of targeting those who are seen as "aliens" who are violating the culinary fetishes of the ruling dispensation.

On the other hand, the killing of the suspected kidnappers of children is apparently the result of an atmosphere of anarchy which has come to prevail in the absence of a stern enforcement of law and order — a lacuna which the judiciary wants to be rectified to instill fear in the offenders.

24 Section 2(3(vii)), Rajasthan Protection from Lynching Bill, 2019

25 Section 2(3(viii)), Rajasthan Protection from Lynching Bill, 2019

The narrative has been developed in such a manner that the due process and the belief has been put to the wrong use which has created differences of opinion amongst the people as such that they have imbibed the hate in them.

The social media, being the best tool to spread hate and rumors, needs to be countered at first place in such a manner that anyone who intends to spread the fake news gets immediately caught and any such fake news be altered with the correct facts.

The areas sensitive to communal disharmony should also be given some serious attention as to avoid any communal violence per se and ensure the security of everyone present per se in that area.

The laws and other rules should be created in such a manner that immediate action be taken against the convicts and instill in the minds of the people the fear to avoid the unnecessary violence and taking part in them.

CONCLUSION

The concept of mob lynching has always been involved with the more of pride and honor commitments of one religion over another with an intention to create a scene of dominance just to assert it and use it as a tool to stick to it. The nature of mob lynching, both in the US as well as in India have a common agenda: Supremacy of one community over another. The journey to reduce the crime rates of lynching in USA took a long time as to counter with the incoming of unnecessary reforms delaying the process and creating a mood of fear and thus failing to reduce the crime rates. India, as a young nation with a lot of open thought processes can per se imbibe and take lessons from other countries and develop laws accordingly. With the prospects of India being a super power in near future, these hindrances and such offences can not only affect the internal peace as well as create an image of disgust amongst the other nations. A centralized law should be established in the country based on the guidelines laid down by the Supreme Court of India and on those lines, the States in the country can also follow those laws and create peace in the country.