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“If India ever finds its way back to the freedom and democracy that were proud hallmarks of its first eighteen years as an independent nation, someone will surely erect a monument to Justice H R Khanna of the Supreme Court.”

THE NEW YORK TIMES ON JUSTICE KHANNA

This issue is dedicated to one of the best jurists India has ever known

Justice Hans Raj Khanna (1912-2008)
A Tribute to the Democratic Spirit in India

Justice Khanna, known for his judgments that form the basis of the modern Constitutional Law in India, accredited with the formulation of the Basic Structure in Kesavananda Bharti’s case and for upholding the principles of Liberty and Democracy in the darkest hours of Indian Democracy during the Indian Emergency Era. Justice H.R. Khanna emphasized on the power of dissent as seen in ADM Jabalpur’s case. The act of not supporting the Government-in-place during the emergency costed Justice Khanna the Chair of the Chief Justice of India. He is even today regarded as the True Champion of Human Rights in India.
CONTENTS

EDITORIAL NOTE vii

I. TAX IMPLICATIONS ON MERGERS & ACQUISITIONS VIS-À-VIS CROSS-BORDER MERGERS
Aayushi Singh 8

II. NJAC AND THE LEGAL BATTLE: AN ANALYSIS
Aleena Maria Jose 20

III. LIABILITY IN NUCLEAR DISASTERS IN INTERNATIONAL LAW
Anshika Shukla, Priyavrat Parashar 27

IV. INDIA’S PATENT LAW: COMPLEXITY OF DISPUTE & GLOBAL ECONOMICS
Ashutosh Jain 35

V. BIOPICS: A CONTEXTUAL, SOCIOLOGICAL, LEGAL ANALYSIS OF BIOGRAPHICAL MOTION PICTURES IN INDIA
Chandana Arval, Chunky Agarwal, Tanay Agarwal 51

VI. CHARACTER MERCHANDISING IN TRADEMARKS
Chandrika Tewatia 60

VII. CONSTITUTIONALITY OF CORPORATE SOCIAL RESPONSIBILITY
Deepak Shukla 71

VIII. WHEN TRADEMARKS DECEIVE & BUYERS SPECTATE: A STUDY OF TRADEMARK LAW AND INDIAN CONSUMERS
Jonnavithula Gayatri Anugha, Ujwal Prabhakar Nandekar 80

IX. TRADITIONAL KNOWLEDGE OF JEEVANI: A CASE STUDY
Jaya Steffi Minz 88
<table>
<thead>
<tr>
<th>No.</th>
<th>Title</th>
<th>Authors</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>X.</td>
<td>TRANSFER OF TITLE: JUDICIAL INTERPRETATION</td>
<td>Masud Kalas</td>
<td>95</td>
</tr>
<tr>
<td>XI.</td>
<td>NEW IPR POLICY 2016: TAKING IPR TO ANOTHER LEVEL</td>
<td>Mudit Srivastava, Nikhita Kansal</td>
<td>106</td>
</tr>
<tr>
<td>XII.</td>
<td>BANKRUPTCY BILL 2016 AND CROSS-BORDER INSOLVENCY</td>
<td>Pavan Krishna Reddy</td>
<td>124</td>
</tr>
<tr>
<td>XIII.</td>
<td>CROWDFUNDING: AN ANALYTICAL STUDY OF AMERICAN JOBS ACT</td>
<td>Pavithra Ravi</td>
<td>133</td>
</tr>
<tr>
<td>XIV.</td>
<td>CROWD-FUNDING AS A FINANCING TOOL: THE WAY FORWARD</td>
<td>Sarthak Mishra</td>
<td>144</td>
</tr>
<tr>
<td>XV.</td>
<td>MERGER OF SEBI &amp; FMC</td>
<td>Shubham Rathi, Abhas Srivastava</td>
<td>161</td>
</tr>
<tr>
<td>XVI.</td>
<td>THE ALTERNATIVE INVESTMENT STRUCTURE – REITs</td>
<td>Subhalagna Choudhary</td>
<td>172</td>
</tr>
<tr>
<td>XVII.</td>
<td>ARTICLE 12: TEXT VERSUS TELEOLOGY</td>
<td>Sudhanshu Gupta, Akanksha Anand</td>
<td>180</td>
</tr>
<tr>
<td>XVIII.</td>
<td>GROWTH &amp; OBJECT OF TRIBUNALS IN INDIA: A CRITICAL ANALYSIS</td>
<td>Sukriti Sinha</td>
<td>193</td>
</tr>
<tr>
<td>XIX.</td>
<td>SOCIAL ENGINEERING IN HUMAN MILK BANKING: A PRISMATIC APPROACH TO THE CORPORATE SOCIAL RESPONSIBILITY</td>
<td>Susmita Haldar</td>
<td>213</td>
</tr>
<tr>
<td>XX.</td>
<td>COMPARATIVE ADVERTISEMENT ON THE INTERNET: TRADEMARK DISPARAGEMENT</td>
<td>Tija Goswami</td>
<td>244</td>
</tr>
<tr>
<td>Article Number</td>
<td>Title</td>
<td>Author</td>
<td>Page</td>
</tr>
<tr>
<td>---------------</td>
<td>----------------------------------------------------------------------</td>
<td>----------------------</td>
<td>------</td>
</tr>
<tr>
<td>XXI</td>
<td>LAW BINDING SOCIAL MEDIA MARKET?</td>
<td>Gautam Mishra</td>
<td>257</td>
</tr>
<tr>
<td>XXII</td>
<td>THE LEGAL EXPOSITION OF GAMBLING LAWS IN INDIA: STILL AN UNEXPLORED TERRITORY</td>
<td>Vishal Chakravarthy</td>
<td>268</td>
</tr>
<tr>
<td>XXIII</td>
<td>JUDICIAL ACTIVISM: HOPE OF HIGH-HANDEDNESS OF HIS LORDSHIPS</td>
<td>Sudipta Bhowmick</td>
<td>278</td>
</tr>
<tr>
<td>XXIV</td>
<td>PIL &amp; JUDICIAL ACTIVISM: OVERREACHING OR UNDERACHIEVING</td>
<td>Pallavi Versha</td>
<td>289</td>
</tr>
<tr>
<td>XXV</td>
<td>THE SPIRIT OF SOCIAL ACTION LITIGATION &amp; JUDICIAL ACTIVISM</td>
<td>Swetha S.</td>
<td>298</td>
</tr>
<tr>
<td>XXVI</td>
<td>PIL &amp; JUDICIAL ACTIVISM</td>
<td>Nomita Mishra</td>
<td>309</td>
</tr>
<tr>
<td>XXVII</td>
<td>JUDICIAL ACTIVISM IN INDIA: TRANSITION FROM ACTIVISM TO OVERREACH</td>
<td>Ashish Gupta</td>
<td>317</td>
</tr>
<tr>
<td>XXVIII</td>
<td>REVIEWING JUDICIAL GROUNDS: SCENARIO OF CHANGING WAYS OF JUSTICE</td>
<td>Priyanshi Meena, Jai Meena</td>
<td>327</td>
</tr>
</tbody>
</table>

**THANK YOU NOTE**

*We thank the authors for their valuable contributions*
Editorial Note

The Editorial Team is pleased to bring forth the third issue of the International Journal of Law & Management Studies (ISSN-2455-2771) with the hope that the experience would be enriching for the Readers. This edition of IJLMS (June 2016) was preceded by the 1st IJLMS Justice H.R. Khanna Memorial Essay Competition 2016. This competition had witnessed some of the finest participants with their eloquent essays in the competition. With the theme of Judicial Activism, the participants were to explain and analyze the trends of growth of Judicial Activism in India in the recent-past. Judicial Activism is a tool whereby the judiciary exceeds power assigned to it by law in the interest of justice, equity and good conscience. Theoretically, this violates the Doctrine of Separation of Powers, however, there are two counter-arguments to it, the first being, Separation of Powers is not so rigid in India and the second, the interest of justice overrules it. It is important to note that there are two sides of the coin with regard to the function of the courts of law and their powers. Whether a court is to strictly follow the word of law, following Positive Law, or treat the law with the Principles of Natural Justice, following Natural Law, differs from a case-to-case basis. A cause of Judicial Activism is the clash of judgments with the Political Goals. As Justice (Retd.) P. N. Bhagwati quotes, political ideology is bound to clash with judgments of the courts and the former should not be a basis for a ruling. While it is one perception that harmony and compatibility between organs produces directed efforts towards the goals, a conflict may sometimes ensure ‘Checks-and-Balances’ being an essential part of the democracy. Indian Democracy has been undergoing a change in terms of the division of powers and the Judiciary seems to be taking the naturalist view and upholding Supremacy of Constitution & Natural Justice Principles over the legislature made Law. Activism is widespread today and actions of Legislature & Executive are under constant Judicial Scrutiny. This calls for the citizenry to review and analyze each step of the unelected vital organ of the democracy in order to ensure that it does not result in Judicial Totalitarianism. We at IJLMS dedicate this issue to the discussion whether Judicial Activism is paving the right way in India.

“The employment of Activism must be in the spirit of the Constitution to uphold its principles and its vanishing point must be where it treads towards Overreach. At all times, Supremacy of Constitution and Harmony between organs must be ensured for a better democracy.”

EDITOR-IN-CHIEF
TAX IMPLICATIONS ON MERGERS AND ACQUISITIONS VIS-À-VIS CROSS-BORDER MERGERS

AAYUSHI SINGH

Abstract

Throughout the waves of mergers, restructuring and amalgamations, there has been no dearth of explanations for the increase in the activity in the market for corporate control. The paper firstly emphasizes the positive role that mergers and takeovers play in the allocation of resources in society while some point out towards the tax benefits and incentives that ensue from the same. The objective of the paper is to understand the principle and tax implications of the amalgamation and reconstruction of companies. Firstly, the applicable tax provisions have been scrutinized and the capital gains tax liability has been understood in terms of the amalgamating and amalgamated company with special reference to recent case laws and an in depth analysis of Sec. 34, 35, 45, 47 of the Income Tax Act, 1961.

The tax motive has also been mentioned frequently and the underlying intent with which corporate entities are reaping windfall gains via tax reductions and the treasury may be unintentionally subsidizing takeover activity that must be paid for by others in the fiscal system is analyzed. Due to the recent upsurge in cross-border mergers and growth in FDI, tax incentives provided to cross-border mergers have been dealt with and case studies as Sanofi, Vodafone Essar, Idea Cellular, Genpact have been briefly dealt with, while comparing the viability of cross-border mergers as against Greenfield mode of foreign direct investments. A comparative study of US, UK and EU laws regarding cross-border merger policies has also been made.

The availability of benefits of carry forward and set off of accumulated losses and unabsorbed depreciation of the amalgamating company owning an industrial undertaking have been scrutinized in light of the Income Tax rules and Sec. 72 of the Act. Prior to the concluding remarks, the tax neutrality of certain amalgamations and demergers has briefly been dealt with. The paper finally culminates with how the introduction of the new direct tax code brings with it an attempt to emphasize transparency and taxpayer-friendliness.

Introduction

India is merely a toddler in terms of mergers, amalgamations and acquisitions and the maturity levels it has attained for the same but it is a large enough economy and domain that it will need to immediately incentivize foreign investments, and provide opportunities to Indian business for investment opportunities abroad. In order to facilitate globalization, Indian government also

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implemented various policies which marked a paradigm shift in the operation of the domestic firms as it removed the patronage enjoyed by the domestic firms under the assumptions like Infant Industry argument and opened them for the free play of market forces. More importantly, globalization reduced the product life cycles and the firms began to bring out new products quickly to the market as compared to the past. The time now is crucial and the future is critical. Amalgamation and arrangements are slowly growing to be the lifeblood of Indian business now, and it must be provided the support and stability to ensure that the sector and economy remain progressive and positive.

Thus, the major issues of research that present themselves before us at this juncture are:

a) Whether the tax liability of capital gains on shareholders of amalgamated/amalgamated company is minimized post an amalgamation

b) Whether cross border mergers are more economically viable than Greenfield investment of acquiring FDI

c) Whether set off of accumulated losses and unabsorbed depreciation provide inherent tax incentives than merely incurring unprecedented losses for the newly formed company

d) Whether practice of demerger inculcates and tax neutrality and the financial viability of the same.

Applicable legal provisions.

There are several advantages in M&A — cost cutting, efficient use of resources, acquisition of competence or capability, tax advantage and avoidance of competition are a few. Amalgamation is used for effective tax planning. It is used a) when one of the amalgamated companies has accumulated business losses b) when one of the amalgamated companies enjoys a subsidized rate of taxation. In such a case, it will result in large tax savings for the amalgamated company. The Indian law starts on the premise that transfer of capital assets in a scheme of amalgamation by the amalgamating company to the amalgamated company will attract capital gains tax. However, if the amalgamated company is an Indian company, it is exempted from capital gains tax. If conditions mentioned under Sec. 2(1B) of the Income Tax Act are satisfied then tax incentives are available to the a) amalgamating company b) amalgamated company c) shareholders of amalgamating company. Section 2(1B) essentially explains how amalgamation takes place when all property as well as liabilities of amalgamating company becomes property of amalgamated company immediately after amalgamation and shareholders holding
not less than 3/4th of the share capital of the amalgamating company become shareholder of amalgamated company. The above purchase should not be pursuant to a purchase agreement or winding-up.

**Tax incentives – For amalgamating company.**

*Section 35ABB, Income Tax Act, 1961* – There is no tax liability on transfer of a license to operate telecommunication services by amalgamating company to amalgamated company.

*Section 42, Income Tax Act, 1961* – There is no tax liability on transfer of a business of prospecting for or extraction or production of petroleum and natural gas by the amalgamating company if the amalgamated company is an Indian company.

*Section 47 (vi), Income Tax Act, 1961* - There is no capital gain arising to amalgamating company consequent to transfer of capital asset to Indian amalgamated company.

*Section 47 (via), Income Tax Act, 1961* – Any transfer, in a scheme of amalgamation, of a capital asset being a share(s) held in an Indian company, by the amalgamating foreign company to the amalgamated foreign company.

**Tax concessions – For amalgamated company**

If the amalgamating company has incurred any expenditure eligible for deduction under sections 35(5), 35A(6), 35AB(3), 35ABB, 35D, 35DD, 35DDA, 35E and/or 36(1)(ix), prior to its amalgamation with the amalgamated company as per section 2(1B) of the Act and if the amalgamated company is an Indian company, then the benefit of the aforesaid sections shall be available to the amalgamated company, in the manner it would be available to the amalgamating company had there been no amalgamation.

**Capital gains tax liability on the shareholders: Jurisprudential aspect**

Effect on amalgamating company

Shareholders of an acquired corporation can receive many forms of payment when they sell their shares as part of a merger or acquisitions. Such receipts may be deemed taxable or nontaxable. If they are taxable, then the shareholders must pay capital gains taxes on their gain over basis. The question whether allotment of shares, debentures, or payment of cash etc. to the shareholders of the merging company attracts liability to the capital gains is debatable.

In the case of *Commissioner of Income Tax v. Mrs. Grace Collis and Another*, the SC has held that “extinguishment of any rights in any capital asset” under the definition of “transfer” would include the extinguishment of the right of a holder of shares in an amalgamating company, which
would be distinct from and independent of the transfer of the capital asset itself. Hence, the rights of shareholder of the amalgamating company in the capital asset, i.e. the shares, stands extinguished upon the amalgamation of the amalgamating company with the amalgamated company and this constitutes a transfer under Section 2(47) of the ITA. The provisions of Section 45 relating to capital gains will not apply to any transfer by a shareholder when a shareholder in the scheme of amalgamation transfers the shares held by him in the amalgamating company if the following conditions are satisfied. Further, amalgamation does not involve an exchange or relinquishment of shares by amalgamating company as held in Commissioner of Income Tax v. Rasik Lal Manek Lal. No such tax would be payable unless amalgamation involves was a transfer within the meaning of section 2(47).

Every scheme of amalgamation provides for a transfer date from which the amalgamation is effective i.e., the ‘Appointed Date’. The ‘effective date’ is the date when the amalgamation actually takes place after obtaining the jurisdictional Court Approval and furnishing of the relevant documents with the RoC. The effective date thus differs from the appointed date. For purposes of income-tax, the appointed date mentioned in the Scheme, and not the date of receiving the last approval for the amalgamation, should be considered.

- **Capital gains tax implication for the amalgamating (transferor) company.**

There will be no capital gains tax on transfer of a capital asset by the amalgamating company to the amalgamated company in the scheme of amalgamation if the amalgamated company is an Indian company. Charge of capital gains arises in respect of profits or gains arising from transfer of capital assets. Income is to be computed from the consideration for transfer. In other words if there is no consideration, capital gains cannot arise. In case of merger, properties and liabilities of merging company vest in the merged company by virtue of a court sanctioned scheme. The consideration for such vesting flows directly to the shareholders in the form of cash, equity shares and the like. Thus so far as company is concerned, since it would not receive any consideration, no capital gains would arise in the hands of company.

**Widening ambit of Sec. 47 of the Income Tax Act – Tracing case laws.**

Sec. 47 deems to cover under its Clause (vii) only the Transfer of Shares of the Amalgamating Company to it and not the allotment of shares in the amalgamated company. Allotment of shares in the amalgamated company to the shareholders of the amalgamating company in a scheme of amalgamation is an Extinguishment u/s 2(47) and hence is chargeable to Capital Gain Tax. While
granting exemption u/s 47(vii) on Transfer of Shares held in an amalgamating company during a scheme of Amalgamation, the court had held that if the consideration paid to the shareholders on such Amalgamation consists something more that the Shares in the amalgamated company, then benefit granted under this section shall stand to be relapsed, consideration contemplated is only Shares and not bonds/debentures.

Whether the assessee’s transaction of merging his proprietary business into a private limited company is outside the scope of transfer as provided under Section 47(xiv) and therefore not liable to be taxed under the head long term capital gains has been debated and CIT (A) has made a categorical finding in his order that the entire transaction is nothing but the conversion of assessee’s proprietorship concern and hence not taxable. The combined reading of Section 2(42A), 47(vii) and 49(2) leaves no room for doubt that the ‘consideration’ contemplated under sub-clause (a) of section 47(vii) is nothing but Share or Shares only in the amalgamated Company. It is not necessary to add or read the word ‘only’ in that sub-clause. If besides the share or shares in the amalgamated Company, the Shareholder of amalgamating Company is allotted something more, say bonds or debentures, in consideration of the transfer of his share or shares in the amalgamating company, he cannot get the benefit of section 47(vii). Composite consideration is not contemplated by section 47(vii)(a).

The Authority for Advance Ruling in the case of Credit Suisse (International) Holding AG ruled in favour of the applicant while considering the capital gains tax chargeable under the Income tax Act on vesting of shares of an Indian company held by the Amalgamating foreign company in the Amalgamated foreign company on its Amalgamation with the Amalgamated foreign company. The AAR followed its ruling in Dana Corporation and held that no capital gain is chargeable to tax under the Act in terms of Section 47 read with Section 48 of the Act. Ruling in Hoechst GmbH further supports the position. The contentions raised were that merger entered into was not a transfer in the eyes of law. Alternatively, even if the transaction is assumed to be a transfer, no consideration accrued to the applicant. Further such a transaction was exempted from the capital gain tax by virtue of Section 47(via) of the Act. The merger of the set companies under the Articles of Swiss Merger Act, went ahead to prove that the aforementioned transaction is not a transfer but a merger wherein a merger can take place when one company takes over the other company, which is designated as ‘merger by absorption’. The only case taking an alternate course of action in the scenario was In re wherein it was assumed that the change of ownership of the shares from the applicant to the amalgamated company would involve a transfer of shares by the applicant to the amalgamated company, however this is an old case and is barely being followed in the present context.
Taxation of Cross-border mergers

Many countries have some tax rules that grant certain benefits to merger and acquisitions transactions, usually allowing some deferral of the tax otherwise imposed on the owners of some of the participating parties upon the transaction. On the other hand, once mergers and acquisitions transactions cross borders, countries are much less enthusiastic to provide tax benefits to the involved parties, understanding that, in some cases, relief of current taxation practically means exemption since such countries may completely lose jurisdiction to tax the transaction. The pre mid 1990s merger scenario was dominated by domestic deals, while there is an increasing presence of cross-border deals within India since the mid 1990s. Finally, there was witnessed another stage of overseas deals during the post 2000 period, which showed that the overall macroeconomic scenario over the years is presently shaping the motives of merger.

The legal framework for business consolidations in India consists of numerous statutory tax concessions and tax-neutrality for certain kinds of reorganizations and consolidations. GAAR empowers the Tax Authority to declare an ‘arrangement’ entered into by an assessee to be an ‘impermissible avoidance agreement’ (IAA), resulting in denial of the tax benefit under the provisions of the Act or tax treaty. An IAA is an arrangement the main purpose of which is to obtain a tax benefit and which:

- creates rights and obligations that are not ordinarily created between persons dealing at arm’s length
- results in the misuse or abuse of tax provisions
- lacks commercial substance, or
- is not for a bona fide purpose
- More viable than Greenfield mode of investment.

The corporate sector all over the world is restructuring its operations through mergers and acquisitions in an unprecedented manner in order to successfully overcome the challenges posed by globalization. One of the striking features of the present mergers and acquisitions scenario is the presence of a large number of cross-border deals, which is an easier way of internationalization comparing Greenfield mode of entry. A green field investment is a form of foreign direct investment where a parent company starts a new venture in a foreign country by constructing new operational facilities from the ground up. In addition to building new facilities,
most parent companies also create new long-term jobs in the foreign country by hiring new employees. When we look at the advantages of mergers and acquisitions as discussed earlier, we can see that most of these categories will be able to achieve their objectives through mergers and acquisitions in a better way compared to Greenfield investment. The entry through mergers and acquisitions will enable the firms to attain these critical resources in an easy way compared to the Greenfield investment, which will take much more time and effort.

The resource seekers who are more interested in getting the physical and labour resources at cheaper rates will be better off through mergers and acquisitions compared to Greenfield investment since they will be able to use the already established resources of the partner firm. If they are following Greenfield mode of entry, major advantages to them are the expansion of their market to a foreign country and the availability of factors of production at cheaper rates. Whereas if they are entering a foreign market through mergers and acquisitions, they can achieve these objectives and more, with less cost and effort compared to fresh entry. They can access and share the already established market and avail resources of an established firm in a better way and avoid the problems of culture, language etc. Not only they can achieve the benefits of large scale of operation but also the reduction of many expenses such as marketing, advertisement, distribution, R&D etc through avoidance of duplicate expenses. The effect of cutting R&D expenditure would be too high since it will save much time, effort and cost.

Moreover from a firm’s point of view, they can raise the market power to a large extent through the reduction of number of firms in the industry and the expansion of operation, which enable them to have a say in the determination of prices.

**Tax incentives to cross-border mergers in India**

The Companies Act, 1956 due to Section 394(4)(b) restricts cross-border mergers to the Indian transferee companies. This legislative policy was a unusually restrictive and parochial, and ostensibly existed to protect Indian companies. This neo-colonisation mindset viewing business with foreign entities with suspicion should have been long sacrificed in this era of economic liberalization, where the Indian government is slowly and cautiously moving towards an open door policy for inbound foreign investment, with progressive relaxation on capital account transactions (in a rather flip-flop manner); and the benefits of comparative advantage are quite well established for trade and commerce. Indian Government is arguably moving towards a freer capital account convertibility. In such an environment the restriction on cross-border mergers imposed by the Section 394(4)(b) should not be countenanced. When it comes to merger matters, the new Act has enlarged the scope of cross-border mergers. The new
Companies Act 2013 retains the welcome changes pertaining to simplification of the process relating to cross-border merger of companies. As per the Companies Act, 1956, in case of a cross-border merger the Indian company has to necessarily be a transferee company that is, a foreign company is permitted to be merged with an Indian company and not vice versa. However, as per the new Act, in a cross-border merger the Indian company can either be a transferee or the transferor company, that is, a foreign company is permitted to be merged with an Indian company and vice versa.

With the FDI policies becoming more liberalized since the past many years, mergers, acquisitions and alliance talks are heating up in India and are growing at an alarming rate. The policies included opening for international trade and investment into India allowing the investors cross the globe to enter the Indian market without restricting them to one particular type of business. The list of past and anticipated mergers and acquisitions in India covers every size and variety of business providing platforms for the small companies being acquired by bigger ones. In the recent years, India has become a desired destination among the emerging economies for foreign investors as the FDI inflow has seen an upward trend with countries like Mauritius, Singapore topping the list due to the tax treaties signed by the Government of India with the respective countries. The key factor in making a successful investment through FDI in India lies in understanding the forms in which business can be set-up comprehending the regulatory framework and mode of operation.

Case analysis of cross border mergers.

Hutch-Vodafone deal: Hutchinson International, a non-resident seller and parent company based in Hong Kong sold its stake in the foreign investment company CGP Investments Holdings Ltd., registered in Cayman Islands (which, in turn, held shares of Hutchinson-Essar, an Indian operating company through another Mauritius entity) to Vodafone, a Dutch non-resident buyer. The deal consummated for a value of $11.2 billion, which comprised a majority stake in Hutchinson Essar India. In light of this, the Revenue issued a Show-cause notice to Vodafone asking for an explanation as to why Vodafone Essar (initially Hutchinson Essar) should not be treated as an agent of Hutchinson International and asked Vodafone Essar to pay $1.7 billion as capital gains tax. The whole controversy arose about the taxability of transfer of share capital of the Indian entity. Generally, the transfer of shares of a non-resident company to another non-resident is not subject to tax in India. However the Revenue department opines that this transfer represents transfer of beneficial interest of the shares of the Indian company, and,
hence, it will be subject to tax. On the contrary, Vodafone’s argument is that there is no sale of shares of the Indian company and what it had acquired is a company incorporated in Cayman Islands which in turn, holds the Indian entity. Hence, the transaction is not subject to tax in India. However, the revenue authorities are of the view that as the valuation for the transfer includes the valuation of the Indian entity also and as Vodafone has also approached the Foreign Investment Promotion Board for its approval for the deal, Vodafone has a business connection in India and therefore, the transaction is subject to capital gains tax in India.

The tax authorities had invoked withholding tax provisions to claim that Vodafone had failed in its responsibility to pay tax in relation to its 2007 acquisition of shares of a Cayman company that held, directly and indirectly, majority shareholding interest in Hutchison Essar Ltd, which was at that time the second largest telecom company in India. Hutchison was realizing a material capital gain on its investment which it had effected through an investment structure in 1998 via an investment company in Cayman Islands. The Supreme Court has held that the sale of the share of the Cayman Islands company did not trigger a tax liability in India, the investment structure was bona fide and needed to be respected, and there was no tax liability on Vodafone to withhold tax and deposit it in India.

**Genpact Deal** - Thwarting the Income Tax department’s plans to rake in the moolah from cross-border deals, the court ruled that Genpact cannot be treated as an agent or representative assessee in the 500 million dollar GE-Genpact. The Income Tax Department had its plans laid out. It was banking on its powers to tax the resident entity involved in a cross-border deal, should the non-resident party or parties be beyond its tax ambit. It was angling to use this route to hold Genpact India taxable in the 2005 deal where General Electric sold a 60% stake in Genpact to US Private Equity Firms for around 500 million dollars. However, the Delhi High Court had to bring a close down to the plans. The court has held that since the subsidiary does not have any specific business connection with the income that was generated by this cross-border transaction, it cannot be treated as a representative assessee.

**Taxation of mergers, amalgamations and acquisitions: A Comparative Study of US, UK and EU.**

There have been many recent developments in the competition and taxation laws of various countries. The tax is a deciding factor for any cross border reorganization and so all the countries should try to have a favorable tax environment.

**United States:** The two primary relevant federal securities laws in US that has to be complied are the Securities Act of 1933 and the Securities Exchange Act of 1934, including the rules
and regulations promulgated by the Securities and Exchange Commission. Another Internal Revenue Code of 1986 is provided by the federal government, this code provides for tax laws in US. Section 267(f) of this code exempts American corporate entity in some cases relating to taxation aspect as far as mergers and acquisitions are concerned.

**United Kingdom:** Finance Act 2009 and Corporation Tax Act 2009 which are likely to have a considerable impact on the British acquisition structuring. The existing Treasury Consent Regime whereby certain transactions involving a foreign body corporate may be unlawful without prior consent) is replaced with a reporting requirement for large transactions from 1 July 2009. Minor changes have been made to the U.K. controlled foreign company (CFC) rules from 1 July 2009 over a two-year transitional period.

**European Union:** European competition law is governed primarily by Articles 85 and 86 of the Treaty Establishing the European Community. Article 85 is designed primarily to achieve the same goal as the Sherman Act in U.S. legislation insofar as it prohibits all agreements and concerted practices that affect trade among E.U. members and which have as their main objective the prevention, restriction or distortion of competition. Article 86 is designed to meet the policy objectives of the Clayton Act in that it prohibits the abuse of a dominant market position through unfair trading conditions, pricing, limiting production, tying and dumping. India has hence followed the footsteps of the developed economy by tax reforms and other regulatory developments.

**Carry forward and set off accumulated losses and Unabsorbed depreciation.**

Rule 9C of the Income-tax Rules prescribes the following further conditions for carry forward or set off of accumulated loss and unabsorbed depreciation in case of amalgamation:

- the amalgamated company shall achieve a level of production at least 50% of the installed capacity of the amalgamating industrial undertaking before the end of the four years from the date of amalgamation and the said minimum level of production should continue till the end of five years from the date of amalgamation
- the Central Government has powers to relax the above condition in case of genuine difficulty aced by the amalgamated company
- a certificate in Form No. 62 of the Income-tax Rules, duly verified by an accountant shall be furnished to the assessing officer in this regard.
The benefit of carry forward and set off of accumulated losses and unabsorbed depreciation of the amalgamating company owning an industrial undertaking would be available to the amalgamated company only if the following additional conditions are fulfilled:

- the amalgamating company would have been engaged in the business for at least three years during which the accumulated loss has occurred or the unabsorbed depreciation has accumulated, and
- the amalgamating company has held continuously as on the date of the amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of amalgamation

Depreciation is allowed on a ‘block of assets’ basis. All assets of a similar nature are classified under a single block – and any additions/deletions are made directly in the block. The depreciation rates apply on a reducing-balance basis on the entire block. However, companies engaged in the generation and/or distributions of power have the option to claim depreciation on a straight-line basis. Another issue raised frequently has been whether the amalgamated company can claim depreciation on the goodwill, accounted as a balancing factor while merging the accounts of the amalgamating company into the amalgamated company being commercial right of similar nature as enumerated in Section 32 of the Act. Goodwill is a commercial right of similar nature as enumerated in Section 32. The aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xiiib) and clause (xiv) of Section 47 or Section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place.

**Amalgamations and mergers may also be tax neutral.**

Mergers are tax neutral in the hands of the amalgamating company and the shareholders of the amalgamating company, provided certain conditions as prescribed under the Act are fulfilled. Specified conditions in the case of an amalgamation of one or more companies into another includes all assets and liabilities of the amalgamating companies becoming assets/liabilities of the amalgamated company and the shareholders holding 75% of the share value in the
amalgamating companies becoming shareholders of the amalgamated company. Further, exemption to the shareholders is available if they receive shares of the amalgamated company in exchange of shares of the amalgamating company, pursuant to the merger. No tax for the amalgamating company or its shareholders could be garnered if the cost of acquisition for new shares received would be the same as the cost of acquisition for shares held in amalgamating company. The period of holding of shares also to be reckoned from the timeshares were held in amalgamating company. Tax Benefits in the nature of tax incentive for export oriented units, expenditure for scientific research, acquisition of patent rights/copyrights, expenditure on prospecting for minerals and amortization of preliminary expenses pertaining to transferor company will be available to transferee company.

**Conclusion.**

There are several different ways that a companies may reduce taxes through amalgamations and the tax benefits can accrue at the both the corporate and the shareholder level. In these transactions, taxes are a critical element to consider while evaluating the design of the merger or acquisition structure. The Income Tax Act at the individual and corporate level imposes an extremely complicated set of provisions for mergers and acquisitions; the tax system is certainly not neutral in this area. Similarly, if not planned and implemented properly, a merger can create huge costs which were also not planned. Prior to formal deals, letters of intent or commencement of due diligence, corporate should have developed a tax strategy that meets deal objectives.

The underlying object of corporate restructuring and amalgamations is efficient and competitive business operations by increasing the market share, brand power and operational synergy. Indian companies are gearing up for global size operations. There is no reason why the company and Income tax laws should not be harmonized. Amalgamations will be easier if the time-consuming processes under company law, like approaching the Company Law Board and the High Courts for approval, are either eliminated or made less cumbersome than at present. The direct tax code (DTC) seeks to simplify and rationalize the scheme of taxation with respect to amalgamations, demergers and other forms of business reorganizations as also the sale of businesses. The new direct tax code that the Government is planning to introduce, to replace the current Income-tax Act, is expected to emphasize transparency and taxpayer-friendliness, and will hopefully bring a ray of fervent hope.

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NJAC AND THE LEGAL BATTLE: AN ANALYSIS
ALEENA MARIA JOSE2

Abstract

Judiciary, the justice delivery system resorted to by the common man for his legal and moral rights are at its zenith in Indian democracy. It is seen as the epitome of justice delivery system in India. But there has been dissent with respect to appointment of judges to various courts. The existing collegium system of judges exercising absolute powers to appoint judges is the complete lack of transparency in the procedure and process of appointments. Nobody outside the system knew about the appointments of the few while the rejection of other few. The absolute power is vested with the judges. Lord Acton’s words, “Power tends to corrupt and absolute power tends to corrupt absolutely” rightly proves this very same fact. Hence a new attempt was made to make the system more transparent and effective. Such an initiative was the adoption of National Judicial Appointments commission (NJAC) and it later turned out to be bigger controversy. The past few months saw a long standing legal battle between the executive and the judiciary regarding the appointments to various High Courts and Supreme Court in India. In order to appease the situation, the Court held the NJAC as unconstitutional and void. This article seeks to analyze the juridical history of judicial appointments in India, the proposed new system of national Judicial Appointments Commission (NJAC) and the battle surrounding it. The author with the help of various secondary sources such as books, published articles, and other works has analyzed the above positions. According to the author, both the NJAC and the collegium system are far from perfect. But, the stand taken by the author is that NJAC has the potential to become perfect system after curing its minor defects.

Keywords

Judiciary, Appointments, NJAC, Collegium System, Legal Battle

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Introduction

The sky is clear now and the battle has come to an end declaring the NJAC as unconstitutional. Over the past months, the political whirlwinds surrounding efforts by Narendra Modi's BJP government to change India's judicial appointments system have given way to a storm of constitutional contestation. In a democratic country like India, the judiciary is the epitome of justice. The common man puts his immense faith in the judicial system for a remedy against his injured legal and moral rights. But due to the abuse of power and corruption, “values in the judiciary, from lower courts to Supreme Court are sliding and people are losing trust in the system.” Since the past two decades, opaqueness has been prevailing over the selection of judges to the various Courts across India. There had been a prolonged tussle between the three organs for the selection of judges to the Supreme Court and high courts. On the pretext to relax this tussle, the National Judicial Appointment Commission Act, 2014 was formed. This later turned out to be a greater controversy stating that the new system impairs the judicial independence which was settled by the Supreme Court by declaring the same unconstitutional. In this paper, the author tries to trace the juridical history of judicial appointments in India, the new proposed system of National Judicial Appointments Committee and also a brief analysis on the NJAC verdict.

From The Beginning: Tracing the Juridical History

The events which actually led to the formation of the National Judicial Appointments Commission started way back in 1981. The constitutional provisions that deal with the appointments and transfer of judges of the High Court and the Supreme Court are Articles 124, 217 and 222. The framers of the Constitution keeping in view the separation of powers between the executive and the judiciary enacted these provisions. However, now the

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appointments to the High Courts and the Supreme Courts were not being made with respect to these provisions of the Constitution.6

Until 1981, the guiding principles for the appointment of judges and the final decision making power in this regard vested with the President as per the above-mentioned provisions of the Constitution. This position of law, however, was altered by a set of decisions, popularly referred to as the “Three Judges’ Cases”. In Sakalchand Sheth v. Union of India7 the question regarding the nature of consultation was first raised. It was observed that “consultation” meant effective consultation for which the three constitutional machineries must have for its consideration “full and identical” facts, but the President has the discretion to accept. A meaningful concept of consultation could not be drawn by the Court by such a holding and it was only a formal concept rather than a substantive one.8 In 1981, the SC in the First Judges’ Case9 held that the word “consultation” mentioned under Article 124 did not mean “concurrence” and the Government was not bound by the opinion of the CJI and could reject it for “cogent reasons”. The end result of this judgment was that the power solely rested in the hands of the executive with respect to the appointment of judges to the higher judiciary leaving the primacy of the Chief Justice in this matter. However, this position changed after the landmark decision given in the Second Judges’ Case10. The ruling in the First Judges’ Case was overturned by the majority and held that the “role of CJI is primal in nature”.11 The majority of the bench held that the appointments had to be made so as to be in agreement with the opinion of the CJI.12 Thus, the existing collegium system was introduced, where the power to appoint judges to the higher judiciary rested with the CJI and the two senior-most judges of the SC. This is followed in 1998 by the Third Judges’ Case13, where President K.R. Narayanan made a presidential reference to the Supreme Court relating to the above issue. The Court in the present reference opined in conformity with the decision in the Second Judges’ Case and reiterated the fact that CJI had the primacy in the decision-making process and held that any appointments made without his consultation would not be valid. But, the worrying concerns continued relating to appointment of inappropriate candidates and selection based on favoritism and nepotism, influential connections and personal likes and

7 2328 SC AIR (1977)
8 VR Jayadeven, Judicial Creativity in Constitutional Interpretation, 2011 p. 42
9 S.P Gupta v. Union of India, AIR 1982 SC 149
10 Supreme Court Advocates on Record Association v. Union of India (1993) 4 SCC 441
11 Ibid
12 Supra note 4 at
13 Special Reference No. 1 of 1998, Re.; (1998) 7 SCC 739
dislikes.\textsuperscript{14} Considering such flaws, the Law Ministry in 2014 sought to put an end to the collegium system of judges appointing judges.\textsuperscript{15} So, an effort was put to make such a body which could bring transparency in judicial appointments.

\textit{The New Way Forward}

In 2014, the NDA government brought in the bill for setting up of a National Judicial Appointment Commission for regulating the appointment of the judges to the Supreme Court and High Courts in India. A bill was also brought in by the government to amend Article 124 of the Constitution in order to provide the NJAC a constitutional status as required by the Constitution under Article 368.\textsuperscript{16} The Constitution amendment bill requires ratification by at least 50 percent of the state legislatures and 16 out of 29 states have already ratified the bill. It was passed by both the houses in August without a single negative voting which shows the urgency and need for setting up of such a commission and cleared by the President on 31 December 2014. The Constitution is the law of the land and hence it had to be first amended before any such Commission could be put into place and amendments are made to Articles 124 (2) and 217 (1) of the Constitution that deals with the appointment of judges in the Supreme Court and the High Courts, respectively and some words in other articles are also been substituted. Therefore, new Articles, i.e., Article 124A, 124B, and 124C are been inserted in the Constitution (Ninety-Ninth Amendment) Act, 2014. The newly inserted Article 124A and 124B describe its composition, functions, and powers. Article 124C provides the power of the Parliament to make laws with respect to the procedure followed by the NJAC for appointing judges of the High Court as well as the Supreme Court. The NJAC Act was drafted in lieu of this Article to lay down the procedure to be followed by the commission while making the appointments. Moreover, the NJAC Act lays down the procedure to be followed which involves the process of consultation amongst the various governmental bodies involved in the process, along with the veto powers which ensures some amount of transparency and accountability.\textsuperscript{17} Finally on 31st December 2014, the assent of the President Mr. Pranab Mukherjee was received on the bill, scrapping the opaque and unconstitutional collegium system of appointing judges.

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\footnotetext[14]{Available at: http://www.thehindu.com/opinion/lead/making-judiciary-more-transparent/article6277602.ece, Last visited on 6.12.2015}
\footnotetext[15]{Supra note 3 at}
\footnotetext[16]{PTI, 16 states ratify Judicial Appointments Commission Bill, 02/02/2015, Available at: http://timesofindia.indiatimes.com/india/16statesratifyJudicialAppointmentsCommissionBill/articleshow/4566202.cms , Last visited on 7.12.2015}
\footnotetext[17]{Supra note 4}
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which plainly violated the central principle of check and balance of power by all the three organs of the state.\textsuperscript{18}

As per the amended provisions of the constitution, the Commission will consist of the following persons: Chief Justice of India as the Chairperson, ex officio; Two other senior judges of the Supreme Court next to the CJI, the Union Minister for Law and Justice, ex-officio, two eminent persons (to be nominated by a committee consisting of the Chief Justice of India, Prime Minister of India and the Leader of opposition in the Lok Sabha or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in Lok Sabha). Of the two eminent persons, one person would be from the Scheduled Castes or Scheduled Tribes or OBC or minority communities or a woman. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination.\textsuperscript{19} The Commission shall on the basis of ability, merit and any other criterion of suitability nominate and also recommend persons for the appointment and transfers of the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts. Hence looking at the numerical strength of the Commission with the judiciary being represented by 3 members it can be said that there is no upper hand of the Executive in the process. Thus, speculations of loss of judicial autonomy by the enactment of NJAC hold no serious ground. This arrangement is perfectly in tune with the original Constitutional provision for appointment as provided under Article 124 of the Constitution.\textsuperscript{20} The Act also ensures that the Commission doesn't take up an arbitrary shape and states that no recommendation of the Commission if vetoed by any of the two members of the commission shall be valid. Hence, a consensus is requisite amongst the members regarding the recommendation to be made to ensure a transparent process of appointment of judges. Thus, veto provision is regarded as important to ensure that the judiciary is free from the influence of any kind from any organs.

\textit{The NJAC verdict: An Anti-constitutional judgment}

The Supreme Court’s verdict that invalidated the 99\textsuperscript{th} Constitution Amendment and the NJAC Act as unconstitutional puts forth numerous unanswered questions. The analysis of this verdict should not be our perspective about what makes a good policy but rather should be the

\textsuperscript{18}Sathyam Rathore & Ankitha Rithuraj, NATIONAL JUDICIAL APPOINTMENT COMMISSION AN ANALYSIS OF NJAC’S EFFECT ON JUDICIAL INDEPENDENCE IN INDIA, Available at http://journal.lawmantra.co.in/wp-content/uploads/2015/05/211.pdf, Last visited on 20/5/2016
\textsuperscript{19}Supra note 3
\textsuperscript{20}Supra note 16
construal which should ensure conformity to the Constitution, to the intentions of its framers and to the documents final aspirations.\textsuperscript{21} When viewed from this angle the case is profoundly unsatisfactory as it fails to adequately address the fundamental question at the root of the controversy. Moreover, the decision totally acquired a political character.

The constitutional mandate with respect to selection and transfer of judges is provided in Articles 124 and 217. It grants to the President the power to appoint judges to Supreme Court and to the various High Courts in consultation with certain persons\textsuperscript{22}. To make an appointment to the highest judiciary (SC), the CJI must always be consulted whereas in elevating persons to a High Court, the CJI of that High Court and the Governor of the State concerned acting through the Council of Ministers must be conferred mandatorily.\textsuperscript{23} However the present collegium system, the creation of the Second Judges Case interpreted the word “consultation” used in Articles 124 and 217 to mean “concurrence”. A close look at the collegium system reveals that it is not a constitutional mandate. It is nothing but the creation of the Supreme Court to make it a self-serving body by expropriating the powers from both the Parliament and the executive. The enactment by way of 99\textsuperscript{th} Amendment was intended at redressing this imbalance.

The Amendment’s object was to replace the collegium with a bore–minded forum but it failed to decide the primary question that does the removal of the prerogative solely vested in the collegium in appointing judges to India’s higher Judiciary violate the Constitution’s basic structure?.\textsuperscript{24} The four of the majority opinion in the verdict fails to analyze the fact that granting primacy to the CJI and his colleagues is the only way under our Constitution scheme to achieve an independent judiciary. Instead, the judgment is similar to a political gambit. Further, Justice Khekar was also unsuccessful to explain to us how the removal of judicial primacy in the matter of judicial appointments impairs the basic structure of the Constitution. The learned judge relies on the decision in Second Judges’ Case but a proper reading of the same shows us that there is no explicit finding in the same that a dominance of judicial opinion in making appointments to the higher judiciary is a part of the Constitution’s basic structure.\textsuperscript{25} It could be possibly supposed that granting such a primacy would make for a more independent judiciary but it is not the only way to ensure the judiciary’s autonomy. Thus placing reliance on this decision to conclude that

\textsuperscript{22} Ibid
\textsuperscript{23} Ibid
\textsuperscript{24} Ibid
\textsuperscript{25} Id
the removal of the collegium impedes judicial independence violating the Constitution’s basic structure is hence incorrect. The other majority opinions are also similar and have jointly created an altogether detrimental result\textsuperscript{26}.

**Conclusion**

The collegium system had many flaws and it led to the formation of the NJAC Act. It was a step in creating an accountable and transparent system. But a closer analysis of both these systems reveals that neither of the two is foolproof. The NJAC has the potential to become an ideal system but we must admit that in the current form it suffers from some defects. Hence, in order to fight the existing difficulties, it should be made error free. Thus, an effort in this respect can reform the present system and provide an efficient and effective mechanism.

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\textsuperscript{26} Id
ABSTRACT

Nuclear liability arising from nuclear damage has been largely debated concern all around the world. The damage caused by a nuclear disaster causes huge destruction of human life and also becomes a reason of mental agony of people. Renowned illustration of this has been the Chernobyl disaster and the Hiroshima disaster, which was the main genesis of giving various conventions and classifying various liabilities under nuclear liability.

Some of the fundamental principles in nuclear liability which were incorporated after Chernobyl incident have been discussed in detail in the research study. The principles given include strict liability, exclusive liability, Limitation in Liability of time and amount, Liability depending on exclusive jurisdiction. Various legislations have been worked out to govern and provide for liability of the operator. These legislations include Paris Convention, 1960, and various additional protocols given to amend it, Brussels supplementary convention 1963, Vienna Convention, 1963 and Joint Protocol of 1988. These conventions have been discussed in detail in the article.

Various lacunae are being discovered which are needed to be amended and to be worked out. The fundamental principles given to determine the liability of the operator and the legislations worked out in this direction has been given in order to maintain a balance between the society and the development taking place in relation to nuclear weapons So, that a proper management can be structured along with moving towards development and building up new technologies.

Introduction

Nuclear liability arising out of nuclear damage has been a debated and controversial issue since times immemorial. This issue is of great eminence owing to the damage caused by nuclear disaster is more voluminous compared to damage caused by any other disaster. The biggest and the major example in this concern were the Chernobyl disaster and the Fukushima disaster, which brought vast devastation and was an eye-opener to many countries which encouraged them to take active efforts at international level to deal with the same.

The accident which took place in Chernobyl Nuclear Power Plant was the major source of emanation on international nuclear liability law. The Accident took place in 1986 in Ukraine.
which caused serious damage to the environment and social, economic and political disruption that affected human health in neighboring countries of Ukraine i.e. Belarus and the USSR, in a negative manner. Prior to Chernobyl accident International Court of Justice in Trail Smelter Arbitration (1939) and The Corfu Channel Case(1949) gave certain principles in order to prevent transboundary environmental caused harm. But, after the Chernobyl incident ample of issues were raised regarding International Court of Justice’s jurisdiction due to which various efforts were taken. Paris Convention 1960, Brussels supplementary convention, 1963 and Vienna Convention 1963 and 1988 Joint Protocol were the major initiatives taken to deal with the issue of nuclear liability, which gave the convention on Third Party Liability. This was followed by joint protocols 1988 which linked the two conventions and different amendments were also adopted by the countries.

On the other hand, the Fukushima disaster in Japan fail to attract international attention to redress the damage caused. Even though, certain international efforts were taken including that IAEA International Expert Group on Nuclear liability took certain action which proved to be an unsuccessful attempt. That is why, the international efforts taken after Chernobyl accident were the concrete efforts which are still prevailing and thus, required to be studied in detail.

**EVOLUTION OF PRINCIPLES OF NUCLEAR LIABILITY**

When the Chernobyl incident took place, it was decided by the countries that in order to ensure peaceful usage on nuclear energy there is a need of introducing fundamental principles forming basis for nuclear liability and replacing the rules of ordinary tort law. These principles are followed by most of the convention and are also contained in the laws relating to the nuclear third party liability i.e. the liability of the third party arising out of the nuclear damage and so, these principles are enlisted below:

- **Strict Liability:** In this liability, the person operating the nuclear reactor will be liable to the third party to compensate for any injury or harm caused to him during the installation of nuclear reactor or at the time of transportation of nuclear substances i.e. making the operator fully liable for the injurious consequences and it relieves the claimant from proving the fault or negligence, there must be the proof of link between the nuclear accident and the damage caused by it. A third party in this concern can be any person except the operator of nuclear reactor, supplier of goods services or
technology. And for this matter, employee of the operator of the nuclear reactor can also be a third party.

- **Exclusive Liability:** The nuclear reactor operator will be exclusively liable for the damage caused to the third party at the time of installation or during the transportation of nuclear substance. The victim in this concern is required to identify the person who actually caused the accident which would be virtually impossible therefore, the operator is made liable for the acts or omissions of any person which resulted in injury to the third party. Apart from this, the supplier of nuclear goods, services and technology are exempted from the liability and are also exempted from the purchase of third party liability insurance, the expense which is incurred by entity supplying goods, services and technology. The carriers are also exempted from the liability of the transportation of nuclear substance because they do not have the knowledge of handling them.

- **Limitation in Liability of time and amount:** The limitation of liability in amount was mainly adopted to reduce the burden of making compensation for the damage caused to the victim, on the operator. And sometimes, they may have to confront a situation where they have to use their own assets to make payment when the insurance coverage for the risk is exhausted. The principle of *quid pro quo* for the benefits of the victim was adopted, i.e. the compensation will be given equal to the liability arising out of strict and exclusive liability and any further compensation will not be given.

The Limitation of liability in time is usually for the providers of the financial security, private insurers by limiting the time by not letting it exceed more than 10 years from the date of personal injury and property damage claims, caused due to nuclear accident. This will prevent the insurance companies and the nuclear operator from remaining liable for an infinite period of time. The discovery rule is also followed in most of the jurisdiction which requires the institution of the claims within two or three years of date upon which the victims discovered the damage for which the compensation is claimed.

- **Liability must be financially secured:** It is the obligation of the operator of nuclear reactor to obtain and maintain security in respect of their liability to the third parties which must be in corresponding to their imposed liability, this is done in order to ensure that timely funds are available when compensation is actually has to be made to the claimants. The nuclear operator frequently obtain the insurance provided by the
private sector and may also assort to other sources like bank guarantee provided S.B.I., self-insurance and many other such means.

- **Liability depends on exclusive jurisdiction**: The liability of the nuclear operator is also dependent upon the exclusive jurisdiction which means the court of the country where the accidents occur has the jurisdiction to try the case. This would limit the liability of the operator who cannot be made liable wherever and whenever they want to. This ensures that the competent court try the cases and also that these courts are easily accessible by the parties.

So, these were the fundamental principles on the basis of which the liabilities of the nuclear reactor are decided which arises against the third party when any loss is suffered by them. Now, it is important to study about these liabilities in different conventions and also scrutinization of efforts taken by the convention has to be done.

**PARIS CONVENTION, 1960**

A convention was prepared by the Organization for Economic Co-operation and Development (OECD), to give the third party liability in order to compensate the damages caused by the accidents due to the nuclear energy. The Paris convention came into existence on 29 July 1960 came into force in 1 April 1968 and was the first convention to deal with nuclear liability related issues and was founded by Western European countries in which 16 countries have been party to it but it is still not ratified by Austria and Luxemburg. The convention provides compensation for the loss or damage of life or property caused in a nuclear installation or during transportation of nuclear substances to and from installations.

Various recommendations has also been given in relation to Paris Convention like in 1968, recommendation was given by NEA steering committee that the nuclear accident occurring on the high seas will be covered under the convention and in 1971 it was recommended by the committee that the convention applies even to those countries which are not party to the convention. These recommendations have been adopted by different countries. This has been provided in Article 16 of the convention.

Article 1 of the convention defines the terms like “nuclear incident”, “nuclear installation”, “nuclear substance” and “operator”. Article 3 makes the operator liable for damage or loss of
life or property of a person. Article 4 of the convention provides for strict and exclusive liability of the operator. Article 7 limits the liability of the operator in respect to damage caused by nuclear accident and this should not exceed the maximum liability of 15 million special drawing rights as mentioned in the convention. Article 8 limits the liability of the operator by providing the limitation of time and says that the right of compensation under this Convention shall be extinguished if an action is not brought within ten years from the date of the nuclear incident.

Article 10 of the convention requires operator to maintain insurance or other financial security of the amount established pursuant to Article 7. Article 13 of the convention provide for the exclusive jurisdiction of the courts that shall lie only with the courts of the Contracting Party in whose territory the nuclear incident occurred.

Therefore, these are the major articles of the Paris Convention that deals with the liability if the operator.

**2004 Protocol to amend Paris convention**

This protocol was introduced with the aim of increasing the amount of damages and to include more types of damages to be compensated when harm was caused to the victim, and this was adopted on 12 February 2004. The amount of compensation was increased which has been dealt in Article 7 in the protocol, the amount of operator liability was increased to euro 70 million. Article 3 has been amended and it has been said that if the liability arises of more than one operator then liability will be joint and several. Article 8 was also amended and operator was now made liable also for types of economic loss, the cost of measures to reinstate a significantly impaired environment, loss of income resulting from that impaired environment and the cost of preventive measures, including loss or damage caused by such measures and also time period was extended, extinction periods for nuclear damage claims will be extended to 30 years. Article 10 was also amended and the operator was made liable to those countries also, who were not party to the convention.

So, these were the few changes which were brought by this protocol in 2004.

**Brussels Supplementary Convention 1963**

This convention was given as a supplement to the Paris convention, in order to provide additional compensation to that already provided in Paris convention so that an additional finance mechanism is created to ensure adequate compensation which Paris convention failed to provide. The convention was adopted in 1963 and came into force on 4 December 1974, ratified by 12 countries. The states who are the contracting parties to the Paris convention will
remain a contracting party to the Brussels Supplementary Convention and it will only remain in force until and unless Paris convention is in force. It was further amended by the additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982.

- After the amendment by the additional Protocols Article 3 and 4 are the major provisions dealing with the increasing of the compensation amount and the amount of compensation was increased to SDR 300 million encompassed in three tiers. The first tier was corresponding to the amount imposed by the Paris Convention i.e. its required to establish the liability of the operator up to SDR 5 million which is to be provided by the way of insurance or other financial security. The Second Tier, consisted of the difference of the amount i.e. SDR 175 million which was to be financed from public funds to be made available by the party in whose territory the nuclear installation of the liable operator is situated. The Third tier consisted of SDR 125 million to be financed from public funds contributed jointly by all the parties to the Brussels Supplementary Convention.

So, these were the three tier bifurcation made by the Brussels Supplementary Convention.

**VIENNA CONVENTION, 1963**

The replication of principles given by Paris Convention was sought to be done and this was thought to be done in Vienna Convention on Civil liability for Nuclear Damage by the International Atomic Energy Agency. The convention was adopted on 21 May 1963 and came into force in 12 November 1977 and it’s based on the principle of full liability. The convention has been ratified by eight countries including Yugoslavia, Colombia, The United Arab Republic, Cuba and the Philippines. The nuclear liability of the operator has been illustrated in different Articles.

Article II of the Convention makes the operator liable for the injury caused due to nuclear installation, Article VII is illustrative of operator’s liability regarding to provide with security, Article IV makes the liability of the nuclear operator absolute, Article V fixes the liability of the nuclear operator to make compensation to the losses caused up to US $ 5 million for any one of the nuclear incident. Article VI provides the limitation of liability of time that the right to claim compensation extinguishes if it’s not brought within 10 years from the date of nuclear incident. Article XI provides for the exclusive jurisdiction. All the nuclear liabilities are established on the same line as it has been given in Paris Convention 1960, but only distinctive feature is there in
this that is provided in Article IV that "If the operator proves that the nuclear damage resulted wholly or partly either from the gross negligence of the person suffering the damage or from an act or omission of such person done with intent to cause damage, the competent court may, if its law so provides, relieve the operator wholly or partly from his obligation to pay compensation in respect of the damage suffered by such person."

So, these were the certain provisions of the Vienna Convention that deals with the liability of the nuclear operator against the third party.

1997 Protocol to amend Vienna Convention Civil liability for Nuclear Damages and The 1997 Convention on Supplementary Compensation for Nuclear Damage (Supplementary Compensation Convention)

This was adopted by IAEA and this was done mainly because of reason of broadening the definition of nuclear damage, provide for higher compensation and for updating the jurisdiction. The major amendment made in respect to the nuclear liability was the amendment related to the compensation to be provided to the victim.

The compensation provided under SCC was given in two-tier system where in the first tier, the amount of compensation was fixed to SDR 300 million which has to be paid by the operator and if the funds are insufficient then public funds were to be used to compensate the victim. Whereas in the Second tier where the amount of compensation exceeded SDR 300 million, the same was to be compensated through contributions by member states based on their installed nuclear capacity. This has been dealt in Article 3 and 4 of the convention. This indicates the increase of amount of compensation than what was mentioned in Paris convention and Vienna Convention.

Another major change mentioned in Article XI (1) (a) and (b) was that to compensate the damage suffered by outside and inside the installation state was to compensated by 50% of the international funds and as provided in Article XI (2) if the installation state makes available a national compensation amount of 600 million special drawing rights or higher, then the whole amount of supplementary compensation is to be used to compensate damage suffered both inside and outside the installation state. And according to Article V these international funds were not made available to the non-contracting parties.
So, these were the major amendments made in the convention.

1988 JOINT PROTOCOL

The Chernobyl incident 1986 was the major impetus of this protocol which aimed at broadening the scope of International nuclear liability regime. Since, Paris convention and Vienna Convention were independent of each other, the countries were free to adopt either of the convention but the main issue which was encountered was that it was becoming difficult to maintain the balance and coordination between the two because no country can be party to both the conventions at the same time thus, to meet this demand Joint Protocol 1988 was introduced which was again the initiative of IAEA and OECD which came into force in 1992. The parties to both the conventions were now able to take the benefit of both the conventions. There are many countries which have not ratified the convention including United Kingdom and France.

Whenever a particular incident took place, either of the two conventions applied to one nuclear accident and this assurance is given by Article III of the Joint Protocol, which also provides that the compensation, Article IV of the Joint Protocol provides that the provisions of the convention will apply to the contracting parties of Paris.

Conclusion

By all the observations made after the study it can be contemplated that nuclear damage has been a worldwide issue and thus it is important to provide the law to govern the health issues and various other damages and that would give the nuclear liability of the operator against the third party liability.

Numerous efforts are made by the international law to curb down the damages caused by the nuclear disaster and also to make the parties liable. This was done by giving various conventions that includes Paris Convention, 1960, Vienna Convention 1963, 1988 joint protocol, which gave major provisions defining liability of the nuclear operator. This is done to ensure proper management among the technology and society, also various lacunae in the convention should be worked out.

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INDIA’S PATENT LAW: COMPLEXITY OF DISPUTE AND GLOBAL ECONOMICS

ASHUTOSH JAIN

Abstract
The paper is going to provide an insight on ongoing battle on patent laws that are confrontation with US lawmakers. The main focus of the paper is on the point that why there is so much hue and cry for amending the Indian Patent laws and superficially those that are related to pharmaceutical Industry. The paper will try to find out why US is one of biggest critique of Indian Patent laws and pushing so hard to pressurize India to change such laws, what is the US stake in the Indian patent laws, and what benefit it will enrich from this. Another major issue that this paper would discuss is about the said allegations that India has violated TRIPS agreement, to which it is signee. The Paper would try to go behind the curtains and will eventually try to find out what is the truth behind all these allegations and what is the real situation. Is it only the laws that need to be involved or there are other things that are at huge stakes. The paper will try to find out the real reasons for so much interest of U.S. and other world economies in to the Indian laws related to patent and will try to find the solution for the same.

Introduction
Over the period of time, pharmaceutical patents market in India has become much more discussed topic around the world and India’s attempts to protect and manage it, has caught the attention of intellectual property observers everywhere and the pharmaceutical industry in particular. On July 15, 2014, High Court of Bombay refused dismiss the writ petition filed by Bayer against compulsory licensing.30

On April 30, 2014 United State Trade Representative put India along with China and 13 other countries in the priority list that require scrutiny for the weak laws related to Pharma industry

29 VI Semester, Institute of Law, Nirma University.

30 Bayer Corporation v. Union of India, AIR 2014 Bom 178
as well as Technology.\textsuperscript{31} In its ‘2015 Special 301 Report’\textsuperscript{32}, Ambassador Michael B.G. Froman, United States Trade Representative, while discussing about India, focused on the steps that include India’s establishment of a domestic IPR-focused experts group, commitment to technical engagement on specific issues of concern, and the issuance of encouraging domestic policy pronouncements.\textsuperscript{33} The paper what are the weak laws that USTR talks about, the paper will follow the genesis of the problem of US-India conflict.

While US assert pressure on India for more flexible norms, India has set higher bar for protection. Though US and European countries grant patents more often but in India it is difficult for the companies to get the patent for a new drug, whose ingredients were in public knowledge unless they show significant benefit.\textsuperscript{34} The paper will try to find the India’s defence against the big accusation level against it and try to find the deep root of the problem.

But before moving ahead it is very important to understand why the patent for Pharmaceutical drugs are so important that it involves so many stakeholders. It is important to know that the Indian Pharmaceutical market, in terms of value, is approximately 1.4% of the global pharmaceutical industry and in terms of volume, it is about 10%.\textsuperscript{35} Also India is the biggest supplier of generic drug all around the world with the Indian generics representing 20% of global

\textsuperscript{31} C. L. R Narasimhan, “Defending India’s IPR”, The Hindu, May 17, 2015

\textsuperscript{32} The Special 301 Report (Report) is an annual review of the state of intellectual property rights (IPR) protection and enforcement in U.S. trading partners around the world, which the Office of the United States Trade Representative (USTR) conducts pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (19 U.S.C. § 2242).


\textsuperscript{34} Geeta Anand, “Inside India: India’s fight against big pharma patents is just a war”, The Wall Street Journal,
http://blogs.wsj.com/indiarealtime/2015/03/19/inside-india-indias-fight-against-big-pharma-patents-is-a-just-war/ Last Visited (5 February, 2016).

exports in terms of volume.\textsuperscript{36} Adding to that the Indian pharmaceutical market reached US$ 10.04 billion in size in July 2010,\textsuperscript{37} As on March 2014, Indian pharmaceutical manufacturing facilities registered with the US Food and Drug Administration (FDA) stood at 523, highest for any country outside the US.\textsuperscript{38} And above all the Union Cabinet has clear the way to allow 100% FDI under automatic route for manufacturing of medical devices subject to certain conditions for pharmaceutical sector, it is interesting to note that between April 2000 and September 2015, the inflow of FDI in drugs and pharmaceuticals is worth US$ 13.32 billion.\textsuperscript{39} Now it can easily be understood that why Indian Pharmaceutical market is so important for pharmaceutical industries and therefore why Indian laws should be in the favour of these industries.

Along with the difficult patent laws, the paper will also focus on the dispute between India and TRIPS. The dispute between the two arises mainly on two key issues.


1. As per the Article 70.8 TRIPS,\textsuperscript{40} Indian Patent laws does not provide any “means” through which invention application can be secured easily within the meaning of Art. 70.8 (a).\textsuperscript{41}

2. As per Article 70.9 TRIPS,\textsuperscript{42} It has been alleged that there is no mechanism in place in India for the grant of exclusive marketing rights for the products covered by Art. 70.8(a) and thus Art. 70.9 are violated.\textsuperscript{43}

The paper will look in to the reality of the allegations made by the TRIPS, and how India respond to these allegations, how far these allegation are true and will try to find out what can be the best possible way out.

U.S.-India Conflict

In March 2012, India’s Patent Controller for the first time issued compulsory license to an Indian generic firm against German manufacturer Bayer which was charging $5,500 per person per

\textsuperscript{40} Art 70.8 Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;

(b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and

(c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

\textsuperscript{41} India – Patents (US), WTO dispute settlement: one page summary.
https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds50sum_e.pdf , Last visited ( 15 February 2016).

\textsuperscript{42} Art 70.9-Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

\textsuperscript{43} Supra note 12
month for kidney and liver medicine while Indian firm 'Natco' which was granted the compulsory license was providing the same with less 97% lower cost. This raises the eyebrows of many around the globe. Following the same on March 27 2012 US Commerce Secretary John Bryson raised the concern regarding compulsory license with India.

But the matter became worse when in landmark judgement Supreme Court of India upheld the stricter patentability standard because of which ‘Novartis’, a Swiss company loss seven year legal battle against Indian Patent laws. Therefore on March 13, 2013, in U.S. trade hearing, Roy F. Waldron (Intellectual Property Counsel for Pfizer) in his testimony before House of Representatives' Committee on Ways and Means’ Subcommittee on Trade gave the testimony, in which he made various allegations against India, some of following are:

i. Issuance of compulsory license
ii. Increase in the production of generic drug

**Issuance of compulsory license**

The much hue and cry created by US is over granting compulsory license to be granted by India. And because of which India has been criticised for having weak laws. But the concept of compulsory licensing was already incorporated in Indian Patent Act under section 80 but the


48 **Section 80 Exercise of discretionary powers by Controller.** - Without prejudice to any provision contained in this Act requiring the Controller to hear any party to the proceedings there under or to give any such party an opportunity to be heard, the Controller shall give to any applicant for a patent, or for amendment of a specification (if within the prescribed time the applicant so requires) an opportunity to be heard before exercising adversely to the applicant any discretion vested in the Controller by or under this
compulsory license is on the same footing as of in Paris Convention. As per section 5A of Paris Convention (World Intellectual Property Organization), every country has right to grant compulsory license to prevent abuse of patent right. The same was brought in TRIPS under article 30 and article 31, which talk about the compulsory license and issuance of the same. Because of which Indian Patent Act 1970 was amended in 1999, 2002 and in 2005 making Indian patent regime compatible with TRIPS. India is not the first country to grant compulsory license, since Doha Declaration, around 52 countries have issued compulsory license but India being the third largest market of pharmaceuticals involves huge interest around the world. India gave it first compulsory license to Natco for the generic version of Bayer Corporation’s patented medicine, ‘Sorafenib Tosylate’, used in the treatment of liver (Hepato cellular carcinoma [HCC]) and kidney cancer (Renal cellular carcinoma [RCC]) at advanced stages.

Act. Provided that the party desiring a hearing makes the request for such hearing to the Controller at least ten days in advance of the expiry of the time-limit specified in respect of the proceeding.


Article 30 Exceptions to Rights Conferred Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Article 31 Other Use Without Authorization of the Right Holder Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected, for complete act visit https://www.wto.org/english/docs_e/legal_e/27-trips.pdf, Last visited (17 February 2016).


Compulsory License - A Tool To Enable Availability Of Affordable Medicines, Access, Vol. IV, Issue No. 2, October 2014. To see the article, please visit http://www.lawyerscollective.org/wp-
drug around Rs.2,80,428 per month per person. While Natco proposed to charged less than 10000/- per person per month. The question arise even though a generic drug can be produced at low cost, is it not violation of basic principles of IPR jurisprudence. The answer to this question lies under article 21 of the Constitution of India. Article 21 talks about right to life and dignity ad is a fundamental right along with that article 47 talks about state’s responsibility to improve health as one of its primary duties. Internationally also, under article 12 of the International Covenant on Economic, Social & Cultural Rights (ICESCR), to which India is a signatory, talks about state’s obligation to facilitate the right to health to its citizens.

Now it can be held obvious that ensuring public health is one of the most fundamental duty of the state, which it cannot deny at the first place. Also section 84 of Indian Patent Act, 1970, gave clearly builds up the construction on which a compulsory license can be given, as per the section the compulsory license can be given if

i. the requirement of public has not been satisfied
ii. the patent invention is unaffordable

56 Article 21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

57 Section 47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

58 The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

59 Section 84 of Indian Patent Act, 1970, talks about compulsory licensing.
iii. patent invention is not worked in the territory of India

In the present case it was submitted that around 4838 patients of liver cancer are in terminal stage and required 'sorafenib tosylate' and it was found that in 2011, only 200 patients were given the drug also clearly, cannot afford such high cost medical drug. Total expenditure on health is 4.2 per cent of GDP, of which only 1.1 per cent is current public expenditure,\(^\text{60}\) India with per capita income $ 1581.5.\(^\text{61}\) Therefore it was very valid to grant compulsory license, as the duty of the state is first to protect its citizens then to look the private interest of a private manufacturer.

Therefore it can easily be infer from the above that Indian laws are not weak as it has been alleged by the US senate rather they are adaptable according the internal situations of the country. This landmark judgment has also pave the way for the government to grant compulsory license in future for those drugs which are unaffordable at first place. Though it can be argued that it may lead to a huge loss to original manufacturer because of which there may be less investment in the future in the country but what should be understand is India's need to affordable medical considering India's commitment to provide health and care to its citizens which is huge in size, the argument of loss of investment does not hold water against loss of life due insufficient and unaffordable medical help.

Though this very step of granting compulsory license may give boom to domestic generic drug manufacturer which is a very serious concern for the international community again specially U.S. as they have one of the biggest pharmaceuticals companies and India is one of the biggest market. There fore allowing domestic companies to produce generic drug may help the country in securing cheap medical help but at the same time will cost the huge loss to the original manufacturer. This may lead to bigger conflict not only between between U.S.-India in terms of international relations but also in terms of foreign investment in India by Pharmaceutical industry.

*Increase in the production of generic drug*

\(^{60}\) Savita Gautam & Meghna Dasgupta, “Compulsory licensing: India’s maiden experience”, http://www.unescap.org/sites/default/files/AWP%20No.0.%20137.pdf, Last Visited (16 February 2016)

During December 2011, India’s pharmaceutical market grew at 15.7%. The expectation from Indian Pharmaceutical industry to grow till 2015 is 9.9%, by sales it expected to reach U.S. $ 74 billion by 2020 and it is ranked 17th in terms of export its products to more than 200 countries around the world. No doubt that from these figures it can easily be understood that India is one of the leading market player in pharmaceuticals, competing against US, Europe etc. Therefore it is also easy to infer that because it is upcoming market player it is going to be criticized for being the leader. The same can be seen as the Organization for Economic Corporation and development (OECD) identified India as the source of counterfeit medicine for producing generic drugs.

Though the counter argument to legitimize India’s generic drug production can be asserted from the WHO report that says that 3.2% fall below poverty line because of high medical bills. 39 millions Indians fall under poverty every year because of ill health. And because of financial constraint 30% rural Indians are not able to for any treatment along with that WHO shows serious concern India’s high expanse on medicine.

The above data clearly indicates the need to create cheaper and affective health care and medicine to tackle the situation which perfectly legitimize India’s stand to produce generic drugs. In the recent study conducted in order to compare the generic and brand drug by American Medical Association for the treatment of heart and artery decease. It was found that...
36 out of 38 found no big difference.\textsuperscript{67} Also it is important to understand that Indian generic industry feeds almost 80% need of countries like Zimbabwe and Liberia. These drugs are related to HIV, TB, Malaria and a wide range of infectious diseases.\textsuperscript{68} Adding to the affect, Indian generic drug because of its low cost were helpful in saving around 10.5 million African lives. Around 15 million African need treatment which is possible without the low cost effective generic drugs that India produce.\textsuperscript{69} In the recent concluded summit where India hosts 54 heads of state of Africa, the major issue discussed by the African heads was regarding India’s ability to produce generic drugs at affordable prices. It is India’s generic drug production policy that has enable the HIV drugs prices to fall up to 99%, from $10,000 per person per year in 2000 to $100 per year today in African continent.\textsuperscript{70} India is considered as the ‘pharmacy of the developing world’.\textsuperscript{71}

India - TRIPS Dispute

The Agreement on Trade related Aspects of Intellectual Property Rights of the WTO is most commonly known as the TRIPS Agreement. It is one of the main agreements which also comprise the World Trade Organisation (WTO) Agreement. The said Agreement was negotiated in the Uruguay Round extending from 1986 to 1994. The Uruguay Round introduced intellectual property rights into the multilateral trading system for the first time through a set of


comprehensive disciplines."\(^{72}\) The Trade Agreement on Trade-Related Aspects of Intellectual Property sets up least benchmarks of protection for every classification of intellectual property rights and ought to be connected as per the standards of most-favored country and national treatment. TRIPS is the exchange concurrence with most ramifications for the generation of and access to medicates, especially in the developing nations. The point of the agreement is to bring Intellectual Property Rights frameworks around the globe together under a common international arrangement of principles, in this way tending to issues of worldwide theft and IPR encroachments. The TRIPS Agreement sets minimum basic standards in the field of intellectual property (IP) protection that all WTO Member countries will have to respect. To achieve this goal WTO Members will have to modify their IP laws to make them consistent with the new WTO standards.\(^{73}\) TRIPS endeavors to strike a harmony between giving impetuses to innovative work and permitting individuals to have entry to and use existing developments and manifestations. TRIPS establishes minimum global standards governing the scope, availability and use of IPR and patent protection.\(^{74}\)

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\(^{72}\) Trade Related Aspects of Intellectual Property Rights (TRIPS);

\(^{73}\) Essential Medicines and Health Products Information Portal;

\(^{74}\) Trade, foreign policy, diplomacy and health; http://www.who.int/trade/glossary/story091/en/, Last Visited (23 February 2016).
The dispute originated by the complaint filed by United States and European Community stating that India violates TRIPS agreement articles 27, 65, 76 & 77.

**Article 27**

Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to [the transitional provisions relating to developing countries and patent protection for pharmaceutical and agricultural products], patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5. Page 348

3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.

5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

**Article 77**

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.

2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement. In respect of this paragraph and paragraphs 3 and 4, copyright obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention (1971), and obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement.
3. There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.

4. In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and which were commenced, or in respect of which a significant investment was made, before the date of acceptance of the WTO Agreement by that Member, any Member may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration.

5. A Member is not obliged to apply the provisions of Article 11 and of paragraph 4 of Article 14 with respect to originals or copies purchased prior to the date of application of this Agreement for that Member.

6. Members shall not be required to apply Article 31, or the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

8. Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

   (a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;

   (b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and

   (c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force
it talk about patentable mater and suggest that a patent shall be grated for any invention provided that it is new and innovative. Through this U.S. brought to the light India’s mailbox issue with TRIPS

**Mail Box Issue**

**Complaint**

US alleged that India failed to comply with TRIPS agreement to establish ‘mailbox’ system, in order to receive and preserve patent application.⁷⁸

**Findings**

The Appellate body found India in violation of

1. article 70.8.⁷⁹ The body found that “the system did not provide the “means” by which applications for patents for such inventions could be securely filed within the meaning of Art. 70.8(a), because, in theory, a patent application filed under the administrative instructions could be rejected by the court under the contradictory mandatory provisions of the existing Indian laws: the Patents Act of 1970.”⁸⁰

2. Art. 70.9 (exclusive marketing rights): “The Appellate Body agreed with the Panel that there was no mechanism in place in India for the grant of exclusive marketing rights for the products covered by Art. 70.8(a) and thus Art. 70.9 was violated”⁸¹

**Response**

India asserted that from the present findings no evidence can be found that demonstrate that ‘mailbox’ application can be challenged in Indian Courts and the same has failed to provide a proper mechanism for the same.

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⁷⁹ Supra note 11

⁸⁰ India-Patents (US), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds50sum_e.pdf, Last Visited (23 February 2016).

⁸¹ Id
Also to the violation of article 70.9, \textsuperscript{82} India replied that even if the Article 31 of Vienna Convention on The Law of Treaties is to be interpreted, no need arise to create a mechanism in order to provide the grant of exclusive rights. \textsuperscript{83} India also cited article 9.1 DSU\textsuperscript{84} and 10.4\textsuperscript{85} to established its claim to dismiss the case because EC did not join United Sates.

\textit{Conclusion}

Though the panel did recognize India’s argument but stated that it is not a proper forum to decide the matter of multiple complaint process, but stated that as per article 11, the role of the panel is to “\textit{make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements}” and therefore rejected India’s claim.

\textit{Result}

On the basis of the findings and the conclusion drawn, the panel stated that India has not complied with article 70.8 (a) because it did not provide any sound legal basis for adequately preserving novelty and priority for products in pharmaceutical and agricultural chemical inventions during the transitional period, which it is supposed to follow under article 65 of TRIPS

\textsuperscript{82} Supra note 13
\textsuperscript{83} Supra Note 8
\textsuperscript{84} Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.
\textsuperscript{85} 1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a “third party”) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.
4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.”

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agreement and India has not complied with Article 70.9 TRIPS. Result of which India had to amend Indian Patent Act.

**Conclusion**

Indian being one of the biggest market of pharmaceuticals and one of the biggest supplier of the same is a conflict zone for many. Many big player want to exploit the opportunity and want to be the biggest gainer. Which have raised complexities at multiple level. Firstly, where the unequal economic conditions gives scope to the generic production of pharmaceutical drugs, at the same time, the rise of generic production gives a hard blow to the established major players. This is core of whole patent battle, the interest of major pharmaceuticals industries v. interest of the nation. India with its large population and consumer of large quantity of drugs is the apple of eye of every one. But, due to large population still below poverty line, the state has duty to provide cheap medical help and by doing this it effects the business of major players because of which the market of parent companies suffered, which in result lead to the involvement of the nations. Where India's interest is to protect the right of its people and to provide best possible cheap medical help, the interest of U.S. and European countries lies in protecting the interest of there major industries. Therefore in the present case, it is not the laws that need to be focus upon, rather, to understand the problem, the deeper look is required in to the economics and socio dynamics involved in the situation. Indian state at any cost cannot allow drug market to be monopolize by big pharmaceutical players, simply because of its socio-economic differences, which gave birth to the manufacturing of generic drugs. India's need manufacture generic drugs turned out to be worlds one of the biggest requirements, which created the hue and cry for original drug makers. Though both sides have valid arguments to claim their rights but major question to be asked is that whether this dispute should only be seen from the point of view of patents or social audit is also required?

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BIOPICS: A CONCEPTUAL, SOCIOLOGICAL AND LEGAL ANALYSIS OF BIOGRAPHICAL MOTION PICTURES IN INDIA

CHANDANA ARVAL, CHUNKY AGARWAL, TANAY AGARWAL

Abstract
This research paper is structured to first conceptualize biopics and define the elements surrounding it. Also, the historiography of biopics is briefly discussed in this section. Thereafter, sociological aspects such as public impact, morality, decency, obscenity, etc. are discussed with the aid of case laws and relevant examples. The third part of this paper lays down the legal aspects surrounding the production and regulation of biopics. Issues such as defamation, right to privacy, requirement of consent, burden of proof, and rights of publication are submitted supported by relevant case laws and statutory provisions. Tortious liabilities, including comparative analysis with other common law countries, concerning biopics are also delved into in this section. The paper is concluded by summarizing the established jurisprudence and suggesting a way forward to incorporate the growing trend of biopics in India.

Introduction
A generic definition of a biopic (abbreviation for a biographical motion picture) is a film that aims to portray the life and times of an actual person, irrespective of him living or not at the time of making or release of the film, or a group of person. It is a comprehensive attempt to dramatize at least the most historically/sociologically/politically significant years of their lives. Big screen biopics cross many genre types such as music, western, crime, religion, war, art or science, among others.

Biographical films first came about at the turn of the nineteenth century. The first biopic made was Jeanne d’Arc, a film about Joan of Arc, made in 1900. They hit their peak of popularity in the 1930s but they are still some of the most popular films today. In certain rare cases, the protagonist (subject) of the film is enacted by the person himself or herself such as Muhammad Ali in The Greatest and Howard Stern in Private Parts.

86 Year IV, O.P. Jindal Global Law School
Indian cinema is currently attempting to be brave and do a lot of biopics (films based on the biography of a certain person). It isn't as if the idea is new. There have been attempts to make movies based on real-life people or films "inspired" by world-renowned celebrities from various walks of life. Of course, many a time, there has been a hurdle with the kith and kin of the celebrity whose life the movie is reportedly based on or inspired by, taking strong objections. So sometimes, the film is aborted even before it is born.

National awardee filmmaker Gnana Rajasekaran, the maker of biopics Bharathi, Periyar and Ramanujan attributes this growing inclination of filmmakers towards the genre to a changing taste among audience from fictionalised films to more realistic ones. "Biographies on the other hand should have a social message or a relevance to the present age so as to establish a connect with the audience," he says.

The first biopic made in India was a 1993 film ‘Sardar’ on the life history of Sardar Vallabhai Patel, one of India’s greatest freedom fighters. This move was directed by Ketan Mehta and written by renowned playwright Vijay Tendulkar. This movie was a remarkable piece in terms of rendition of the British India instrumenting the lens of a freedom fighter. Many diverse topics such as Gandhi, his differences with Nehru, Quit India Movement, Partition of India, etc. were cohesively included in this biopic.

Biopics involve in themselves various issues that might be legal, political or sociological in nature. Important legal aspects such as the requirement of consent, defamation laws, publication laws, privacy laws, burden of proof, etc. surround the filmmakers who dare to make a biopic. The social impact assessment has become an important step in the procedure, which includes issues such as public standards of modesty and social morality. There are various political considerations involved much like many other mass media communication instruments such as movies which have the potential to stir political ideas or radical ideologies in the minds of the masses.

Submitting hence, about the sociological aspects of biographical films: it is important that we consider what is the actual meaning of altering public opinion and its repercussions. Motion


pictures, since its inception, have stirred the minds of millions of people in a way, which no other form of mass media has. In India, apart from the most famous Hindi Bombay film making circuit called the Bollywood, there are multiple regional as well as linguistic counterparts or sub-spheres of film making communities such as Tollywood for Bengali and Telugu films and Sandalwood for Kannada films. Hundreds of movies are produced every month through all these communities and millions of viewers are subjected to the ideas of the producers. In a scenario like this, it is important that we consider the gravity of such infiltration of ideas and whether or not they are in the interest of the public good.

Public morality has always been a politically skewed concept in India. Issues such as nudity, sex, modesty, religion, political heroes, etc. have always been areas of contention in the public domain. Biopics are a comprehensive manifestation of a highly dramatized life history of a person once living. It is important that if such person or such information about his life history has the potential to disrupt, disorganize or dissuade public opinion, it should be minimally regulated and/or a prima facie supervision be exercised on them. Apart from the obscenity laws in India regulating such aspects of mass media, there have been multiple case laws where the courts have considered the social impact assessment standards and it have hinted on a policy draft on such controversial issues.

One such leading case law is Vadlapatla Naga Vara Prasad Vs. Chairperson, Central Board of Film Certification, Bharat Bhavan, Mumbai and Seven others\(^{91}\). This case was filed by the petitioner questioning the action of the respondents in portraying his sister in the movie ‘The Dirty Picture’ in a defamatory and obscene manner and also to restrain them from getting certification for exhibition of the family. The petitioner claimed that his sister - Kum. Vadapatla Vijaya Lakshmi, popularly known as ‘Silk Smitha’ was an acclaimed South Indian actress, whose only surviving heir was the petitioner. It was alleged that through the print and electronic media, various statements were issued proclaiming that the film was based upon the life of the said sister and she was portrayed as a woman of very loose or immoral character. This resulted in a lot of curiosity and unwanted attention to the petitioner’s family and relatives. The film also allegedly contains obscene scenes which are opposed to public morality and decency and degrade the women in general.

The respondents denied the fact that the film was based on a biopic. Instead, they claim that the

\(^{91}\) AIR 2012 AP 78
film is a work of fiction and the statements issued through the public media are unauthorized, hearsay and is not published with the permission and consent of the respondents and is a mere conjecture. The court therefore, in the light of the evidence adduced, held that the film was not a biographical film and was not based on the life story of the deceased actress.

In another judgment, Bobby Art International, Etc. vs Om Pal Singh Hoon & Ors on 1 May, 1996, the Supreme Court of India The writ petition was filed by the first respondent to quash the certificate of exhibition awarded to the film "Bandit Queen" and to restrain its exhibition in India. The film deals with the life of Phoolan Devi. The film is based on a book written by Mala Sen called "India's Bandit Queen". The book has been in the market since the year 1991 without objection.

On 17th August 1994, the film was presented for certification to the Censor Board under the Cinematograph Act, 1952. The Examining Committee of the Censor Board referred it to the Revising Committee under Rule 24(1) of the Cinematographic (Certification) Rules, 1983. On 19th July, 1995, the Revising Committee recommended that the film be granted an 'A' certificate, subject to certain excisions and modifications. (An 'A' certificate implies that the film may be viewed only by adults). Aggrieved by the decision of the Revising Committee, an appeal was filed under Section 34 of the Cinematographic Act before the Appellate Tribunal. The Tribunal's order states that the film "portrays the trials and tribulations and the various humiliations (mental and physical) heaped on her (Phoolan Devi) from childhood onwards, which out of desperation and misery drove her to dacoity and the revenge which she takes on her tormentors and those who had humiliated and tortured and had physically abused her.

The scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men is intended by those who strip her to demean her. The object of doing so was not to titillate the cinema-goer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The 1st respondent's writ petition was dismissed. The "A" certificate issued to the film "Bandit Queen" upon the conditions imposed by the Appellate Tribunal was restored.

It is pertinent to note that such regulatory measure as in aforementioned cases, help regulate the process of safeguarding social morality and public decency. Sociologically, biopics and obscenity have a very delicate nexus since it borders on a person's privacy and public sentiment.

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92 (1996) 4 SCC 1
concurrently. The role played by relatives or legal heirs of a certain person in defamation cases related to biopics might be seen in consonance with the role of an interest holder in a public modesty suit. Indian Courts, through the course of time, have been able to establish a rich and cumulative jurisprudence on such issues. However, certain hard cases of political heroes and the public sentiments attached to them or national terrorists enjoying the epitome of hatred from the masses, the Courts have to decide on a case to case basis with the legal statutes and precedents guiding them.

Section 5-B of the Cinematograph Act, 1952, which echoes Article 19(2), states that a film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of, inter alia, decency. Under the Provisions of sub-section (2) of Section 5-B the Central Government is empowered to issue directions section out the principles which shall guide the authority competent to grant certificates in sanctioning films for public exhibition.

The guidelines earlier issued were revised in 1991. Clause (1) thereof reads thus:

"1. The objectives of film certification will be to ensure that -

(a) the medium of film remains responsible and sensitive to the values and standards of society:
(b) artistic expression and creative freedom are not unduly curbed;
(c) certification is responsive to social change;
(d) the medium of film provides clean and healthy entertainments; and
(e) as far as possible, the film is or aesthetic value and cinematically of a good standard."

Clause (2) states that the Board of Film Censors shall ensure that-

(vii) human sensibilities are not offended by vulgarity, obscenity or depravity;
(ix) scenes degrading or denigrating women in any manner are not presented:
(ix) scenes involving sexual violence against women like attempt to rape, rape or any form of molestation or scenes of a similar nature are avoided, and if any such incident is germane to the theme, they shall be reduced to the minimum and no details are shown;

Clause (3) reads thus:
“The Board of Film Certification shall also ensure that the film-

(1) is judged in its entirety from the point of view of the overall impact; and

(ii) is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the mortality of the audience.”

In Sakal Papers (P) Ltd. and Ors. vs. The Union of India\(^93\), a Constitution Bench held that the only restrictions which can be imposed on the rights of an individual under Article 19(1)(a) were those which clause (2) of Article 19 permitted and no other. This was reiterated in Life Insurance Corporation of India vs. Proof. Manubhai d. Shah, 1992 (3) S.C.C. 637.

In Bobby Art International, Etc vs Om Pal Singh Hoon & Ors\(^94\), the Supreme Court held that the guidelines are broad standards. They cannot be read as one would read a statue. Within the breath of their parameters the certification authorities have discretion. The specific sub-clauses of clause 2 of the guidelines cannot overweigh the sweep of clauses 1 and 3 and, indeed, of sub-clause (ix) of clause (2). Where the theme is of social relevance, it must be allowed to prevail. Such a theme does not offend human sensibilities nor extol the degradation or denigration of women. It is to this end that sub-clause (ix) of clause 2 permits scenes of sexual violence against women, reduced to a minimum and without details, if relevant to the theme. What minimum and lack of details should be is left to the good sense of the certification authorities, to be determined in the light of the relevance of the social theme of the film.

Submitting hence about the right to privacy and its influence on biopics, it was held in Sakal Papers (P) Ltd. and Ors. vs. The Union of India\(^95\), that held, further, that the State could not make a law which directly restricted one guaranteed freedom for securing the better enjoyment of another freedom. This initiates another very important aspect of biopics, the requirement of

\(^93\) 1962 (3) S.C.R. 842

\(^94\) (1996) 4 SCC 1

\(^95\) Supra note 7.
consent. Bollywood recently released a biopic 'Bhag Milkha Bhag' which was made with the consent and aid and assistance of Milkha Singh, the inspiration subject matter of the film. In another case, in a Hindi movie 'No One Killed Jessica', a very controversial murder case was reconstructed. It was not exactly a biopic however, since it was based on a real-life incident, many of the characters were inspired by actual living or dead persons. One such person was a witness who turned hostile and she belonged to a very influential family in real life. A legal notice was sent to the makers of the film for a public apology to show the character in a humorously up-class sophisticated character. The makers however refused to do anything about it since a little amount of creative freedom is allowed when a real life incident is dramatized.

In Balwant Singh Tomar v Tigmanshu Dhulia and Ors\textsuperscript{96}, the plaintiff filed this petition for a criminal trial against Tigmanshu Dhulia for the alleged breach of a contract. The petitioner alleges that he entered into a contract with the respondent for supplying all the information regarding the life of his uncle Paan Singh Tomar for the making of a biopic on his uncle's life story and in return was assured a sum of Rs 40 lakhs by the respondents. The respondents denied the presence of any such contract. The Court held that in the circumstances present, a criminal trial could not be brought about on the respondents and the issue was merely contractual which could only be enforced if there would be concrete evidence to support the claim of the petitioners.

This case however, depicts the implied requirement that the film industry practices wherein, biopics are made with proper consent of the person as the subject matter if alive, or his/ her relatives or heirs. This not only reduces to a major extent the risk of defamatory laws to swoop in but also extinguishes any right to privacy that might be claimed otherwise. Practically, such consent is beneficial for the film makers to exercise full creative freedom while making the film in order to suit their audiences.

On the issue of privacy, it was held by Matthew J. in Supreme Court of India in Govind v State of Madhya Pradesh and Anr\textsuperscript{97}, that too broad a definition of privacy will raise serious questions about the propriety of judicial reliance on a right that is not explicit in a Constitution. The Right to Privacy will, therefore, necessarily, have to go through a process of case by case development. Hence, assuming that the right to personal liberty, the right to move freely throughout India and

\textsuperscript{96} ILR (2013) MP 967

\textsuperscript{97} 1975 AIR 1378
the freedom of speech create an independent fundamental right of privacy as an emanation from them, it could not be absolute. It must be subject to restriction on the basis of compelling public interest. The Court traced the origin of Right to Privacy in this case and a number of American decisions including Munn v State of Illinois\(^98\), Wolf v Colorado\(^99\) and various other articles were considered.

In another classic judgment rendered by Jeevan Reddy J. in R. Rajagopal & Anr. v. State of Tamil Nadu & Ors.\(^100\), the right of privacy vis-a-vis the right of the Press under Article 19 of the Constitution were considered and in the research-oriented judgment, it was laid down, inter alia, as under:

"The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone:" A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful of otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however; be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."

However, it is interesting to note that defamation laws are still intact in the issue of biopics, the way they are in ordinary jurisprudence. For instance, in Rajagopal v State of Tamil Nadu\(^101\), an established law was made in India that so far as the government, local authority and other organs and institutions exercising governmental powers are concerned, they cannot maintain a suit for damages for defaming them. This is also applicable for public figures since they have an influential role in ordering society. They have access to mass media communication both to influence the policy and to counter criticism of their views and activities; and a citizen has a legitimate and substantial interest in the conduct of such persons.

\(^{98}\) (1877) 94 US 113

\(^{99}\) (1949) 338 US 25

\(^{100}\) [1994] 6 SCC 632

\(^{101}\) AIR 1995 SC 264 p.277
Another significant aspect of defamation in relation to biopics is the defense of a fair and bona fide comment which on a matter of public interest. Thus legitimate criticism is no tort; should loss ensue to the plaintiff, it would be damnum sine injuria. This was held in Dainik Bhaskar v Madhusudan Bhaskar102. Also, as mentioned by the case laws above, it is a defense that a plaintiff has impliedly or expressly consented to the publication complained of.

Concluding, significantly, biographical motion pictures is a sub-genre of film making which separates itself from conventional entertainment films. It associates its subject matter with an individual or a group of individuals which existed or are still in existence in the real world. Biopics have an increasing number of audience in the recent times and are widely acclaimed as intelligent film making. With such a huge potential for impact on the masses, it is important that it be regulated before it stirs the public mind. General standards of public morality, modesty and laws relating to obscenity are inherent in the regulation of biopics as seen in the case laws relating to popular motion picture such as the Bandit Queen and The Dirty Picture. Legally, there are multiple issues that surround biopics. Primarily, the laws relating to defamation remain the same including its defenses such as consent. Consent is also important since it gives the adequate amount of creative freedom to the filmmakers. Issues of right to privacy are also to an extent curbed by the existence of consent. Anyways, right to privacy is not an absolute right as established by leading case laws and is subject to limitations such as public interest. Another important legal aspect is the fact that public officials, including public figures do not stand a chance to take forward a case for damages for defamation. With the growing technology and multiplying genres of film making, it shall be interesting to know how Indian Courts sustain this pseudo-liberal regulation of biographical motion pictures in the times to come.

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102 AIR 1991 MP 162
CHARACTER MERCHANDISING IN TRADEMARKS

CHANDRIKA TEWATIA

INTRODUCTION

"Good merchandising will always take the consumer from deciding whether they are going to buy to which are they going to buy," said Stewart Goldsmith, Vice-President of Sales for Todson.

Chhota Bheem, the famous boy of Dholakpur first premiered in 2008 on Pogo TV. In 2016, one can find Chhota Bheem T-shirts, watches, toys which have become a phenomenal range with the Indian kids. Character merchandising has been defined as secondary exploitation by the creator of a fictional character by a third party of its various features such as the name, image or appearance of a character in relation to various goods or services with a view to creating in prospective customers a desire to acquire those goods or to use those services because of the customers’ affinity with that character. Here, the character maybe fictional or real. Character merchandising may be equated to brand building of a product. Without any protection of the brand, there would be no benefit to the creator of the brand which here is the character. So, like brands are protected through intellectual property right, characters can be protected through various IPRs like copyright, trademark and industrial designs. Unlike copyright, which protects expression, trademark protects brand names and graphical designs which are applied to different products or in connection with services.

Character merchandising has been a century old concept but had started rising only after the advent of Disney in 1930s. The first appearance of ‘Mickey Mouse’ in 1934 and later on, other Disney characters that had led to the momentum in character merchandising. During this period, one of Disney’s employees, Kay Kamen, set up a department focusing on the secondary commercial exploitation of these characters in the form of buttons, badges, posters, etc. This led to the rise in the building of the ‘character’ among the masses. By the end of the nineteenth century, character merchandising had led to use of the character in movies, advertisements and products like T-shirts, watches, action figures, princess dresses which were only bought because

103, L.L.M. (IPR), Gujarat National Law University
of its association with that character which has become a multi-billion dollar industry. It has intensified as one of the most lucrative methods of popularizing different forms of literature; be it books, movies or TV shows. It holds a projected market of $2.5 Billion in the Indian industry alone.\textsuperscript{107}

The concept can be seen to have philosophical beginnings through Georg Wilhelm Friedrich Hegel (1770-1831) who has given that, ‘Property is an expression of self and the locus of an individual’s claim to rights, since it is through property that one can say “this is mine,” a claim that others respect. Property is the “embodiment of personality.’\textsuperscript{108} One can see that personality can also said to be part of property and as trespass of property is sanctioned, similarly trespass of one’s personality who has attained fame and reputation, whether fictional or real, would be protected under the law.

Trademark rights are acquired in names, logos, symbols and other marks by any person or business entity by using it in the normal course of business, for instance on a tag or label for merchandise being sold to the public. In character merchandising, the character acts like the trademark as it represents the company or the creator’s brand. The creator may further license to other companies who may use it in other fields like movies, apparel etc. here, the license agreement works like a rental contract. The ‘character’ acts like the property, the creator acts as the licensor and the acquirer of the other rights as the licensee. The present source of characters tends to originate from movie and television such as Star Wars, Star Trek and Jurassic Park. The various memorophilia involved in the publicity of these movie would come under the merchandising of the character. With the latest Star Wars movie, various products including Kellogg and McDonalds had come with different products like swords and action figures. The classic characters from comic strips are still popular example. Superman has been so popular that a movie series as well as a TV series have been formed with different kind of products like T-shirts etc. These characters have been protected through Trademark and their further use would also be protected under the same. Copyright law also protects artistic

\textsuperscript{107} Rahul Bajaj,’ An Analysis of the burgeoning Character Merchandising Industry in India’ (25 October 2014) <http://blog.ipleaders.in/an-analysis-of-the-burgeoning-character-merchandising-industry-in-india/> accessed 2\textsuperscript{nd} February 2016
\textsuperscript{108} Centre for Public Policy Research, ‘Character Merchandising’ (12 May 2011) <http://cppr.blogspot.in/2011/05/character-merchandising.html> accessed 5\textsuperscript{th} February 2016
\textsuperscript{109} Georg Wilhelm Friedrich Hegel, \textit{Phenomenology of spirit Philosophy of Right}, I–II: Abstract Right and Morality (1807)
creations like music, text, scripts, screenplays, and artwork. But the research paper is going to focus on how protection can be administered to such brands under Trademark.

**LEGAL IMPLICATIONS OF CHARACTER MERCHANDISING**

Recent communication, marketing trends have given a rise to character merchandising which has turned into a multi-billionaire business. The concept of character merchandising is riddled with legal implications in almost all jurisdictions. Through many common law countries like UK, South Africa; India has followed these judgments and has created a framework of protection for the character merchandising. Courts across the entire world are recognizing the need for regulation of this market and nations have recognized this need by using legislative or judicial means. So, the rights of the entity can be acquired through license or otherwise.

There are many reasons which can be contributed to the reasons of the rise of Character Merchandising in India. The growth of the Industry has been linked to the boom in the retail sector. Licensors prefer to invest in obtaining licenses that already have an international or regional presence.\(^\text{110}\) India’s organised retail segment is projected to grow from 9 per cent of the total retail market in 2015 to 20 per cent by 2020.\(^\text{111}\) Many foreign entrants have entered the Indian market to sell their product and co-merchandise, example Disney. Also, the emergence of popular sports league like IPL has also contributed to the rise in character merchandising in India. Recently, Harbhajan Singh had sold his right to use his name to the company- License India.\(^\text{112}\) There is a growth in consumer spending in relation to quality as well as status. Today’s Indian consumers want to be at par with the International consumer and are interested in products which they associate with like movies, books etc. Cartoon Network and Pogo have increased their sub-brands, products, merchandising by 70% since its inception of the marketing branch in India in 2001.\(^\text{113}\) Increased brand awareness has also given rise to counterfeit goods

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as it creates an aspiration in the consumers to own the brand. This can demonstrate the character merchandising boom and its importance of regulation, protection in India.

In India, Section 2(1) of the Trademark Act, 1999 has outlined the entities for which a trademark can be acquired. It states, inter alia, that personal names, designs and the packaging of goods can be registered as trademarks.\textsuperscript{114} As the fictional character is being represented in a 3d form or a pictorial form on goods and services, it can be protected under trademark law. The protection must be done under the various classes in Rule 22 under Trademark Rules, 2002 which have been mentioned through the NICE classification given under WIPO.\textsuperscript{115} It mentions goods from Class 1-34 and services from Class 35 -45. After applying for trademark, one can choose different goods through which they would like to merchandise or license their product. There is a presence of counterfeit goods so the trademark in different classes is the best option for protection from infringement as well as its use. The protection of characters in trademarks is abysmal\textsuperscript{116} and the Indian market must rise to the challenge and avail of this service atleast for protection.

Through this, one can say that even characters may be entitled to be a trademark which has been given in India in the case of \textit{Sholay Media vs. Parag M Sanghavi}\textsuperscript{117}. Here, in this case, it was given that name and title of the work also creates an identity in the minds of the people. Different film makers choose distinct and unique movie names so that it creates an impression in the conscience of the people. The case relates to the issue of the ambit of trademark law in providing protection to the titles of cinematographic movies. Therefore, trademark protection has become a necessity for the protection of the brand of the movie. The Ram Gopal Verma's film "Ram Gopal Verma Ke Sholay" was restrained from release due to copyright and trademark infringements in relation to the cult film Sholay by the Delhi HC. One of the basic issues raised was whether trademark protection could be granted to the title of the film. The Delhi High Court issued an ex parte injunction to restrain the defendants from infringing the plaintiff’s rights and

\textsuperscript{114} Rahul Bajaj,’ An Analysis of the burgeoning Character Merchandising Industry in India’ (25 October 2014) <http://blog.ipleaders.in/an-analysis-of-the-burgeoning-character-merchandising-industry-in-india/> accessed 2\textsuperscript{nd} February 2016
\textsuperscript{115} NICE Agreement classification of goods and services (1957)
\textsuperscript{116} Nikita Hemmige,’ Character Merchandising in India’ (September 17 2014) <http://www.selvamandselvam.in/blog/character-merchandising-in-india-part-one/#sthash.HAcK2aJd.dpbs> accessed on 15\textsuperscript{th} February 2016
\textsuperscript{117} \textit{Sholay Media vs. Parag M Sanghavi} CS (OS) No. 1892 of 2006
recognised rights in the title of the film after a series of hearings and the defendant gave an undertaking that it would not infringe the plaintiff's rights.\textsuperscript{118}

Similar judgments have been given in other cases like \textit{Biswaarop Roy Choudhary v. Karan Johar}\textsuperscript{119}, \textit{Kanungo Media (P) Ltd v RGV Film Factory}\textsuperscript{120}. In the former case, the plaintiff had sought an injunction towards the use of the name ‘Kabhi Alvida Na Kehna’ as the name of their movie. Even though the defendant had not registered the movie name, the defendant was the actual user of the name and had already finished the production of the movie. Delhi High Court resulted in denial of interim relief to the plaintiff and gave that Kabhi Alvida Naa Kehna was a phrase in common parlance and therefore could not be used with exclusivity and furthermore there was delay by the plaintiff in approaching the Court. In the latter case, the esteemed court gave that the movie titles can be divided into two categories- title series of films and secondary titles of movie titles which can be copyrighted. Title series might be provided for trademark, it is the secondary title which creates the issue. The onus is upon the plaintiff to show how the movie title has acquired secondary character and has acquired a wide reputation among the public. This is a commendable judgment by the court to fill the gap and settle the position of the movie titles being registered trademark law. This is similar to the law which is followed in the US law which would be explained in detail in Chapter 3.

Famous cases in India regarding Character Merchandising are \textit{DM Entertainment v. BABY Gift house}\textsuperscript{121}, wherein the dolls of the noted playback singer Daler Mehndi was sold in the market without the consent of the company which had bought complete rights from the singer. The Court found it to be a passing off, as it causes impression on people as to deceive people that it was a product of the company which had rights over the singer. Here, the brand is the eminent personality which is the singer and can constitute as brand merchandising.

\textsuperscript{118}Himanshu Sharma,’ India: Movie Title: Protection under Law of Trademark’ (26 February 2014) <http://www.mondaq.com/india/x/295382/Trademark/MOVIE+TITLE+PROTECTION+UNDER+LAW+OF+TRADEMARK> accessed 17\textsuperscript{th} February 2016

\textsuperscript{119} Biswaroop Roy Choudhary v. Karan Johar (2006) 33 PTC381 (Del)

\textsuperscript{120} Kanungo Media (P) Ltd v RGV Film Factory(2007) 34 PTC591 (Del)

\textsuperscript{121} DM Entertainment v. BABY Gift house CS(OS) No. 893 of 2002
In JK Rowling v. Puja Committee, Kolkata, one of the pandals which was set up during the Durga Puja was Harry Potter themed with Hogwarts like castle. Harry Potter is a trademark which has been registered under the name of JK Rowling. Even then, the Delhi HC refused to restrain the Puja committee and directed the Puja Committee to file an undertaking stating that they would not use any character from the book without permission in future. The defendant had given that it was a non-profit making society and was using the characters only for charitable purpose.

In the case of Chorion Rights Limited vs. Ishan Apparel and Ors., the plaintiff claimed to be the owner of fictitious character named NODDY having marketing rights and worldwide trademark over it. The plaintiff wanted to prevent the defendant from selling apparel under the trade name NODDY. While the court recognized the importance of upholding character merchandising rights, it held that the registration for the mark was granted to the defendant in 1995 whereas the plaintiff’s claim on the mark was with effect from 1997. Hence, even though the plaintiff owned the merchandising rights in NODDY in most jurisdictions, the defendant was first past the post with regard to India.

There has been an assortment of cases infringing the worldwide trademark and the merchandising rights of Disney in India. The amount of cases and injunctions filed by Disney are enormous. Its famous characters have created a problem for Disney India to keep a check on the amount of infringements. Some of the cases - Disney Enterprises Inc & Anr vs. Gurcharan Batra & Ors in which school bags with the Disney characters were being sold without permission was given permanent injunction and damages of 1 Lakh; Disney Enterprises Inc & Anr vs Harakchand Keniya & Ors in which the defendant was selling party hats and other party decorations were being sold, the court awarded the plaintiff Disney with Rs 2 Lakh and permanent injunction against the defendants; Disney Enterprises Inc. & Anr. vs Balraj Muttneja & Ors, an injunction was obtained against the defendant for selling toffees, chocolates with the Disney characters; Disney Enterprises ,Inc & Anr vs Gurmeet Singh & Ors, the court held that ‘Disney’ and its characters come under the definition of well known trademark and was settled out of the court.

122 Decided by Delhi HC
124 Chorion Rights Limited vs. Ishan Apparel and Ors. (2010) ILR 5 Delhi 481
127 Disney Enterprises Inc. & Anr. vs Balraj Muttneja & Ors CS(OS) 3466/2012
128 Disney Enterprises ,Inc & Anr vs Gurmeet Singh & Ors CS(OS) 1451/2011
Most of these cases were settled ex-parte. The most recent case would be *Disney Enterprises Inc. & Anr. vs. Santosh Kumar & Anr.* 129, the defendant was selling school boards with the images of Hannah Montana, Winnie the Pooh, Mickey Mouse. Disney was awarded permanent injunction as well as damages of 5 Lakh. The court held that there is an intense degree of association between the plaintiffs and the aforementioned characters which is why any reference to these characters reminds the public exclusively of the plaintiffs. 130

129 *Disney Enterprises Inc. & Anr. vs. Santosh Kumar & Anr. CS(OS) 3032/2011*

INTERNATIONAL SCENARIO OF CHARACTER MERCHANDISING

There is no particular law related to character merchandising in the various countries and the jurisprudence has been evolved on the basis of various judgments given in various countries or the Intellectual Property law.

The term character merchandising has been first defined in the international scenario in Australia through the case by Burchett J. in Sue Smith Case, Shoshana Pty. Ltd v. I0th Cantane Pty Ltd\(^{131}\). He gave that character merchandising is a technique which is used by advertisers using the public image of a personality concerned to develop in the minds of the public an identification of the product with that personality. In Pacific Dunlop Limited v Hogan ("Crocodile Dundee Case")\(^{132}\) Justice Burchett said, “The whole importance with character merchandising is the creation of an association of the product with the character; not the making of precise representations. Precision would only weaken an impression which is unrelated to logic and logically indefensible”. In Australia, character merchandising is being protected through Section 52\(^{133}\) and 53\(^{134}\) of the Trade Practices Act, 1974 as well as the law of Torts. In Hogan's Case\(^{135}\), the respondents who operated two retail outlets called “Dundee Country” in display signs inside and outside the shops as well as on various items sold in the shop displayed the image of a koala in a get-up reminiscent of the character Crocodile Dundee. The applicants who were associated with the film Crocodile Dundee sought an injunction restraining the respondents from using the koala image. The action was brought under Section 52 of the TPA and the law on passing-off.

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\(^{131}\) Shoshana Pty. Ltd v. I0th Cantane Pty Ltd (1988) ATPR 40-851,49,167 (Fed Ct.)

\(^{132}\) Pacific Dunlop Limited v Hogan (1989) 87 ALR 14 (Full Court)

\(^{133}\) Section 52. (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive.
   (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of sub-section (1).

\(^{134}\) Section 53. A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services-
   (a) falsely represent that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model;
   (b) falsely represent that goods are new;
   (c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
   (d) represent that the corporation has a sponsorship, approval or affiliation it does not have;
   (e) make false or misleading statements concerning the existence of, or amounts of, price reductions;
   (f) make false or misleading statements concerning the need for any goods, services, replacements or repairs; or
   (g) make false or misleading statements concerning the existence or effect of any warranty or guarantee.

\(^{135}\) Pacific Dunlop Limited v Hogan (1989) 87 ALR 14 (Full Court)
The Court granted the injunction and found that the implied representation that the business was associated with the film was a ground for a passing-off liability.\textsuperscript{136}

There have been a lot of judgments in the context of character merchandising, but there is no consensus on the view and judgments are related but not identical. A landmark case in the jurisprudence of law relating to character merchandising could be considered the \textit{Holly Hobbie Case}\textsuperscript{137}. In this case, the American company wanted to expand its business to UK and had tried to get a Trademark under Section 17 of The Trademark Act, 1938. After gaining popularity in greeting cards, they decided to increase their market by using the trademark in tableware, lamp shades. They did not intend to use it on their own but license it out further. This trademark was rejected and was termed as ‘trafficking of trademark’. But with the new UK Trade Mark Bill 1993 would make the \textit{Holly Hobbie case} obsolete and allow more easement for international traders for merchandising their goods.

The British judges have been adamant on considering character merchandising as a business at all as given in the \textit{Kojakpops case}.\textsuperscript{138} In this case, a British soap, Kojak with the main protagonist always having a lollipop in his mouth. The Television producers licensed another company to produced lollipops under the name of Kokakpops whereas another company had already started producing pops under the same name and had already gained reputation and goodwill. The court held that it could not believe that there was any overlap between lollipop and a TV series.

The recent case of \textit{Betty Boop}\textsuperscript{139} was one of character merchandising, and the issue there was whether trade mark registrations for the name and image of an old cartoon character known as Betty Boop had been infringed by a company that had used the image of the character without the licence of the trade mark owner. The court found that there had been infringement, and in the process it rejected a number of defenses that had been raised.


\textsuperscript{137} Re American Greetings Corp’s Application (‘Holly Hobbie’)(1984) 1 W.L.R. 189, 1 ALLE.R. 426, R.P.C. 329

\textsuperscript{138} Tavener Rutledge, Ltd. v. Trexapalm, FSR 479 [1975].

\textsuperscript{139} Hearst Holdings Inc & Another v A.V.E.L.A. Inc & Others [2014] EWHC 439 (Ch)
In *Rihanna v Top Shop*[^140], the issue there was whether Top Shop, who sold t-shirts bearing Rihanna’s image but who had never bothered to get the singer’s consent, was guilty of passing off. The UK court gave that Rihanna is very well known and people will assume that she has endorsed the t-shirts. The facts that Rihanna had endorsed products in the past, and the fact that she was active in the field of fashion, were clearly seen as relevant considerations. Here, it can be seen that Rihanna has created such a brand image that it can be used as a further market by attaching herself to some goods. This type of character merchandising is further termed as personality merchandising.

A similar approach had been adopted in a case involving images of Elvis Presley, where the UK authorities were not convinced that anyone would assume that those goods had been endorsed or licensed by the late singer’s estate.

In a case[^141] involving Formula One racing driver, Eddie Irvine, a UK court found that a radio station that had used his photo in an ad without his consent was guilty of passing off. The court gave that people seeing the ad would assume that he had endorsed the station and allowed the injunction and damages of 25,000 pounds.

South Africa follows in the steps of UK courts being a commonwealth country. In a South African case involving the 1994 Football World Cup, the court accepted that the public understands the concepts of character merchandising and endorsement. There can be little doubt that today most of us understand that those who are fortunate enough to own famous names and faces often licence their assets to those who provide us with the goods and services we buy, in return for a royalty or fee.

Another option that may be available in South Africa is the Code of the Advertising Standards Authority, which provides that a company can’t portray a live celebrity without their consent. There are some vague exceptions, for example where it doesn’t interfere with the celebrity’s privacy, and where it doesn’t amount to unjustifiable exploitation.[^142]

**CONCLUSION**

India is an emerging business market for merchandising and can be seen increasing tremendous folds in the coming future era. There is no express provision for the protection of character merchandising.

[^140]: *Rihanna v Top Shop* [2013] EWHC 2310 (Ch)
[^141]: *Irvine v. Talksport Ltd* Ch D 25 March 2002

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merchandising in India. India can use the example of Australia and develop on a law and introduce amendments in Trademark Act, Copyright Act. From a legal standpoint, there is a dire need to put in place a robust framework for regulating the sale of character merchandise. In a bid to buy the cheapest available merchandise, customers often fall prey to the deceptive tactics of those who sell counterfeit merchandise. Various judgments have emerged in the Indian as well as International jurisprudence for protection of the interests of the creators as well as the consumers to prevent them from buying counterfeit goods.

Character merchandising is often invoked legally to prevent unfair competition, since there is a high chance that competitors may use noted celebrities while advertising. Protection of the personality rights of celebrities should also be made a priority, even though they are considered as public entities, they’ve made a brand out of them through their own hard work.

There is a need to protect the rights and interests of the creators who had taken strains to create a work using their intelligence. While intellectual property rights provide protection to such creators as an incentive to their creation, they are often weak in protecting the misuse of characters created by individuals. Creators and celebrities are at the receiving end when it comes to such misuse. It is important to grant protection and prevents misuse of their name or face for purely commercial endeavours or misrepresentation. India needs to strengthen its IPR regime to provide protection to creators and encourage innovation. Character merchandising laws shall be able to strengthen the IPR regime and build up reputation of India as a nation strong in encouraging and protecting inventors.

In sum, there is an imperative need to streamline overlapping and conflicting norms which inhibit the growth of this industry and to put in place clear guidelines with the codified law that would promote the progress of this innovative form of marketing.
CONSTITUTIONALITY OF CORPORATE SOCIAL RESPONSIBILITY

DEEPAK SHUKLA

Abstract

The basic issue of this research paper will be, whether CSR policy has any relevance with constitution of India and can sagacious principle of constitution of India like (Equality, social justice, freedoms, life and liberty, rights and duties etc.) applied in CSR policy.

This paper deals with the constitutional aspect of CSR and its implication. The researcher has analysed various concepts of constitution like state welfare and social justice. The scope of the research has been to CSR policy with reference to study of social aspects, welfare aspects of stakeholders and others who are directly or indirectly affect with CSR policy.

It’s hypothesized by the researcher that CSR policy is very much relevant from the perspective of constitution of India, the turnover or net profit exceed prescribe limit this companies are under compulsion to make provision of CSR and researcher also try test Constitutional validity of CSR by applying the test of Classification under article 14 of Indian constitution so researcher in this paper resolve this conflict of interest by explain various provisions of constitution of India and another relevant national and international perspective.

Introduction

This project is an endeavour taken up the researcher to explain various constitutional aspects relating to Corporate Social Responsibility to explain this researcher is relied on various articles of CSR and various constitutional aspects and Laws relating to CSR to explain this concept more clearly researcher is also focusing on certain International aspects of CSR and Constitution of Other Countries and various laws relating CSR.

The Researcher divide this Project in to two Part Where first Part is dealt with the What is CSR and Historical Background of CSR Where in Second Part dealt with how CSR is archive the various objectives Constitution of India and While archiving this objects researcher try to answer the various question which are important to dealt with.

CSR is consider as important tool to archive various Social, Economic, Environmental and Ethical Responsibilities of Business which ensure their Success in long run and it also ensure stability for the Business The most important thing is that businesses are important and integral part of

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society. A socially responsible company has to achieve certain parameters like ethical practice and good governance by this company can create an image of a socially responsible company.

The idea of CSR was first introduced in 1953 by HR Bowen in a book called 'Social Responsibility of the Business'. This became important work for understanding CSR and still there is no clear consensus work of CSR.

HR Bowen defines CSR as follows: ‘Social responsibility of a businessman refers to the obligation of the businessman to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society’.

Due to the growth of business and economy, companies have become more responsible, and due to this various authors and critics define CSR in different perspectives in every decade. The role of CSR has become more vital, and following are important points:

- In 1950s: Social Obligation.
- In 1960s: Relationship Between Corporation and Society.
- In 1970s: Due to involvement of Stakeholder’s social interest, the citizen’s role provided for various responsibilities for corporations like economical, legal, ethical, and discretionary.
- In 1980s: Voluntariness for various supportive activities like philanthropic, economical, legal, ethical.
- In 1990s: Social obligation relating to Environment which includes people, planet.

After discussing the introduction of CSR and historical background of CSR, it is important to know what the provisions of CSR are under Indian law. Indian Companies Act, 1956 was the law which governed various companies and provided regulatory aspects of companies. But after passing of new companies act 2013, numerous new concepts were introduced like one man company, class action suits, most important concept CSR, which was introduced under section 135 of companies act 2013.

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144 Shafiqur Rahnan 'Evaluation of Definitions: Ten dimensions of Corporate Social Responsibility' (2011) 1 World Review of Business Research 166, 173
As per the provision every company having net worth of 500 crore or more, or turnover of 1000 crore or more, or net profit of 500 crore or more during any financial year shall constitute a CSR Committee of the board consisting of three or more director, out of which at least one director shall be an independent director.

It is mandatory for CSR committee to formulate board and recommend to the board CSR policy which provide for important activities to be undertaken by company which are specified in schedule VII(a) and it is necessary to recommend the amount of expenditure to be incurred on the activities.

It is also mandatory for board of every company which is referred in sub section(1), to ensure that company spends, in every financial year, atleast 2% of average net profits of the made during the 3 immediately preceding financial years, for the purpose of CSR. It is mandatory for the board to mention reason for not spending the amount which is require to spend for the purpose of CSR prescribed under clause (o) of sub –section(3) of section 134.

**Why Corporate Social Responsibility?**

To explain and understand CSR it is necessary to give explanation Why CSR? Because corporation has already various responsibilities like labour welfare, environmental governance and if corporation fails to do so then there are trade unions and court to held corporation for irresponsibility and it is also a state prerogative to do social welfare then why burden also given to corporation to answer this question it is also keep in mind certain parameters like social obligations when we are talking about social obligation it is referring to corporation does owe duty from society because corporation are the integral part of society they use the resources from society and it their responsibility to pay back by doing various activities which are mention under Schedule VII of Companies Act, 2013. There is also Stake holder’s involvement which also the one of the reason of CSR because stake holders have other interest than business which can also Consider as need of CSR.

Economic Development just doesn’t consider growth of company and its contribution in GDP but Economic development is improving quality of life and standard of living which can be done by way CSR so it is another key role for corporation to indulge into activities like this so this is another reason why CSR is needed.

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145 Shashank Sharma, 'Making CSR Mandatory in India: A Flawed Approach' (2013) 3 IJSSH 33,33

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The most important parameter for justifying the need of CSR is to ethical business practice because it is not just moral responsibility of corporation to be socially responsible but it is also ethical for corporation to follow societal expectation and compliance with law and regulations.

Transparency and accountability are the perspectives which justify the need of CSR this are the proof of corporation are being socially responsible to project their intention to society.\textsuperscript{146}

\textbf{Various International Standards of Corporate Social Responsibility and Constitutional Framework of India:}

There are the various international standards for CSR which specifically talk about various rights of workers and environmental issues so it is necessary for Indian companies to meet with these standards.

Following are the Known International Standards:\textsuperscript{147}

1. ISO 26000
2. ISO 24000
3. United Nations Global Compact
5. European Union Green Paper On Corporate Social Responsibility
6. OECD Guidelines for Multinational Enterprises
7. Ethical Training Imitative Base Code
8. Amnesty International's Human Rights Guidelines for Companies
9. Social Accountability 8000
10. Global Reporting initiative Guidelines

In short above mention standard can be briefly Summarise as follow and which provides Following Rights:\textsuperscript{148}

\textsuperscript{146} Ibid 173.
\textsuperscript{148} Ibid 183,197
1. Equal opportunity and Equal Rights
2. Freedom of Association
3. Child Labour Shall not be used
4. Health and Safety
5. Fair Living Wages are paid
6. No Forced Labour
7. No discrimination is Practised
8. Sustainable Development

While examining various international scenario researcher is trying link how Indian constitution already met with the international standard of CSR and how it indirectly affect the provisions of CSR under Indian law which can examine by interpreting schedule VII of Companies act, 2013 which is provide for various CSR activities where company spend their expenses.

**Constitutional Framework of other Countries and Corporate Social Responsibility**

While discussing constitutional framework of other countries it is to be mention how international standards of CSR are to relevant in constitution of other countries researcher has try to focus on many European countries because of as part of EU Accession to adopt Lisbon treaty's commitment towards improving competitiveness of EU business in line of the European Countries.\(^{149}\)

Norway is country which has set example “corporate welfare “which is become integrated of culture of Norwegian business model.

Denmark is another country where Danish government established the Centre for CSR which provide for obligation for CSR reporting since 2009.

Austria is country where ministry of Labour and Economy, the federation of Austrian Industry and Austrian federal Economic Chamber instituted the initiative of CSR Austria at the end of 2002.

Turkey is the only Country where CSR- Turkey Proposes the article for the new constitution of Turkey these decision was taken in the line of the survey conduct by CSR turkey in the partnership with the UNDP-Turkey and ILO where many Companies are not implementing CSR practices as properly as expected so to encouraging improvements in CSR new law is being draft for providing various measures under commercial law which strengthen the CSR and Corporate Governance including accountability, Transparency and working Condition of Labour.

CSR-Turkey proposed new article for the new Constitution of Turkey:

"Every individual and corporate citizen has right to establish a free enterprise. However, all enterprises should act in compliance with social, environmental, human rights and ethical responsibilities that are framed via legal, voluntary and international CSR"150

So if we closely examine proposed new article for new constitution of Turkey and compare with Indian Scenario of CSR state has expressed same intention by making CSR mandatory because under new article of turkey Constitution it is provided that corporation has right to established enterprise but corporation has to comply with various social responsibility so on the one part state give right to corporation and it also put restriction also similarly making CSR mandatory also put restriction on Corporation to practice any profession, or to carry on any occupation, trade or business under article 19(1)(g) of the Constitution of India.151

**Constitutional Validity of Corporate Social Responsibility**

Section 135 of the Companies Act, 2013 creates a classification amongst the existing companies in India. It divides companies in to two categories:

1. Companies having net worth of 500 crore or more, OR a turnover of 1000 crore or more a net profit of 5 crore or more
2. Other remaining companies.

Section 135 is applicable only to companies in category (1) as stated above. Since this section create a ’classification’ it would attract test of being valid on threshold of article 14 of the Constitution of India i.e. equality before law.


151 Ibid 34
The Supreme Court has laid down the following two tests for any classification to be held to be valid under article 14.\textsuperscript{152}

1. The classification must be based on intelligible differentia i.e. the groups created through the classification must be easily distinguishable from each other.

2. The classification created must have a rational nexus to the object sought to be achieved by the act.

Section 135 easily satisfies the first test, it is the second test where it fails. As has been stated by the minister of corporate affairs, the purpose of this clause is to ensure that ‘corporate entities contribute meaningfully’ towards the growth and prosperity of the nation\textsuperscript{153}. Nowhere is mentioned how these figures have been arrived at, or particular companies should be subject to such an obligation. This kind of categorization of company creates arbitrariness.

Thus the section 135 failed to show a nexus between the classifications created under the section and object of section of companies Act, 2013 so this section is violate article 14 of the constitution of India and it Can also be subject to judicial review.

**Judicial Review of Corporate Social Responsibility**

As discussed in above paragraph that section 135 of Companies Act, 2013 can be subject to judicial review then question what could be the scenario to answer this question it is necessary to understand similar kind of situation was created in Indonesia where various provisions of Mandatory CSR was subject to judicial review. India and Indonesia are the only countries in the world where CSR is mandatory. Now it is to be understood what decision was given by Indonesian courts. In the Decision No. 53/PUU-IV/2008. The Constitutional Court of Indonesia held that CSR is mandatory in nature, and that this is in accordance with the 1945 Constitution where in this decision constitutional court of Indonesia clarifies the intention of the legislature.\textsuperscript{154} If section 135 of Companies Act, 2013 subjected to judicial review then it is the

\textsuperscript{152}In Re: Special court Bill, 1978 AIR 1979 SC 478.


Supreme Court will decide what should be the provision under section 135 of Companies Act, 2013. So again Supreme Court will play the role of legislature.

**Various Flaws under Mandatory Corporate Social Responsibility:**

### Duty of the State

Duty of state is to establish welfare state which is provide under directive principle of state policy and preamble of the constitution of India which are directive in nature that means they cannot enforced in court of law, because these principles impose positive obligation on the state. The directive principles contained in part IV of the Indian constitution of India are guidelines for the state to be kept in mind while framing laws and policies for the welfare of the citizen so welfare is prerogative of the state as mandate by the constitution of India. So question here is that can that mandate be shift on corporation by state.\(^\text{155}\)

This can be consider as flaws for making mandatory CSR because it can be argued that where welfare is prerogative of state which is not put any burden on the state they are directive in nature but state try to shift that burden on corporation by compulsion this is the issue where legislature fails to explain the reason of making CSR mandatory. The only reason which was given by the ministry of Corporate affairs, corporate entities contribute meaningfully towards the growth and the prosperity of the nation. Does this reason justify making CSR mandatory and shift the burden on Corporation. Still clarifications are needed to making CSR mandatory.

### Absence of a Monitoring Body

This is another flaw under provisions CSR under companies Act, 2013 where there is no mention of body which monitor the activities of CSR it only put responsibility on CSR committee and director to mention in its report regarding whether company is complying with the CSR or not it disturbed the check and balance which can be maintain if there is any body which regulate this function and create proper mechanism.

### No Definition of Corporate Social Responsibility

Nowhere under Companies Act, 2013 definition of CSR is given so it create lot of confusion what amounts to CSR because scope of CSR is wide which includes many things which are mention under schedule VII and list provided under schedule is not exhaustive in nature it is inclusive so it defined many other aspects also. So it will give rise litigations from companies and other body to enforce and implement this provision.

\(^{155}\) Ibid 33.
Conclusion & Suggestions

While answer to research question researcher come to conclusion that although there are lots of issue to be clarify by the legislature which are creating confusion and raise question on the intention legislature and gives lots of scope of interpretation for the research scholar, jurist, students etc.

The researcher has also examine provisions of CSR from other European Countries while examining provision researcher is reach to conclusion that CSR in European country play major role of justifying constitutional object of country and some countries has specifically proposed new article of CSR under constitution of that country so it shows how CSR can accepted under constitutional framework of the particular country and it also shows the how CSR become instrument to bring harmony between Society and Corporation.

While examining various aspects of CSR researcher like to conclude that by making CSR mandatory State try to achieve ‘Socialist’ objective constitution of India which is main the object of preamble of the constitution and it also try to justify Concept of ‘Social welfare’ under Indian Constitution.

From above Conclusion researcher has put Following Suggestions:

1. There should be Separate monitoring Department of CSR or Statutory Body which can check and balance on CSR Policy of Corporation

2. There should be clarification on definition of CSR and CSR activities provided under Schedule VII of Companies Act, 2013.
Introduction

Statutory definition of trademark includes device, brand, heading, label, ticket, name, signature, word, letter, numeral, packaging or combination of colour or any other combination. The function of the trademark is to give an indication to the consumer relating to the source and quality of the goods. In the modern business conditions, it performs four major functions. Identifying the product and its origin guarantees its unchanged quality advertises the product, and creates an image for the product. The development of trademarks can be traced back to the onset of industrial revolution, which facilitated in the large scale production and distribution of goods. With the growth of globalization and e-commerce consumers started identifying their products with that of certain marks and symbols so as to distinguish these products from other similar products in the market.

The trademark is much more than just branding of a product. It is also indirectly associated with the trust of the consumer. When a consumer especially becomes brand loyal, a trademark plays very significant role. In the businesses a trademark plays a major as one particular trademark represent the whole product and convinces the consumer that the quality of the product is maintained and is the same. Human beings are prone to confusions but what would happen if the confusions are created for the sake of profits in the business. The "confusion", “deception” or the “dilution” is one of the most common practices related to the trademarks which are one of the major forms of infringement misleading the consumer in a manner where he gets deceived by another mark presuming it to be the one he is buying or aiming for.

As stated by Supreme Court in the Whirlpool Corporation v. Registrar of the Trademarks, the disputes or problem, especially those relating to infringement of trademarks or passing off were

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156 Advocate Bombay High Court, Mumbai
decided in the light of Section 54 of the specific relief Act, 1877 while registration problem was tackled by obtaining a declaration as to ownership under the Indian Registration Act, 1908.\textsuperscript{161}

After various amendments and suggestions, The Trademark Act 1999, was passed with 159 sections on 30\textsuperscript{th} December 1999 this particular Legislation had dual purpose:

1. It grants certain rights to an owner of the Trademark who has invested his time money and talent to develop the marks

2. On the other hand it enables the action against infringement which tries to preserve the public interest.

It has provisions like Section 9(2)(a), where there can be a refusal of registration of a mark in the cases of confusion and deception and under Section 11, concerning the same or similar marks is dealt in the Act.\textsuperscript{162}

The first trademark law in India was passed in the year 1940 and was known as the Trade Marks Act, 1940. This law was subsequently replaced by the trade and Merchandise Act, 1958. Thereafter the Government of India amended this Act in order to bring the Indian trademark law in compliance with its TRIPS obligations\textsuperscript{163}. The new Act that was passed was the TRADE Marks Act, 1999.\textsuperscript{164} This Act came into force in the year 2003. The Trade Marks Act, 1999 and the Trade Marks Rules, 2002 after which the trademark amended rules 2013 came into picture, presently govern the trademark law in India.

A trademark registration in India gives exclusive proprietary rights to the rights holder for protection of their trademark in India. However as the Indian legal system is based on the common law system, even an unregistered trademark is entitled to protection and the rights holder of the unregistered trademark can initiate action against a third party under the law of passing off.

In the present Act the “Deceptively Similar” and its variants has been used in the several sections and form different grounds and criteria to be applied in the trade mark law e.g. Section 11, Section 16 (1), Section 29, Section 30, Section 34, Section 75, Section 102; though they construe

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the same meaning and effect. The act does mention that what will be the “Deceptively Similar”
but do not lay down any particulars to decide it.

In various laws across the world deceptively similar trademarks and its infringements have been
described differently in different sections. The enforcement of such laws has been different in
different countries and the result of such laws has been contradicting from place to place. Every
country tries to protect and preserve its consumers from deception and confusion which can
cause harm to the ethics of the states endangering the public interest. Confusion can cause harm
in the market to the public and also in the international trade. The purpose of various legislations
trying to protect is for having a safe market where the confusion does not harm the quality of
the products lowering the standard of living and trade.

What is similar or what is deceptive is very tricky when it comes deciding the extent of deception
or the extent of harm caused. Various jurisdictions in the world try to dealt with the similar issue
with their laws and judgments. With the time passing by the definition of similarity is been
redefined by various judgments in various jurisdiction.

The population of India is estimated at 1,267,401,849 as of July 1, 2014.\textsuperscript{165} That is 17.5\% of the
world population. This also means that the responsibility of the government becomes much
more crucial not just because of the population but also because of the types and different
classes of people living in this country. The law makers have to consider all the classes of people
all the sects and then make laws accordingly. In the case of consumer market Germany and
Canada dropped from the list of top 10 global trademark registrars and are replaced by India,
Mexico and Taiwan.\textsuperscript{166} India being in top 10 in the highest consumer market economies the laws
especially relating to the trademarks play a prominent role in maintaining a standard and trust
in the people in relation to the quality of the goods which will reciprocate their standard of living.

India has by far the largest population of illiterate adults at 287 million, amounting to 37 per cent
of the global total, a United Nations report said highlighting the huge disparities existing in
education levels of the country’s rich and poor.\textsuperscript{167} Hence the consumer education is also low
which directly means that the chances of deception is not just because of the market scenario

\textsuperscript{165} Available at http://www.worldometers.info/world-population/india-population/ (Last accessed May 22,
2016).
\textsuperscript{166} China, Brazil, India, Mexico and Taiwan Have Highest Consumer Market Potential, March 27, 2014,
taiwan-have-highest-consumer-market-potential.html (Last accessed May 22, 2016).
\textsuperscript{167} India tops in adult illiteracy: U.N. Report Updated: January 29, 2014 12:40 IST THE HINDU, available at
http://www.thehindu.com/features/education/issues/india-tops-in-adult-illiteracy-un-
report/article5629981.ece (Last accessed May 22, 2016).
or strategies it is also because of the lack of awareness about deception. This also depends on the class of products. For example in the case of a product like spices the consumers from all economic and literacy range tend to buy the product in a country like India. But for the people with better economic condition and literacy will understand the deception compared to the person who is less literate and is economically backward.

**Methodology**

The study is purely based on doctrinal method as well as non-doctrinal method, In order to achieve the object stated, an analysis of the statute pertaining to trademarks i.e. Trademarks Act, 1999. Also, various laws relating to the trademarks and deception. An analytic and critical approach has been followed involving an impact analysis process. An empirical research has been done with the help of questionnaire method. The questions were asked to the consumers about the trademark law and their encounter with the deceptively similar trademarks. This has been done because there was a need to understand the understanding of the law in the consumers mind. It has always been believed that the intellectual property laws are made to protect the owner of the intellectual property asset. In terms of trademarks, reality is more than the owner of the mark the consumers has more to lose.

**Empirical Research**

An empirical research conducted by researcher shows the position of the consumers in Urban India. 56 responses have been collected which comprised of house wife to working class people. Different consumers showed different kind of experiences when it came to buying products in India. Different questions related to deception of the trademarks were asked and the results were quite shocking as the percentage of consumers, victims of deception were is large amounts. Here the deception means the “Deceptively similar trademark” and “non-counterfeiting “goods. Detailed analysis of the questions and its responses are below which showed how an average consumer gets deceived in the consumer market in India.
Q1) Did you ever come across any product with a trademark or trade dress which seemed deceptively similar the product you are a consumer of?

The 56 people who were also consumers from various backgrounds showed responses which were shocking. When particularly asked about the deceptively similar “trademarked” goods, the answer looked quite obvious and common 76.8% consumers did come across some kind of deceptively similar product in the consumer life. The other 23.2 percent of people who did not come across any kind of deceptively similar product particularly stated that, the place where they shop are mostly shopping malls and big retail stores which do not keep such deceptively similar products. Here one thing to be understood it that, the place of purchase also plays a very important role for the consumers. Hence most of the consumer felt that the small retail shops and shops in rural area have more deceptive similar trademark products in India.

Q2) Did you ever buy a deceptively similar product and later realized it?

The next question was regarding their own purchase of such a deceptively similar product which they got in confusion with. The results showed that 51.8% consumers bought a deceptive similar trademark product in their consumer life time’s history. 51.8% consumer’s part of the research stated that, there are certainly many products prevailing in India in different types and kids of stores which are deceptively similar and identical to other product which holds a higher level of
goodwill. The consumers who got deceived said this kind of deception happened to them in the small retail stores and few of them said it was part of the online shopping where they received great amount of discounts which attracted them and their blind trust in the website ended them to buy products which are deceptively similar. There are also cases where what is showed in the webpage of the website is the original product and what is received by them as the end product after placing such an order is a deceptively similar product. The 48.2% consumers who said that they never happen to buy such deceptively similar products though they have come across many said that, deception in a country like India is very common. Few of the consumers rightly stated that the “initial deception” is possible and very common in India. But the consumers also have to their precautionary measures to understand the product before they buy it. Hence, the initial deception which is quite possible but further deception can be prevented by having a cross check on the product which the consumer intends to buy is something which can be inferred in the above research question.

Q3) Are you aware of the laws which are made to protect the rights of trademark owners and consumers?

62.5% of the consumers were not aware of the laws which prevail in the country. The consumers of the country have a right to be protected against such a deception which can cause grievous hurt. The consumers in such large amounts do not know their rights too. Most of the consumers who are deceived in the online medium and are ultimately given a wrong product do not understand how to go about the complaint. The consumers who are literate enough to shop online find the whole consumer complaint a cumbersome process which stops them from taking steps against the people who deceived them. The cases where deception took place in the online shopping websites; like Alibaba.com they deceptive goods were portrayed in the website citing heavy discounts which ultimately attracted the consumers to buy such a product believing it to be true. Ultimately such a consumer did not take any action, presuming that the product deceptive name was clearly written hence the court will feel that it was the ignorance of the consumer but not the deception of the product by the manufacturer or the website owner. 21% of the consumers who knew about the laws, showed the a very fuming response as such a deception when happens in pharmaceutical products or food products proved to be health threatening. And such a deceptive practices must be abolished entirely from the nation. The above figure clearly shows the amount of consumer literacy in the country in the matters of
awareness towards their own laws of the country. If the consumers are not aware of their own laws how they will protect themselves is the question.

Q4) Do you feel it is also the responsibility of the seller to make sure they do not encourage deceptive products in their stores?

Are sellers responsible too was the next question to the consumers. 91.1% of the consumers felt that the sellers are equally responsible. Sellers not just hold a business responsibility but also a hold a very big social responsibility towards the country. The manufactures of the products manufactures such a deceptive marks along with the product because, he has a belief the product will have a platform where it will be sold to the consumers. All the website especially where in their disclaimers do not own a responsibility of the product the websites should check on what is in their online store as the deception can lead to damage in their own goodwill too. Only 8.9% of the consumers believe that the said seller will sell if such a deceptive trademarked good coming for a way cheaper price is in demand. There are cases in rural areas where deceptive goods end up with more demand than the original goods. In such a circumstance the seller will sell for his profit. Again as deception is different from the concept of counterfeiting, the standard of the product may not be in the level of the original product but is maintained according to the standard to be maintained in the country especially in the case of food products. Such a deception is further a loss to the trademark owner whose goodwill is used more than the consumer who is getting a cheaper product with similar specifications.

Q5) Do you think there is a need for better enforcement of laws in the matters of deception in a country like India?

Enforcement of law has always been a problem in a country like India. The Supreme Court has granted Heinz’s plea to restrain Dabur from using a Glucose-D pack deceptively similar to Heinz’s Glucon-D. The Court observed that the use of trademark Glucose-D by Dabur could mislead the consumers of Glucon-D, the proprietary right of which lies with Heinz Italia, as there is phonetic similarity between the two. But, what about the enforcement to be done to the order given. The research done by the researcher showed random four chemists shops which

still had dabur glucose D. The case which went up to the Supreme Court still lacks up the enforcement issue. 96.4% of consumer’s part of this research believed that the laws have to be more enforceable in a country like India where it is a vital issue. Only 2 % of the consumers felt the enforcement of such a law is done properly .With so many cases already pending in the country and so many deceptive trademarks in the market. Is it really possible for India to have such a law enforced quickly?

Analysis & Outcome

From the above analysis with the help of the empirical study it is easy to conclude that India needs more enforceability of laws in the country. The protection of the consumers should be the major concern of the country rather than just protecting the trademarks of the owners. Not all the deceptions are life threatening, but few are. Those few deception of the trademarks can cause confusion especially if such a deception is done with the rural population or an illiterate consumer. The grey market deception causes degradation of the quality of the goods too. The questionnaire helps to understand that even today the owners of the trademarks and the consumers of the product are being hugely being deceived which is causing monetary and goodwill loss to the trademark owner ultimately resulting confusion in the consumers.

Recommendations

Research has shown that the countries have shown diversities in implementation of the laws so prevailing in internal jurisdiction. But there are still loopholes which have to be filled in by the countries for a better protection of the IPs as well as the consumers. It is not only the duty of associate authorities to deal with problems but State should take strong action against the defaulters or culprit by providing strong legislation along with implementation mechanism, awareness will help the consumer realize and will help them to take preventive measures (Caveat emptor: Buyer Beware). Finally, at international level also countries should stop such deceptive imports from other countries, which are directly linked to the deceptive practices such a manufacture of the products will also limit automatically.

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TRADITIONAL KNOWLEDGE OF JEEVANI: A CASE STUDY

JAYA STEFFI MINZ

Introduction

Traditional Knowledge is a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. As such, it is not easily protected by the current intellectual property system, which typically grants protection for a limited period to inventions and original works by named individuals or companies. Traditional knowledge is often governed by customs and social conventions, making it very widely available. It is not even protected today by any legally defined rights.

In a similar fashion protection of knowledge, innovations and practices associated with biological resources, these do not seem to meet the conditions required for grant of patents or other IPRs (e.g. copyrights, trademark, etc.) as they does not meet requirements of novelty, inventiveness and industrial applicability. These conventional forms of IPRs are inadequate to protect indigenous knowledge essentially because they are based on protection of individual property rights whereas traditional knowledge is by and large collective.

Further, the informal knowledge presents other difficulties in being recognised for the purpose of IP protection, such as:

Knowledge is developed over a period of time and may either be codified in texts or retained in oral traditions over generations. The conditions of novelty and innovative step necessary for grant of patent are therefore not satisfied. There is a need for the development of sui generis protection of traditional knowledge rights.

The Case

Jeevani case relates to the traditional knowledge for herbal medicines among the Kani tribes inhabiting the forests of the Western Ghats region. The herbal lore that this community possesses regarding the large number of wild plants in the region has helped them survive for

169 Year III, NUSRL, Ranchi

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generations. This case study relates to benefit sharing arrangements arrived at between Jawaharlal Nehru Tropical Botanical Garden and Research Institute (TBGRI) (formerly Tropical Botanic Garden and Research Institute) and the Kani tribals of Kerala for the development of a drug called ‘Jeevani’ based on the knowledge of the Kani tribe. ‘Jeevani’ is a restorative, immuno-enhancing, anti-stress and anti-fatigue agent, based on the herbal medicinal plant *arogyapaacha*, used by the Kani tribals in their traditional medicine. Within the Kani tribe the customary rights to transfer and practice certain traditional medicinal knowledge are held by tribals healers, known as *Plathis*.

**Background**

Knowing that the Kani tribe’s knowledge about the area better than anyone, Dr. Pushpangadan then director of TBGRI employed some of them as guides. While traversing through the rough terrain, the team was surprised that after several hours their Kani guides did not feel tired, while they themselves were constantly feeling fatigued. They observed their guides and saw them continuously munching black fruits of some plants. Seeing their exhaustion, the Kani guides offered some of the fruit to the AICRPE team. Upon eating the fruit, the team immediately felt full of energy and vitality.

According to Kani tribal customs, only the Plathi have the right to transfer and disseminate their traditional medicinal knowledge. Because of this, the Kani guides were reluctant to share with the AICRPE team the source of the revitalizing fruit. However after a great deal of pressure, the Kani led the team to a plant known locally as “arogyapacha”.

The knowledge was divulged by three Kani tribal members to the scientists of TBGRI who isolated 12 active compounds from *arogyappacha* (*Trichopus zeylanicus*), and developed the drug ‘Jeevani’. The technology was then licensed to the Arya Vaidya Pharmacy Ltd., an Indian pharmaceutical manufacturer pursuing the commercialization of Ayurvedic herbal formulations. A Trust Fund was established to share the benefits arising from the commercialization of the TK-based drug ‘Jeevani’. The operations of the Fund with the involvement of all relevant stakeholders, as well as the sustainable harvesting of the *arogyappacha* plant, have posed certain problems which offer lessons on benefit sharing over genetic resources and associated traditional knowledge.

**Key Players**
The key players in this case study are: a tribal community called Kani tribe, a research institute called Tropical Botanic Garden and Research Institute (TBGRI) and a pharmaceutical company called Arya Vaidya Pharmacy.

(i) Kani tribe

The Agastyamalai tropical rain forests of Western Ghats is designated as a reserved forest area. Kani is a tribal community inhabiting the Agastyamalai forests. Their current population is approximately 17,000. Their settlement system is such that a few families live in a cluster interspersed with the forest. The terrain is undulated. Kanis maintain small gardens around their huts for growing plants of rubber, palms, fruits and flowers. They also do limited cultivation of tapioca, banana, millets and cash crops such as pepper, coconut, rubber, areca nut and cashew nut etc, in small plots of land given by the Forest Department. They derive most of their livelihood from crafts, and gathering and selling of various permitted forest produce. Though traditionally a nomadic community, most of the Kani’s are now well settled for a long time.

(ii) Tropical Botanic Garden and Research Institute (TBGRI)

TBGRI is an autonomous body established by the Government of Kerala in 1979. It has been accorded the status of a Center of Excellence in conservation and sustainable utilisation of tropical plant diversity by the Ministry of Environment and Forests, Government of India.

Spread over 300 acres, the Garden System of TBGRI has over 50,000 accessions belonging to 7000 tropical plant species. The garden system includes an Arboretum, Bamboosetum, Palmetum, Orchidarium and field collections of medicinal plants, wild ornamentals and lesser known wild edibles. In addition to these, there are special conservatories for rare, threatened and endemic plants, special assorted collections of endangered plants.

The R&D activities of TBGRI are integrated and multidisciplinary in nature and are geared to achieve the most tangible results of conservation as well as of value added and product oriented sustainable utilization of plant genetic resources of the region.

(iii) All India Coordinated Research Project on Ethnobiology (AICRPE)

The Ministry of Environment and Forests, Government of India had launched an All India Coordinated Research Project on Ethnobiology (AICRPE) in 1982, with the broad objective of preserving the knowledge system of our tribal communities. The TBGRI was the Coordinating Centre of this multi-institutional, multi-disciplinary action oriented research programme.

(iv) Arya Vaidya Pharmacy (AVP)
Arya Vaidya Pharmacy, a Coimbatore based company has been manufacturing Ayurvedic drugs since 1948.

**Licensing**

Because TBGRI is a research institute, it does not have the capacity to commercialize any products resulting from its Jeevani invention. Therefore it authorized the licensing of the technology for manufacturing Jeevani to interested parties. TBGRI established a committee to determine which organization would be most suitable for licensing. The committee chose Arya Vaidya Pharmacy Ltd. (AVP) of Coimbatore, one of the largest herbal pharmacies in India, to be the primary manufacturer, and in 1995 AVP signed a seven year licensing agreement with JNTBGRI and paid a US$50,000 licensing fee.

Under the terms of the agreement, TBGRI would receive two percent royalties on any sales of Jeevani products. The licensing agreement with AVP was primarily to establish a market for Jeevani products, after which TBGRI maintained the right to license its manufacturing technology to other companies if it so desired. The license agreement between JNTBGRI and AVP proved to be successful and therefore has been consistently renewed thereafter.

**Patents**

Dr. Pushpangadan and his research team realized that without intellectual property (IP) protection, they would not be able to generate much revenue from Jeevani. With an interest in also helping the Kani people through a benefit sharing agreement, Dr. Pushpangadan also knew that no IP protection also meant there would be no financial gains for the Kani people. IP protection was thus essential.

Therefore, after successfully finishing R&D and further refining Jeevani, in cooperation with the Council of Scientific and Industrial Research (CSIR), a premier Indian R&D organization, TBGRI decided to make a patent application in 1994 with the Office of the Controller General of Patents, Designs & Trademarks of India (IP India) for the manufacturing process of an herbal sports medicine based on the compounds isolated from arogyapacha. The patent for this application was granted in 2010.

**Challenges faced**

Large scale manufacturing of Jeevani therefore faced some significant early challenges, and because of sustainability concerns the Forest Department as kani Tribe were living in their area initially prohibited any products to be sold that were made from the arogyapacha plant.
Jeevani being a herbal formulation, it requires regular supply of fresh leaves of arogyapacha plant. As a solution, TBGRI pointed out that only the leaves of the plant needed to be used to make Jeevani, and that several harvests of the leaves could be made from the perennial plant each year without actually destroying it. In October 1997, a proposal was made to the Forest Department and the Integrated Tribal Development Program (ITDP), an initiative run by the Directorate for Tribal Welfare of the government of Kerala, stipulating that TBGRI was willing to pay the Kani people money for the seeds necessary for the cultivation of the plant and would subsequently buy the leaves harvested. This was not only a sustainable solution, but the sale of the leaves would give the Kani an additional, stable source of income.

To facilitate this arrangement a pilot program for the cultivation of arogyapacha was carried out with support from the ITDP between 1994 and 1996. Fifty families were given approximately US$ 40 each for cultivating the plant. TBGRI was to buy five tons of the leaves per month and supply them to AVP for the production of Jeevani. This scheme was a resounding success, through which many Kani people secured employment and training in cultivation and harvesting, which provided them with stable income and new skills they could use for sustainable cultivation of other natural resources in the region. As a result of this success, the Kani people continue to supply AVP with arogyapacha leaves through similar programs.

**Benefit Sharing Agreement of Kani Tribals**

In November 1997 a trust consisting of nine Kani tribal members was formed with the assistance of TBGRI. Named the Kerala Kani Samudaya Kshema Trust (the Trust), the two Kani who imparted the traditional knowledge to JNTBGRI were appointed as president and vice president of the Trust. The decision to form the trust was made through a local meeting with Kani tribes. The Trust’s objectives are to promote welfare and development activities for Kani people in Kerala, to prepare a biodiversity register to document the traditional knowledge base of the Kani people, and to promote sustainable use and conservation of biological resources. While some Kani in different regions are opposed to the Trust, the aim is to have all adult Kani as Trust members so everyone can equally benefit.

The Trust held its first meeting in March 1999, and shortly thereafter the Kani received the first payment of US$ 12,500 from the benefit sharing agreement. Funds from the Trust are earmarked to be used for a variety of projects, such as installing a telephone booth (the first one the Kani people would have access to) and creating an insurance scheme that would provide coverage for pregnant women and accidental deaths.
In 2006, the agreement entered a new phase when JNTBGRI invited the Kani tribe to form a Business Management Committee (BMC). The BMC decided to set minimum conditions for the benefit sharing agreement, such as an increase in license and royalty payments.

**IP Enforcement & Infringement**

Although Jeevani’s powerful and safe effects have garnered worldwide attention, due to high patenting costs JNTBGRI has yet to secure IP protection for it outside of India as of 2010. This has resulted in a few difficulties for JNTBGRI which may possibly inhibit AVP from international expansion. In 1999, Nutrisciences Innovations LLC (Nutrisciences), a New York based herbal medicine company, applied to register a trademark with the United States Patent and Trademark Office (USPTO) for the Jeevani name. For some time it sold its product in the United States Market without the knowledge of JNTBGRI. When this came to JNTBGRI’s attention, a dispute erupted and brought considerable media attention. While the case never officially resolved, Nutrisciences abandoned its trademark application in 2001.

A similar case happened when Great Earth Inc. (Great Earth), another New York based supplement and vitamin company, registered a trademark for Jeevani in the United States in 2000. Great Earth marketed an energy drink called “Jeevani Jolt 1000” that included the same ingredients as those in the original Jeevani, though it is unclear how Great Earth acquired arogyapacha. This product did not technically infringe on any IP because JNTBGRI never filed a trademark registration for Jeevani with the USPTO. As a result of Great Earth’s product, Jeevani became widely known in North America, and many other companies have since released products under the Jeevani name or claiming to be made of Jeevani. Because these companies are purchasing the arogyapacha plant from suppliers other than AVP, the Kani people are not enjoying any benefits of their traditional knowledge. Although JNTBGRI would like to take up the issue with the USPTO, as of 2010 costs of contesting a trademark in the United States are too high, leaving JNTBGRI with little recourse.

**Conclusion**

TBBGRI did not forget to give credit where it is due. It was through the benefit sharing agreement between TBBGRI and the Kani people has been acclaimed as a model for similar agreements around the world. In 2002, TBBGRI received the United Nations Equator Prize for its work in fostering the creation of the agreement. The United Nations Environment Program and the World Trade Organization have also described the benefit sharing agreement as a global model
for recognizing the traditional knowledge and IP of indigenous people in accordance with the guidelines of the United Nations Convention on Biological Diversity.

This advancement and the overall success of the benefit sharing agreement show how simple and stable cooperative institutions can inspire confidence in indigenous knowledge holders, facilitate equitable conduct in the economy and establish trust between members. Benefit of traditional knowledge could be harnessed for entire mankind, ensuring that IP developed from traditional knowledge can be of a benefit to all involved. Recognizing the rights of traditional knowledge holders can make a significant impact on economic and social development. Social impact in the sense that it has made a significant financial impact on the lives of the Kani people. The Kani have already received financial injections into their community, and the success of the benefit sharing agreement. IP protection is one of the most important tools through which this recognition and development as been arrived by Kani Tribe.

**Bibliography**

1. WIPO on Using Traditional Knowledge to Revive the Body and a Community.

2. The role of IPRs in the sharing of benefits arising from the use of biological resources and associated traditional knowledge – Selected case studies.’ (Case study : India by Prof. Anil Gupta). A joint submission by WIPO and UNEP.


4. ‘Rewarding traditional knowledge and contemporary grassroots creativity : The role of IPRs’ by Prof. Anil Gupta. 2000.


TRANSFER OF TITLE: JUDICIAL INTERPRETATION

MASUD KALAS

ABSTRACT

The focus of the paper is primarily to conduct a study into concept of title in contract law. The aim of this paper is to elaborate on the various provisions in the law of contracts dealing with ‘transfer of title’ of goods and to make their understanding easier and better. It delves into this principle of contract law, which says ‘no one can transfer a better title than he himself has’ and the various exceptions to it. The scope of the research is limited to provisions governing this concept and its exceptions. Along with various illustrations and case laws, this paper explains every relevant provision of The Sale of Goods Act, 1930 and The Indian Contract Act, 1872 clearly and provides a comprehensive commentary and a proper judicial interpretation to the topic.

INTRODUCTION

“Nemo dat quod non habet”, which literally means “no one gives what he doesn’t have”, is a legal rule sometimes called the nemo dat rule. It states that the purchase of a possession from someone who has no ownership right to it also denies the purchaser any ownership title.171

In Bishopsgate Motor Finance Corpn. Ltd. v. Transport Brakes Ltd172, Denning LJ has defined the position of modern law as follows:

“In the development of our law, two principles have striven for mastery. The first is the protection of property: no one can give a better title than he himself possesses. The second is the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title.”

The first principle is enshrined in the Latin maxim, nemo dat quod non habet, which literally means no one can give what they do not have. In the context of sale of goods, it means no one can transfer a better title than he himself has. Section 27 of the Sale of Goods Act, 1930 embodies this principle.

Some of the exceptions of this rule are -

1. Transfer of Title by Estoppel (Sec 27 of the Sale of Goods Act, 1930)

170 Year II, NLU Odisha
171 No one can give what he does not have, US Legal.
2. Sale by a Mercantile Agent (Sec 27 of the Sale of Goods Act, 1930)
3. Sale by joint owner (Sec 28 of the Sale of Goods Act, 1930)
4. Sale by a person in possession under a Voidable Contract - (Sec 29 of the Sale of Goods Act, 1930)
5. Sale by the seller in Possession (Sec 30(1) of the Sale of Goods Act, 1930)
6. Sale by the buyer in Possession (Sec 30(2) of the Sale of Goods Act, 1930)
7. Resale by an unpaid seller (Sec 54(3) of the Sale of Goods Act, 1930)
8. Sale by finder of goods (Sec 169 of Indian Contract Act, 1872)
9. Sale by Pawnee (Sec 176 of Indian Contract Act, 1872)

TRANSFER OF TITLE


Section 27: Sale By Person Not The Owner

Section 27 of the Act reads as follows:

Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by conduct precluded from denying the seller’s authority to sell.

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the buyer act is good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.173

The first part of the section embodies the explanation of the Latin maxim ‘nemo dat quod non habet’ and the second part of the section provides two exceptions to the original principle. Section 27, as a general rule, tries to protect the interest of the true owner of a possession when it provides that where the goods are sold by a person who is not the owner thereof and who does

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not sell them under the authority or with the consent of the owner, the buyer acquires no better
title to the goods than the seller has.

Illustration: If a person leaves a watch on a seat in the park, and it ultimately gets into the hands
of a bonafide purchaser, it is no answer for the true owner to say that it was his carelessness and
nothing else that it enabled the finder to pass it off as his own.174

As explained in Belsize Motor Supply co. V Cox175, if the title of the seller is defective, the buyer’s
title will also be subject to the same defect. This rule does not imply that buyer’s title will always
be a bad one. What it simply means is that the buyer cannot acquire a superior title to that of the
seller. For instance, if a thief disposes of stolen goods, the buyer of such goods has the same title
as the seller had. Similarly, where a person taking goods on hire-purchase basis sells them before
he had paid all the installments, the owner can recover the goods from the transferee, on default
of payment, in the same way as he could have recovered them from the person to whom they
had been given on the hire purchaser basis.

In the case of Life Insurance Corporation v. United Bank Of India Ltd. And Anr176, the court held that
under the Indian Law, an actionable claim is no doubt transferable but it is transferable only by
the person who has a title to the property in respect of which the claim lies.

This provision is however not always fair, as an innocent buyer will suffer where the title of such
goods is under question. The buyer can, in no way, effectively investigate the title to goods and
if the goods are to move freely in the distribution chain then it is important that the buyers are
confident in their purchases. Furthermore, in many cases, goods may be perishable and there is
a need for such goods to be dealt with quickly and efficiently. Due to the harshness of the
provision, Section 27 provides for a proviso containing two exceptions to this rule. All the
exceptions will apply only in favour of a person who acquires the goods in good faith and without
notice of the rights of the original owner.

1. **Transfer of Title by Estoppel** - Estoppel means that a person, who by his conduct or
words leads another to believe that certain state of affairs existed, would be
estopped or precluded from denying later that such state of affairs did not exist. The
closing words of the rule contained in Section 27 which carry this proviso are as under:

175 Belsize Motor Supply co. V Cox [1914] 1 K.B. 244
176 Life Insurance Corporation v United Bank Of India Ltd. And Anr AIR 1970 Cal 513

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Unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell the goods.

When the true owner of goods by his conduct or word or by any act or omission leads the buyer to believe that the seller is the owner of the goods or has the authority to sell them, he cannot afterwards deny the seller's authority to sell. When the buyer innocently acts upon that representation of the owner, it becomes too late to deny the seller's authority. Representation may arise from words or declarations or from an act or omission.

Illustration: A sold his mother's goods in her presence and she made no objection to the sale, she cannot later deny her son's authority to sell and the sale will be binding on her.

Estoppel arises from:

(a) Act or Omission  
(b) Negligence

Estoppel by Act or Omission

In the case of Mercantile Bank of India v. Central Bank of India Ltd., a firm of merchants pledged certain railway receipts with a bank against a loan. Subsequently, they took back the receipts for clearing the goods and storing them in the bank's warehouse. But they fraudulently repledged the receipts with another bank for another loan. The second bank contented that the first bank should not have returned the receipts without impressing up on them their stamp of pledge. Their omission to do so enabled the merchants to repledge the receipts and therefore the first bank should now be stopped from denying the validity of the second pledge. However, the Privy Council ruled otherwise. It was held that the duty to impress the stamp of pledge was not a legal duty. It was a duty of commercial origin and its omission did not arise a legal estoppel.

Estoppel by Negligence

Negligence, in order to give rise to a defense under this section, must be more than mere carelessness on the part of a person in the conduct of his own affairs and must amount to a disregard of his obligations towards the person who is setting up the defense.

178 Mercantile Bank of India v. central bank of India Ltd. [1938] AC 287.
In Conventary Shepherd & Co v Great Eastern Rly.Co\(^{179}\), the defendant carelessly issued two delivery orders relating to the same consignment of goods, thus enabling the person to whom they were issued to obtain an advance from the plaintiff. The defendants were held to be estopped as against the plaintiff from denying the fact that the goods mentioned in the order were held on behalf of the assignor and someone who puts documents of this nature into circulation owes a duty to those into whose hands they may come.

2. **Transfer of title by a Mercantile Agent** - Sale of goods by a Mercantile agent must satisfy the essentials laid down in Section 27(2) of the Act:

- He should be a Mercantile agent
- in possession of goods as mercantile agent and
- with consent of the owner of goods
- he must sell while acting as mercantile agent
- in good faith and without notice.

As defined under Section 2(9) of the Sale of Goods Act, 1930:

“mercantile agent” means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods.

In the case of Folker v. King\(^{180}\), the plaintiff delivered his car to a mercantile agent to sell it for not less than 575 pounds. But the mercantile agent sold it to the defendant for 140 pounds and misappropriated the amount. In an action by the plaintiff it was held by the court that the defendant (buyer) had a good title to the goods.

The mercantile agent should be in possession of the goods as mercantile agent and if the goods are entrusted to him in any other capacity, he cannot convey a good title. This was held in Staffs Motor Guarantee Ltd v. British Wagon Ltd\(^{181}\) where a dealer in secondhand cars sold his lorry to a company and then immediately took it back from the company under a hire-purchase agreement. He then resold the lorry to another company, which claimed that it had good title to the lorry as he brought it from a mercantile agent in good faith. But the court refused to sustain


\(^{180}\) *Folker V. King* [1923] 1 KB 282, CA.

\(^{181}\) *Staffs Motor Guarantee Ltd v. British Wagon Ltd*. [1934] 2 KB 305.
this claim since the lorry had been handed back to the dealer not as an agent but as a hirer and therefore as its bailee, so the buyer cannot get a good title.

The goods must be in the possession of the mercantile agent with the consent of the owner. This requirement is satisfied when it is shown that the true owner did intentionally deposit in the hands of the mercantile agent such goods. In such a case, it is immaterial whether the consent is obtained by fraud. In *Pearson v. Rose and Young Ltd*, a car was left with a mercantile agent and he was authorized only to receive offers and not to sell. The agent obtained the registration book from the owner without his consent and sold it to the defendant. It was held that the sale without registration book would not constitute a good sale as the registration book was obtained without consent of the owner, therefore the buyer did not acquire a good title.

The mercantile agent must sell the goods when acting in the ordinary course of business of a mercantile agent. This means within business hours at a proper place of business and in other respects in the ordinary way in which a mercantile agent would act. In the case of *De Gorster v. George Attenborough & Son*, a broker was entrusted with certain diamonds for sale, he did so through a friend, and the transaction was held invalid as he cannot ask a friend to do the transaction which he was entrusted with.

*Good faith and without notice*

The innocent buyer must act in good faith and should not have notice that the seller had no authority to sell.

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182 *Pearson v. Rose and Young Ltd.* [1950] 2 All ER 1027,1031
183 *De Gorster v. George Attenborough & Son* [1904] 21 TLR 19
Section 28: Sale by one of joint owners

This Section reads as:

If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them from such joint owner in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.¹⁸⁴

According to this provision, if one of the several joint owners of goods has the sole possession of them by the consent of the co-owners of such goods, the property in the goods is transferred to any person who buys them from such joint owner in good faith and without notice of the fact that the seller has no authority to sell. It is to be noted that in the absence of this section, the buyer would have obtained only the title of the co-owners and would have become merely a co-owner like the other co-owners. Hence the provision also constitutes an exception to the rule – "no one can give what he has not got."¹⁸⁵

Section 29: Sale by person in possession under voidable contract

The Section reads as:

When the seller of goods has obtained possession thereof under a contract voidable under Section 19 or Section 19A of the Indian Contract Act, 1872, but the contract has not rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller’s defect of title.¹⁸⁶

According to Sections 19 and 19A of the Indian Contract Act, 1872, if the consent of a party to the contract has been obtained by coercion, fraud, misrepresentation or undue influence, then the contract is voidable at the option of the party whose consent has been so obtained.

Section 29 does not apply to a contract which is void and not voidable, or where the seller has no title at all, for instance, where he has obtained the goods by theft. It provides that if a person has obtained the possession of some goods under a contract which is voidable under Section 19 or 19A of the Indian Contract Act, 1872, and he sells those goods before the contract has been avoided by the party entitled to do so, the buyer of such goods acquire a good title to them. It is, however, necessary that such a buyer must have purchased the goods in good faith and without

¹⁸⁵ Nemo (n 7).
the notice of the seller’s defect of title. The condition to be fulfilled to attract this section is that the sale should be done

a) under a voidable contract,

b) before repudiation and

c) where the buyer acts in good faith\(^{187}\)

Also, in *Phillips v Brooks*\(^{188}\), a fraudulent person posed himself to be a respectable person and obtained from the shop keeper a valuable ring by giving him a worthless cheque. Before the fraud could be discovered he pledged the ring with a bonafide pledgee who acted in good faith.

It was held by the court that the pledgee obtained a good title as the contract was voidable by the reason of the fraud and before it was rescinded, the goods had gone to the hands of a third person.

**Section 30: Seller or buyer in possession after sale**

The Section 30(1) reads as:

*Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery to transfer were expressly authorised by the owner of the goods to make the same.*\(^{189}\)

When a seller, who is in possession of the goods or their title even after the sale, again sells the goods to another person, the seller can convey a good title to the buyer if the following conditions are satisfied:

a) Seller should continue possession of the goods or of the documents of title to the goods, and

b) Buyer should act in good faith without notice of the previous sale.

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\(^{187}\) Dr Elbe Peter, ‘*Nemo dat quod non habet*,’ available at <http://www.legalserviceindia.com> Published on: August 21, 2014.

\(^{188}\) *Phillips v Brooks* [1919] 2 KB 243.

\(^{189}\) The Sale of Goods Act, 1930 § 30.
The Section 30(2) reads as:

Where a person, having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

When a person brought or agrees to buy certain goods for which possession has been given to him, but the seller has some lien or right over the goods, if the buyer resells the goods, the second buyer will get a good title free from the seller’s right of lien. The conditions to be fulfilled to get good title under this sub-section are:

a) There should be actual transfer of goods or the documents of title to the goods;

b) The second buyer should act in good faith and without notice of any lien; and

c) The original seller should have the right to sell goods.

The possession obtained under a hire-purchase agreement does not make the possessor a buyer in possession so that a sale made by him will not convey a good title to the buyer.\(^{(190)}\)

\(^{(190)}\) \textit{Dr Elbe} (n 17).
Other Exceptions

Section 54(3): Resale by an unpaid seller

Section 54(3) reads as:

Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.\(^\text{191}\)

According to this section, if an unpaid seller has exercised his right of lien or stoppage in transit and the buyer does not pay him, he may resell the goods after a notice to the buyer. If such a notice is not given to the buyer, the seller is neither entitled to claim from the buyer for any loss if the goods bring lower than the contract price nor can he retain the benefit if the goods are sold at a higher price.

Section 169 of Indian Contract Act, 1872: Sale by finder of goods

This Section reads as:

When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses upon demand, to pay the charges of the finder, the finder may sell it-

(1) when the thing is in danger of perishing or of losing the greater part of its value, or

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.\(^\text{192}\)

According to Section 71 of the Indian Contract Act, 1872, the finder of goods is subject to the same responsibility as that of the bailee. He has the duty to take due care of goods while they are in his possession and also to return them when their true owner has been found. However, according to Section 169 of the Indian Contract Act, 1872, if the owner cannot, with a reasonable diligence, be found or if he refuses upon demand to pay the lawful charges of the finder, the finder may sell the goods satisfying the two conditions laid down therein.

\(^{191}\) The Sale of Goods Act, 1930 § 54(3).
Section 176 of Indian Contract Act, 1872: Sale by Pawnee

This Section reads as:

If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.\(^{193}\)

According to this Section, if the pawnor makes a default in the payment of the debt, the pawnee may either sue him for the debt or may sell the goods pledged after giving the pawnor a reasonable notice of the sale.

NEW IPR POLICY 2016: TAKING IPR TO ANOTHER LEVEL

MUDIT SRIVASATAVA & Nikhita Kansal

Abstract

The 21st century can be referred to as the century of technology, knowledge and the regime of intellect. The country’s future depends on its ability to translate knowledge into innovation to gain wealth. Thus, the innovation is the key to convert knowledge into wealth. Hence, issues of generation, evaluation, protection and exploitation of IP become important all over the world.

Intellectual Property rights has vital role in all sector and has become a crucial factor for investment decisions by many companies. India being a TRIPS-compliant country has a well-balanced Intellectual Property rights system. The TRIPS is basically an international agreement administered by the World Trade Organization (WTO), which sets down minimum standards for many forms of intellectual property regulations as applied to the nationals of other WTO Members. The well-balanced Intellectual Property rights system in India is helpful for foreign companies to protect their Intellectual Property in India.

The Indian Cabinet on April 13, 2016 passed India’s first National Intellectual Property Rights (IPR) policy in a bid to promote IP regime and encourage creativity, innovation and entrepreneurship in India. The policy is a step forward in creating an altogether new avenue for the IP Industry in India and along with it promoting the slogan, as administered by our Hon’ble Prime Minister Mr. Narendra Modi, of “Creative India; Innovative India: रचनात्मकभारत; अभभनवभारत”. The policy is a vision document that seeks to provide stronger safeguard to IPR in India. By virtue of this policy, from now onwards there will be a proper institutional mechanism in place which will help in incorporating global best practices in the Indian economy.

The primary objective of the policy is to put in place a legal framework that will encourage the IPR regime and substantially reduce the time taken by the governmental agency to approve a trademark to as less as a month by 2017. The nodal agency for regulating IP rights in the country will be the Department of Industrial Policy and Promotion (DIPP). The policy lays down seven objectives and measures to achieve those objectives. These objectives are a map to guide the individuals to benefit from this policy. Therefore, it is important that the policy is implemented properly so as to achieve maximum benefit out of it. And one must appreciate the fact that if the implementation is carried on...
well then the New IPR Policy can definitely turn out to be a success and a major turning point in the history of IP Rights in India.

Introduction

For nearly last two years hundred years, neo-classical economics had recognized only two factors of production: labour and capital. But now this is changing. Information and knowledge are replacing capital and labour as the primary wealth-creating assets, just as the latter two replaced land and labour 200 years ago. In addition, technological developments in the 20th century have transformed the majority of wealth-creating work from 'physically-based' to 'knowledge-based'. Technology and knowledge are now the key factors of production. With increased mobility of information and the global work force, knowledge and expertise can be transported instantly around the world, and any advantage gained by one company can be eliminated by competitive improvements overnight. The only comparative advantage a company will enjoy will be its process of innovation-combining market and technological knowhow with the creative talents of knowledge workers to solve a constant stream of competitive problems- and its ability to derive value from information. The major challenge before organisations in the coming years would be to create a culture for IPRs regime, so that creative work and innovations get duly protected.195

Intellectual property (IP) is a term referring to creations of the intellect for which a monopoly is assigned to designated owners by law.196 They are ideas, inventions, and creative expressions based on which there is a public willingness to bestow the status of property. IPR provide certain exclusive rights to the inventors or creators of that property, in order to enable them to reap commercial benefits from their creative efforts or reputation. There are several types of intellectual property protection like trademarks, copyright, patents, industrial design rights, and in some jurisdictions trade secrets: all these cover music, literature, and other artistic works; discoveries and inventions; and words, phrases, symbols, and designs.197

While intellectual property law has evolved over centuries, it was not until the 19th century that the term intellectual property began to be used, and not until the late 20th century that it became commonplace in the majority of the world.

Countries have laws to protect intellectual property for two main reasons. One is to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.\(^\text{198}\)

The World Intellectual Property Organization (WIPO) is one of the specialized agencies of the United Nations (UN) system of organizations. The “Convention Establishing the World Intellectual Property Organization” was signed at Stockholm in 1967 and entered into force in 1970. However, the origins of WIPO go back to 1883 and 1886, with the adoption of the Paris Convention and the Berne Convention respectively. Both of these conventions provided for the establishment of international secretariats, and both were placed under the supervision of the Swiss Federal Government. The few officials who were needed to carry out the administration of the two conventions were located in Berne, Switzerland.\(^\text{199}\)

The Convention Establishing the World Intellectual Property Organization (WIPO), concluded in Stockholm on July 14, 1967 (Article 2(viii)) provides that “intellectual property shall include rights relating to: - literary, artistic and scientific works, - performances of performing artists, phonograms and broadcasts, - inventions in all fields of human endeavour, - scientific discoveries, - industrial designs, - trademarks, service marks and commercial names and designations, - protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”\(^\text{200}\)

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for many forms of intellectual property (IP) regulation as applied to


\(^{199}\) Ibid.

\(^{200}\) Supra note 1.
nations of other WTO Members. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994.\textsuperscript{201}

The TRIPS agreement introduced intellectual property law into the international trading system for the first time and remains the most comprehensive international agreement on intellectual property to date. In 2001, developing countries, concerned that developed countries were insisting on an overly narrow reading of TRIPS, initiated a round of talks that resulted in the Doha Declaration. The Doha declaration is a WTO statement that clarifies the scope of TRIPS, stating for example that TRIPS can and should be interpreted in light of the goal “to promote access to medicines for all.”\textsuperscript{202}

\textbf{IPR in India and Problems faced in India}

“Creative India; Innovative India: सृजनभारत; रचतभारत” is the motto which will inspire India to take a lead in various fields of human accomplishments. Our Constitution enjoins us to “develop the scientific temper” and “spirit of inquiry” and “to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement”.\textsuperscript{203}

Creativity and innovation have been a constant in growth and development of any knowledge economy. There is an abundance of creative and innovative energies flowing in India. India has a TRIPS compliant, robust, equitable and dynamic IPR regime. TRIPS is an international agreement administered by the World Trade Organization (WTO), which sets down minimum standards for many forms of intellectual property (IP) regulations as applied to the nationals of other WTO Members. An all-encompassing IPR Policy will promote a holistic and conducive ecosystem to catalyse the full potential of intellectual property for India’s economic growth and socio-cultural development, while protecting public interest.\textsuperscript{204} The rationale for the National IPR Policy lies in the need to create awareness about the importance of IPRs as a marketable financial asset and economic tool.

Indian laws provide for both civil and criminal remedies for IP enforcement. The Government has taken effective steps at all levels to enforce IP rights. The legal, administrative and

\begin{itemize}
\item \textsuperscript{201}“TRIPS Agreement” Available at: https://en.wikipedia.org/wiki/TRIPS_Agreement [Accessed on: 20-05-2016 at 18:50]
\item \textsuperscript{202}Ibid.
\item \textsuperscript{203}“National IPR Policy (First Draft), (2014)” Available at: http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/IPR_Policy_24December2014.pdf [Accessed on: 21-05-2016 at 15:00]
\item \textsuperscript{204}Ibid.
\end{itemize}
enforcement machinery has been strengthened. The customs and police enforcement machinery has been streamlined and the measures for curbing piracy and counterfeiting related activities have become progressively more effective.\textsuperscript{205}

The very well-balanced IPR regime in India acts as an incentive for foreign players to protect their Intellectual Property in India. This can be established by the very fact that approximately 80% of patent filings in India are from the MNCs.

IPR plays an important role in every sector and has become an important aspect of research for Pharma and research oriented industries. The continuous efforts of the government in policy establishment, IT protection, infrastructure, IPR search portals and manpower made this Industry a step ahead.\textsuperscript{206} In consideration of all the achievements, our industry is still facing troublesome challenges not only at domestic level but also at international level.

\textbf{Firstly}, in India IPR lacks its roots in remote areas, such areas are considered to be the hot bed of inventions. Many people are still unaware about IPR and their advantages in taking rights for their intellectual property. In such cases, the government should promote the awareness of IPR in such remote areas. Large numbers of awareness camps and educational hubs have to be organized for the skilled impart of knowledge among the inventors.\textsuperscript{207}

\textbf{Secondly}, a legal issue plays an important role in IPR situation in the country. Today various trademark and patent infringement matters are gaining their significance in the legal story of the country. In such increase of IPR matter, a skilled team of law persons (Judges, advocates) and IPR professionals are required. Apart from the above issues, TRIPS flexibility is yet another object to be discussed here.\textsuperscript{208}

\textit{New IPR Policy 2016}

The National IPR Policy is a vision document that aims to create and exploit synergies between all forms of intellectual property (IP), concerned statutes and agencies. It sets in place an
institutional mechanism for implementation, monitoring and review. It aims to incorporate and adapt global best practices to the Indian scenario.\textsuperscript{209}

The work done by various ministries and departments will be monitored by the Department of Industrial Policy & Promotion (DIPP), which will be the nodal department to coordinate, guide and oversee implementation and future development of IPRs in India, a notification on PIB said.\textsuperscript{210}

There are seven objectives under this policy, which are discussed under in detail.

1. **IPR Awareness**

First and the foremost objective is to create public awareness about the economic, social and cultural benefits of IP among all sections of society for accelerating development, promoting entrepreneurship, enhancing employment and increasing competitiveness. Traditionally, knowledge was viewed in India as something that is created and put in the public domain. Monetization of knowledge was not the norm and in one sense ideas blew in from all directions. While laudable and altruistic, this does not fit with the global regime of strongly protected IPR. Hence, there is a need to propagate the value of transforming knowledge into IP assets. Many IP holders are still not aware of the benefits of IP rights or of their own capabilities to create IP assets or the value of their ideas. They are mainly discouraged due to the complexities of the process of creating defendable IP rights. Conversely, they may be unaware of the value of others’ IPR and the need to respect the same. The proposed outreach and promotion programs will illuminate both perspectives.

A nation-wide program of promotion should be launched with an aim to improve the awareness about the benefits of IPRs and their value to the rights-holders and the public. Such a program will build an atmosphere where creativity and innovation are encouraged in public and private sectors, R&D centres, industry and academia, leading to generation of protectable IP that can be commercialized.

It is also necessary to reach out to the less-visible IP generators and holders, especially like in rural and remote areas. Emphasis would be laid on creating awareness regarding the rich heritage of India in terms of our Geographical Indications, Traditional Knowledge, Genetic Resources, Traditional Cultural Expressions and Folklore.


\textsuperscript{210}Ibid.
The urgent call of the program would be the holistic slogan “Creative India; Innovative India: रचनात्मकभारत; अभभनवभारत”.

Measures to be taken in order to attain this objective:

- The slogan of "Creative India; Innovative India" should be adopted and campaign should be launched in print, electronic and even social media. These campaign should be further linked with ongoing campaigns like “Make in India”, “Digital India”, “Skill India”, “Start Up India”, “Smart Cities”, in order to make campaign more effective one.

- Creation of such a systematic campaign that the benefits of the IP are conveyed to all the stakeholder through following means:
  - Campaign should be customized as per the targeted audience like MSMEs, start-ups, R&D institutions, science and technology institutes, universities and colleges, inventors and creators, entrepreneurs.
  - Reaching out to the distinct IP generators in remote areas through campaigns and helping them in converting their innovative ideas into assets.
  - Not only printed but also using audio/ visual material for propagation.
  - Creating materials for IP promotion in multiple languages and pictorial form for those who cannot read.

- Special awareness programs for industry and R&D entities, both private and public. A deeper understanding of IP to the researcher and scientists about the need and ways to protect their inventions. Both public sectors and private corporations should be engaged in creation of IP awareness campaigns. By this the employees will also come to know about IP and will further help in propagating to public.

- Creating events and providing incentives to the IP innovators. Special day should be dedicated to IP and prizes should be distributes for the purpose of creating awareness.

- IP courses should also be launched where the emphasis should be laid down on the importance of IP and different ways inventions could be protected. Online and distance learning programs and even including IPR in school curriculum.

• Tie-ups with media in order to highlight the IPR issues.\textsuperscript{212}

2. \textit{To stimulate the generation of IPRs:}

Though the number of patent filing is increased in India but the number of Indians filing is relatively low. In the case of trademarks, India is among the top five filers in the world, with the majority being filed by Indians.

India has a large talent pool of scientific and technological talent spread over R&D institutions, enterprises, universities and technical institutes. There is a need to tap this fertile knowledge resource and stimulate the creation of IP assets.

GIs is an area of strength and optimism for India, where it has accorded protection to a number of hand-made and manufactured products, especially in the informal sector. The copyright based sector contributes significantly to the Indian economy and its future potential is immense. There is considerable unexplored potential for developing, promoting and utilizing traditional knowledge, which is a unique endowment of India. Activities for promotion of traditional knowledge have to be conducted with effective participation of holders of such knowledge.

Steps also need to be taken to devise mechanisms so that benefits of the IPR regime reach all inventors, especially MSMEs, start-ups and innovators. Incentives may be built-in to encourage filing by such targeted users. These may include schemes to facilitate domestic IPR filings, for the entire value chain from IPR generation to commercialization. R&D needs to be promoted through tax benefits available under various laws, through simplification of procedures for availing direct and indirect tax benefits.

Measures to be taken in order to attain this objective:

\textsuperscript{212}Ibid.
Use the campaign “Creative India; Innovative India” to propagate the value of creativity and innovation.

Encourage researchers in public funded academic and R&D institutions in IPR creation by linking it with research funding & career progression.

Researcher and Innovators should be guided about the national priority areas to focus on for instance biotechnology, nanotechnology, new materials, etc.

Public Sectors should be encouraged for the development of affordable drugs for those diseases which are neglected.

Establishment and strengthening the IP facilitation centres as nodal points especially in industrial and innovation university hubs.

Incentives should be given for the promotion of R&D like Tax Exemption and financial support for import and export.\textsuperscript{213}

3. Legal and Legislative framework:

It is an acknowledged fact that a strong and balanced legal framework encourages continuous flow of innovation and is among the bare necessities to fuel a vibrant knowledge economy. India recognizes that effective protection of IP rights is essential for making optimal use of the innovative and creative capabilities of its people. India has a long history of IP laws which have evolved taking into consideration national needs and international commitments. The existing laws were either enacted or revised after the TRIPS Agreement and are fully compliant with it. These laws along with various judicial decisions provide a stable and effective legal framework for protection and promotion of IPRs. India will continue to utilize the legislative space and flexibilities available in international treaties and the TRIPS Agreement, even as it continues to engage constructively in the negotiation of such international treaties and agreements. India shall remain committed to the Doha Declaration on TRIPS Agreement and Public Health.

India is rich in traditional medicinal knowledge which exists in diverse forms in our country. Amongst them Ayurveda and yoga are well developed systems therefore these need to be protected, be it in oral or codified form.

\textsuperscript{213}Ibid.
The level to which the IP laws are needed keeps on changing therefore to tackle these changes legislative amendments are necessary. And for this purpose the consultation of the stakeholder shall be done to keep the laws updated in consonance with national needs and priorities.

Measures to be taken in order to attain this objective:

- Reviewing the existing IP laws and as per the requirement updating and improving the same. The inconsistencies and anomalies should also be removed with consultation with stakeholders.
- Active and constructive engagement to the international treaties & agreements and in the deliberations at various international fora for the development of legally binding international instruments.
- Review and update IP related rules, guidelines, procedures and practices for clarity, simplification, transparency and time bound processes in administration and enforcement of IP rights.
- Pursuance of transferring eco-friendly technology from developed countries to India thereby lowering down the harmful emissions.
- Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions should be protected by studying the existing laws and determining the appropriateness of those laws.
- Issues regarding the transferring of the technology should be examined seriously and licensing on fair and reasonable terms and a proper legal framework should be provided to the transfer of technology.214

4. Administration and Management:

The Offices that administer the different Intellectual Property Rights (IPOs) are the cornerstone of an efficient and balanced IPR system, administering laws, granting or registering IP rights, providing IPR related services to users, including dissemination of IPR related information for the benefit of research & development and furthering of innovation in the country, as also serving as a bridge between the government, IP support institutions and the user community.

214Ibid.
As IPR increases the economic development, therefore the IP administration and management should also be expanded accordingly.

IPO’s now faces the twin challenges of making their operations more efficient, streamlined and cost effective, with expanding work load and technological complexity on one hand, and enhancing their user-friendliness by developing and providing value added services to the user community on the other. Necessary steps to be taken in order to modernize the IPO’s.

With the increasing IPR load there also arises the need to enlarge the manpower in order to meet the workload.

Measures to be taken in order to attain this objective:

- IPO’s should be restructured, upgraded and modernized taking into consideration the rapid increase and diversity of IP users and services, and workload.
- Increase in manpower after analyzing projected workload, speedy liquidation of backlog, requirements of global protection systems and productivity parameters.
- The interaction between the IPO’s and R&D institutions should be encouraged in order to facilitate the development of personnel and scientists.
- Collaborations with R&D Institutions, Universities, Funding Agencies for providing advisory services for the improvement of IP creation, management and its utilisation.
- Creation of a common web portal for ease of access to statutes, regulations, guidelines and for better coordination.
- Introduction of mechanism so that IP system have a far reaching effect and can even percolate to even most distinct innovators.
- International tie ups and bilateral in order to compare and enhance our IPO’s with their and exchange of technology & infrastructure.\(^2\)

5. Commercialization of IPR

Commercialization of IPR is the only way an IP owner would be rewarded economically and the value of the IPR is known.

\(^{2}\)Ibid.
• An effort for capitalizing the existing IP assets must be made in the country.
• Innovation and entrepreneurship must be encouraged in all situations in order to capture the financial value of the IPRS’s. Entrepreneurs often find it difficult to get finance and hence it may be taken into note that there is a need to connect the investors and the IP creators.
• Valuation and assessment of potential IPR’s must be done. This is to ensure that their marketing can be done properly.

There is a dire need to keep a track of the different government departments and bodies which presently fund the IPR’s (like BIRAC, NRDC and TIFAC). Measures to consolidate these records and scaling up successful models must be done. Duplication must be avoided.

Public-funded research laboratories, academia and other institutions should stimulate commercialization of their research outcomes. They ought to be suitably state-supported in the development and deployment of their IPRs.

While certain larger organizations have the intent and capabilities to commercialize their IPRs, several others do not have the means to do the same. Hence, it becomes imperative to establish facilitative mechanisms that can address such limitations, especially in terms of MSMEs, academic institutions and individual innovators.

One of the effective ways of achieving this would be by synergizing the activities of IP facilitation centres with the industry, especially industrial clusters. This would also include sensitization regarding licensing arrangements.

Efforts should be made for creation of a public platform to function as a common database of IPRs. Such a platform can help creators and innovators connect to potential users, buyers and funding institutions. It would also be helpful in promoting research and innovation in uncovered areas i.e. areas where some new innovation awaits.

Significant potential for innovation exists in new and emerging technologies like nanotechnology, biotechnology, agri-biotech, life sciences, green technologies, telecommunications, new materials, space technologies, etc.

The few steps to be taken towards attaining this objective are outlined below:
• CIPAM shall undertake few tasks. Provide a platform for IPR owners and users of IPRs by acting as a facilitator for creators and innovators to be connected with
potential users, buyers and funding agencies. It must undertake a study to examine the feasibility of an IPR Exchange and establish links among different organizations for exchange of information and idea to develop promotional/educational products and services. CIPAM must facilitate access to databases on Indian IP and global databases of creators/ innovators, market analysts, funding agencies, IP intermediaries. It must also study and facilitate implementation of best practices for promotion and commercialization of IP within the country and outside along with promotion of public sector initiatives for IPR commercialization.

- Promotion of licensing and technology transfer for IPRs and devising of suitable contractual and licensing guidelines to enable commercialization of IPRs must be done. There must be done a promotion of patent pooling and cross licensing to create IPR based products and services.

- Support for MSMEs, Individual Inventors and Innovators must be provided from the informal sectors with enablers like facilitation centres for single window services to help them commercialize their IPRs. Indian inventors, MSMEs, start-ups must be given incentives to acquire and commercialize IPRs in other countries also.

- Examination of availability of Standard Essential Patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms must be done.

- Identifying opportunities for marketing Indian IPR-based products, especially GIs, and services to a global audience. Collaborative IP generation and commercialization efforts between R&D institutions, Industry, Academia and Funding Agencies must be promoted.

These are the few measures which must be taken among the others.\textsuperscript{216}

6. Enforcement and Adjudication

Protection of IPR is the primary obligation of the owner as IP right is a private right. Only the owner can seek legal remedies for the enforcement of rights. Hence it is essential to provide for an effective mechanism through which the owners can enforce their IP rights. It is also important to balance the rights of the public in a manner conducive to social and economic welfare and to prevent misuse or abuse of IP rights.

There is a need to build respect for IPR among the general public and to sensitize the inventors and creators of IP on measures for protection and enforcement of their rights. Measures to check counterfeiting and piracy also need to be searched and implemented.

\textsuperscript{216}Ibid.
Regular IPR workshops / colloquia at judicial academies and other forums for judges would facilitate effective adjudication of IPR disputes. Multi-disciplinary IP courses / modules for other stakeholders are also needed.

It would be desirable to adjudicate on IPR disputes through specialised commercial courts. Alternative Dispute Resolution mechanism may also be explored.

The few steps to be taken towards attaining this objective are outlined below:

- Creating awareness of the value of IP and respect for IP culture by educating the general public, especially the young students, on ills of counterfeit and pirated products and engaging with all levels of industry, including e-commerce, in order to create respect for IP rights and devise collaborative strategies and tools. Also sensitization of inventors, creators of IP on measures for protection and enforcement of their rights can help.
- Strong measures against attempts to treat generic drugs as spurious or counterfeit must be made.
- Stringent measures to curb manufacture and sale of misbranded, adulterated and spurious drugs must be undertaken.
- Public awareness as also legal and enforcement mechanisms, including technology based measures, will be reinforced to combat offline and online piracy is important.
- Small technology firms will be supported in safeguarding their IP rights; for instance, support for IPR in ICT focus areas will be provided through easy-to-use portals;
- Assistance to smaller firms for protection of their IPRs internationally will be enhanced, such as DeitY’s Support for International Patent Protection in Electronics and IT (SIP-EIT);
- Pursue incidents of misappropriation of TK, GR and TCE in other countries vigorously.
- Strengthen the enforcement mechanisms for better protection of IP rights by enhanced coordination between the various agencies and providing direction and guidance on strengthening enforcement measures; coordinating with and sharing of intelligence and best practices at the national and international level; studying the extent of IP violations in various sectors; examining the implications of jurisdictional difficulties among enforcement authorities; and introducing
appropriate technology based solutions for curbing digital piracy; among the other measures.\textsuperscript{217}

7. \textbf{Human Capital Development}

With the increasing trend of globalisation, advancement of technologies, digital environment, development imperatives and global public policy issues in the world, the IPR scenario is fast changing and becoming quite dynamic. Hence it becomes important to provide human force in order to meet this demand and build national capacity for providing leadership in the IPR field. Continuous policy research is also needed on empirical and topical IPR areas of relevance with an interdisciplinary perspective at the national and international level. This research would enrich the process of policy, law, strategy development and international negotiations at the government and organizational levels.

While apex level institutes or bodies exist for most sectors of national importance, such an institution has yet to be established for intellectual property rights development. In order to harness the full potential of IPRs for economic growth, it is essential to develop an increasing pool of IPR professionals and experts in spheres such as policy and law, strategy development, administration and enforcement. IPR expertise would thus need to be developed and increased in industry, academia, legal practitioners, judiciary, IP users and civil society.

In addition, there will be enhancement of multidisciplinary human and institutional capacity for policy development, teaching, training, research and skill building. Such a reservoir of experts will facilitate in increasing generation of IP assets in the country and their utilization for development purposes.

The few steps to be taken towards attaining this objective are outlined below:

- Strengthen and empower RGNIIPM, Nagpur to conduct training for IPR administrators and managers in industry and business, academicians, R&D institutions; IP professionals; inventors and civil society; train the trainers and develop training modules; develop links with other similar entities at the international level; provide legal training for examiners; Strengthen IP Chairs in educational institutes of higher learning to provide quality teaching and research;

\textsuperscript{217}Ibid.
develop teaching capacity and curricula and evaluate their work on performance based criteria;

- Introduce multi-disciplinary IP courses/modules in all major training institutes such as Judicial Academies, National Academy of Administration, Police and Customs Academies, Institute for Foreign Service Training, Forest Training Institutes;

- Making IPR an integral part of the curriculum in all legal, technical, medical and management educational Institutions, NIFTs, NIDs, AYUSH Educational Institutes, Agricultural Universities, centres of skill development and the like; Strengthen existing and create new IPR cells and technology development and management units in NIDs, NIFTs, Agricultural Universities, Technology and Management Institutes and centres of skill development;

- Encourage formulation of institutional IP Policy/Strategy in Government Departments, Higher Education, Research and Technical Institutions; Develop distance learning and on-line courses on IP for all categories of users; strengthen IP teaching in open universities and centres of skill development; Strengthen IP Teaching, Research and Training in collaboration with WIPO, WTO, other International Organizations and reputed Foreign Universities;

- Progressively introduce IP teaching in Schools, Colleges and other Educational Institutions and centres of skill development;

- Facilitate Industry Associations, Inventor and Creators Associations and IP Support Institutions to raise awareness of IP issues and for Teaching, Training and Skill Building;

- Encourage and support capacity building among Women Creators, Innovators, Entrepreneurs, Practitioners, Teachers and Trainers.\(^{218}\)

**Author’s Comments**

The author’s would like to conclude with the following remarks. The New IPR Policy of 2016 aims to integrate IP as a policy and strategic tool in national development plans. It foresees a coordinated and integrated development of IP system in India and the need for a holistic approach to be taken on IP legal, administrative, institutional and

\(^{218}\)Ibid.
enforcement related matters. The policy is a step forward in creating an altogether new avenue for the IP Industry in India and along with it promoting the slogan, as administered by our Hon’ble Prime Minister Mr. Narendra Modi, of “Creative India; Innovative India: रचनात्मकभारत; अभभवनवभारत”. If the objectives as enumerated in the policy are achieved, there will be a rise in the innovation level in the country and a force of educated and aware individuals in relation to IPR’s will be created. There will be new avenues of employment as well for individuals in the fields of law, administration, etc.

But the main concern that we feel is the implementation of the policy. Can this policy be implemented properly? Or will it just be left on the pages in the form of black and white laws? Well in order to derive advantages from the policy, proper implementation and administration needs to be done. It may be noted that intellectual property in India, today, is regulated by several laws, rules and regulations under the jurisdiction of different Ministries/Departments of the government. A number of authorities and offices take care of the administration of the IP laws. The legal provisions need to be implemented harmoniously so as to avoid conflict, overlap or inconsistencies among them. It is necessary that the authorities concerned administer the laws in coordination with each other in the interest of efficient administration and user satisfaction. Legal, technological, economic and socio-cultural issues arise in different fields of IP which intersect with each other and need to be addressed and resolved by consensus in the best public interest.

The Department of Industrial Policy and Promotion has been appointed as the nodal point to coordinate, guide and oversee implementation and future development of IPRs in India. The responsibility for actual implementation of the plans of action will remain with the Ministries/Departments concerned in their assigned sphere of work. Public and private sector institutions and other stakeholders, including State governments, will also be involved in the implementation process.219

Hence, if the implementation is carried on well then the New IPR Policy can definitely turn out to be a success and a major turning point in the history of IP Rights in India.

Bibliography


219Ibid.


Abstract

The Insolvency and Bankruptcy Code 2016 is considered as a major economic reform Bill moved. William Gamble, the business consultant feels insolvency as plumbing as "It consents to the market to wash away the unproductive businesses and reallocate capital to capable businesses". It takes about four years on an average basis to determine insolvency in India, as per the World Bank's Ease of Doing Business Report. This research involves the study related to Bankruptcy and Insolvency Bill 2016 and why is it important to protect creditors in the insolvency mechanism? Insolvency laws and regulations try to shield any person from loss of protection because of constraints of corporate client measures. This essay involves the importance of Bankruptcy Bill 2016 in India presently. The objective of this Code, its features, timeline of process, aid for banks and comparison with US Chapter for Bankruptcy. This essay has even discussed about Cross Border Insolvency issues and how are they tackled. The parliament addresses cross border issues by entering bilateral agreements with different countries which is very limited. This essay talks about incorporating the Model Law in the domestic legal structure and its advantages. This essay concludes with a personal analysis of cross border liquidation of debtors.

Keywords: Bankruptcy Bill 2016, features, timeline, debtor, cross border insolvency, bilateral agreements, UNICITRAL Model Law, advantages
Introduction

India has several laws to deal with bankruptcy, which escort to momentous interruption in dissolving a company. The Indian parliament on 11\textsuperscript{th} May 2016 approved the country’s first National Bankruptcy Law. The Insolvency and Bankruptcy Code 2016 is considered as a major economic reform Bill moved next to GST. The Bill seeks to accomplish certainty for recovery and implement proceedings to a degree, which explicitly is a useful tool for investors and creditors.

It takes about four years on an average basis to determine insolvency in India, as per the World Bank’s Ease of Doing Business Report.\textsuperscript{221} It would take much more time for a person on the ground. William Gamble, the business consultant feels insolvency as plumbing as “It consents to the market to wash away the unproductive businesses and reallocate capital to capable businesses”.\textsuperscript{222}

For the people who are looking for Indian opportunities such as international creditors and investors, it would be of specific interest. The intention of this Bill is to remove the obsolete laws covering various aspects of bankruptcy and insolvency. The Code has set various provisions to modify and take precedence over the existing laws to evade future legal actions. This Code has received assent from the Lok Sabha (Lower House of the Parliament) and Rajya Sabha and anticipates for the Presidents consent for it to come into force.

There have not been much preferred outcomes by creditors through a recovery action either through The Indian Contract Act 1872 or through various special acts such as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. In the same manner dissolving provisions of the Companies Act, 1956 and suits through the Special Provisions Act, 1985 have neither helped to recover for lenders nor assist in restructuring the firms.

In the case of laws dealing with individual bankruptcy, the laws are century old such as The Presidential Town Insolvency Act, 1909 and The Provincial Insolvency Act 1920 which impede the confidence of the lender. Access to debt for borrowers is weakened when the lenders are


unsure, which in turn reveals the condition of the credit markets. The corporate acquaintance is yet to grow and protected credit by banks is the largest constituent of credit market in India.

Objective

The objective of this Code is to support and encourage entrepreneurship, availing credit and balancing the interest of all stakeholders by unifying and revising the laws concerning reorganization and impoverishment resolution of individuals, partnership firms and corporate persons in a time frame for maximization of value of assets and matter that are incidental to.

This Bill aims to strengthen the laws relating to liabilities and insolvencies of companies and partnerships into a single legislation. Unification of law will offer a greater precision and clarity, which smoothens the advancement of application of provisions to various stakeholders who have been affected by business breakdown or incapacity to pay debt.

Features of Code

1. Two distinctive courses of action for resolution of individuals, one being 'Fresh Start' and the other being 'Insolvency Resolution'.
2. To deal with cases affiliated to liquidation and bankruptcy, an Adjudicating Tribunal known as The Debt Recovery Tribunal and National Law Tribunal will operate with respect to individual persons, partnership firms with unlimited liability and limited liability entities respectively.
3. To regulate supervision over bankrupt professionals, organizations, agencies and utilities establishment of an Insolvency and Bankruptcy Board of India.
4. To handle the commercial characteristic of liquidation resolution process, insolvency professionals are appointed. Various professional principles, code of values are developed by the Insolvency professionals. A single regulatory body for insolvency advances for a competing industry for those certified.
5. To establish terms to deal with cross border bankruptcy.
6. A swift, unambiguous, and coherent procedure for early detection of economic suffering and resolution of entities with limited and unlimited liability there is a business set up to be feasible.

Timeline of Process

<table>
<thead>
<tr>
<th>Details</th>
<th>Due dates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filing of bankrupt application (particular details have to be mentioned as specified)</td>
<td>Anytime or X</td>
</tr>
<tr>
<td>Adjudication – admissal or dismissal of application</td>
<td>Within 14days from the date of</td>
</tr>
<tr>
<td>If admitted, the authority asserts a moratorium upon admission</td>
<td></td>
</tr>
</tbody>
</table>
If rejected, the authority serves a notice to the aspirant to rectify the deficiency in the application within 7 days filing the application

Appointment of Insolvency Resolution Professionals
Additional 14 days i.e., (X+14)+14

Appointment of final resolution professional and Constituting a Committee of Creditors
Additional 10 days i.e., (X+14)+14+10

Deference of Resolution plan
Within 180 days i.e., (X+14) + 180

If approved; Moratorium come to an end and does not have effect
If rejected; Commencement of Insolvency process
Completion of Insolvency Resolution Process

Extension of Insolvency Resolution Process
Additional 90 days i.e., (X+14)+180+90

**Priority of Debts in case of Insolvency**

- Cost of liquidation and Insolvency Resolution
- To secured creditor (who have given up on their security interest) and 2 years Workmen’s dues before commencement.
- Wages and dues to employees (other than workmen) (for 12 months before commencement)
- Financial debts to unsecured creditors and Workmen’s previous period dues.
- Crown debts and debts following enforcement of security interest to secured creditors.
- Residual Debts
- Preference Shareholders
- Equity Shareholders and partners

The priority has been given to secured creditors who have given up security requires special attention as it can be misused by the debtor and the secured creditor can mend and impair the guarantee.

**The Four Pillars**

The Four Pillars of institutional infrastructure are the explanation of this Code.

Pillar I: This pillar constitutes of institutional infrastructure in set of legalize people known as the ‘Insolvency Professionals’. These professionals play an important role in the proficient running of the liquidation process. The professionals are regulated by an agency known as the
'Insolvency Professional Agencies'. These agencies construct professional standards and exercise a disciplinary role. A set of three Resolution Professionals are appointed, namely- Interim Resolution Professional, Final Resolution Professional and Liquidator.

Pillar II: This is a new production of the institutional infrastructure known as the 'Information Utilities'. They function is to pile data about stakeholders and their terms of lending in e-databases (Electronic databases). Using e-commerce exterminates delays and quarrels about the facts and data when nonpayment takes place. These utilities collect and pile data, validate and circulate financial data from the listed organizations and firms including their financial and operational creditors of companies. There has been no clarity over whether this will merge with the current Central Registry of Securitization Asset Reconstruction and Security Interest of India (CERSAI) or Central Repository of Information on Large Credits (CRILC) or add to the plethora of registries in India.

Pillar III: This next pillar of the institutional infrastructure is adjudging or adjudication. When a company is insolvent, the National Company Law Tribunal (NCLT) will attend the matter and in the case of an individual being insolvent, the Debt Recovery Tribunal will hear the matter. Various other appellate tribunals such as the National Company Law Appellate Tribunal (NCLAT) and Debt Recovery Appellate Tribunal (DRAT) will be appropriately toughened to accomplish a world class performance of the insolvency process.

Pillar IV: The last pillar of institutional infrastructure is regulatory. The regulatory board for insolvency in India is ‘The Insolvency and Bankruptcy Board of India’. This board has supervision over the bankrupt professionals, agencies and utilities in India.

**Aids the Banks**

On every hearing cases pertaining to insolvency go on and on as the lawyers find loopholes, until the case takes new turns. During this process the banks turn out to be a mute observer in anticipation of the case being resolved, the assets of debtor significantly would have been eroded and there is nothing to recover.

This legislation assists banks to recover the amount from the defaulters within a time period of 180 days and if the majority of the creditors consent, the time period can be extended to not more than 90 days. If the amount is not recovered within the period, then by default the concerned company will be liquidated.

**Cross Border Bankruptcy and Insolvency**
The expansion of International Trade due to rapid growth in the global economy has lead to extensive international trade. Cross Border Insolvency engages insolvency process in a country with the creditors located in some other country or countries and in most complex cases it engages in creditors, operations, assets and subsidiaries in a lot of countries.

When a company has a lot of creditors in more than one country then the issues occur in cross border insolvency. Many of the cases include one or a blend of three conditions.

- Firstly, foreign creditors of the insolvent company yearn for their rights to be protected even if they are not based in a country where the liquidation is taking place.
- Secondly, the assets of the insolvent company can be sited in another jurisdiction of which the creditors would like to take control as a part of the insolvency proceedings.
- Thirdly, liquidation proceedings to the same debtor might be taking place in more than one country. This situation is common when it comes to corporate firms facing financial intricacies and dealings against legal entities within a group are initiated in various jurisdictions.

The Insolvency Bill 2016 deals with the first issue through implication, as there is no differentiation between a domestic and foreign creditor. The definition of persons in the legislation, it has clearly included ‘persons not residing in India’ and as a result the definition of creditors has also been expanded. The Code authorizes foreign creditors to participate and initiate proceedings under the new law. Similar rights of domestic creditors have been given to foreign creditors dealing with the division of assets of the company.

The second and third issues are not dealt through the bill presently, as it is short of system for assistance among jurisdictions or an Indian Court or a Tribunal to seek the aid of a foreign court or an insolvency tribunal when a liquidation process might have implications across national borders. To address these situations the two new clauses – Section 234 and Section 235 have been introduced by the Joint Parliamentary Committee. Section 234 gives the Central Government power to enter into bilateral agreements with other countries for functioning of the Bill. Section 235 authorizes the tribunal or appropriate court in India to issue a letter of request to a foreign tribunal or court seeking its aid to find debtor’s assets overseas.

**Bilateral Agreements in Cross border insolvency**

In the earlier period bilateral agreements have been used to deal cross border liquidation. Courts in various jurisdictions advanced set of rules to collaborate with each other in cross border liquidation cases even earlier to procedural agenda for collaboration implanted in treaties or domestic laws. The first treaty was between the English and US courts in the year
1991 during the liquidation proceedings of an England based media firm with assets in the United States.\textsuperscript{223} This case had lead to instantaneous administrative enacting in the UK and Chapter 11 in the US. On the basis of flowing information among the proceedings was necessary for effective resolution of bankruptcy and preserving the debtor’s estate, so the court developed a collaboration protocol.

The major difficulty faced while cross border insolvency negotiations with various countries which take a lot of time and is a laborious process. Each country has its own insolvency regimes which make it difficult to negotiate and situations where bilateral agreement varies from one’s own country from agreement with another country, leading to uncertainties in execution.

The\textsuperscript{\textit{UNICITRAL – Model Law}}

The UNICITRAL Model Law functions to set a bureaucratic structure for exchanging information, coordination and collaboration in cross border insolvencies. In Model legislations countries adopt their own domestic laws rather than conventions and treaties as they can be drafted with flexibility. The Model Law has been adopted by 41 countries including US, UK, Canada after being endorsed by the UN General Assembly in 1997 in a total of 43 jurisdictions.\textsuperscript{224}

The scope of the Model Law proceedings is collective in nature under the insolvency law of any state having the purpose of liquidation or reorganization of debtor. The Model law consists of four categories of provisions-

- Terms relating to contacting foreign creditors and liquidation representatives to domestic liquidation proceedings.
- Terms relating to identification of foreign insolvency proceedings and yielding of the particular reliefs. The category of relief that are subsequently granted relies on whether the proceedings have been identified as primary or non primary proceeding.
- Terms relating to assistance and direct communication among the insolvency representatives and court in one state with their corresponding person in a foreign state.
- Terms dealing with insolvency proceedings of the debtor in more than a single jurisdiction.

\textsuperscript{223} \textit{In re Maxwell Communications Corporation plc, 170 BR 802, 802 (Bankr SDNY 1994).}


There are numerous advantages for India in accepting the Model Law rather than relying upon bilateral agreements alone. The advantages are as follows:

1. Model Law is far and wide accepted standard that has been adopted by numerous countries.
2. Adopting the Model Law fetches positive assurance to foreign creditors on the standards of access and acknowledgment for foreign liquidation proceedings.
3. Faster adaptation process and saves burdensome negotiation process compared to bilateral agreements at least with such countries which have previously adopted the Model Law.
4. Model Law anticipates the changes such as elimination of particular kinds of institutions and exception based on public policy.

Previously, committees such as The Eradi Committee in the year 2005 and N L Mitra Committee in the year 2001 that reviewed the insolvency laws in India recommended adopting the Model Law with appropriate modifications but was never carried out.

There are certain disadvantages when adopting Model Law into the countries domestic legislation. The disadvantages are as follows:

1. Adopting the Model Law affects the Country’s capital control laws such as the Foreign Exchange Management Act 1999 and the Reserve Bank of India capital control. For example, foreign creditors are at liberty to hold rights similar to domestic creditors such as the capacity to accept cash or assets situated in India depending upon the host of other rules or laws. The Model Law does not have capital control requirements that can be considered once more for developing countries.
2. If Model Law is incorporated in its original texts into the domestic legislation then a foreign delegate of a state that hasn’t enacted Model Law could gain access to Indian Liquidation Proceedings. On the other hand an Indian representative cannot gain access to foreign insolvency proceedings in that country as per the Model Law, but there can be provisions in laws of the country that enables access. This clarifies that the Model Law is not based on the principle of reciprocity between states.
3. The crux of Model Law is whether liquidation proceedings are foreign main or non main proceeding and determining the debtor’s ‘Centre of main interests’ by acknowledging, coordination and cooperation. The Model Law does not describe COMI and it is difficult to determine COMI when MNC’s having functioning and assets in many jurisdictions.

Conclusion

As per the financial data company Bloomberg, eight out of ten entrepreneurs, starting business backslide in the first three years with an astounding 80% failure rate. According to the World

Source: Why India's new bankruptcy law is good for businesses, extracted from

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Bank, when an average business becomes insolvent only 25% of Indian creditors are given money back and when compared with the recovery rate of countries like Europe and United States is 77%. If this gap is reduced by the new law then it would facilitate boost investment for the new start ups.226

The two insolvency procedures for companies is Chapter 7 and Chapter 11 in the United States, where Chapter 7 deals with the liquidation process through appointment of trustee by the Court to supervise the liquidation of the company. As per this chapter the business is closed before the assets are sold. A company can operate while a plan of reorganization is being worked out with the creditors as per the Chapter 11.

When the Insolvency and Bankruptcy bill is compared to the US provisions, this code seeks to tackles problems that are currently faced in the perspective of insolvency. This law guarantees efficient allotment of wealth in an economy and if it is implemented in India it will undoubtedly improve innovation and productivity. The Bankruptcy and Insolvency is an organized and comprehensive reform which gives a portion rise to the performance of the credit market. This Code would make one of the world’s best insolvency regimes. The establishment of a corporate bond market, the code lays a foundation which would finance projects of the future. The discharge of this code will ease business in India.

The adoption of Model Law in the domestic legal framework it should be cautiously be reviewed that suit India’s particular needs. The above mentioned should not be the reasons for not adopting the Model Law but places where it should be adjusted for it to be effective. Model Law is a robust procedural standard that addresses the difficulties arising in cross border liquidation and is best for a developing country like India.

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Abstract

The modern universe is the creature of manifold revolutions beginning from agricultural, industrial, technological and digital to what is called today as 'Start-up Revolution'. The number of the start-ups that gained entry in the any remarked year is a relative factor to decide the total employment range and the weight of the entrepreneurship of any nation. Further, it was considered that the opportunities available for start-ups to enter and exit the market also have been a contributing factor to determine the overall productivity of any given region. Hence it becomes mandatory for the nations to greet more start-ups for its upgradation in the global ranking. The start-ups that enter the economy has to **prima facie** face certain risks such as determining the target market, creating market value, consumer base, adoption of suitable business model, technical feasibility and most importantly the risk of finance and liquidity. Where the start-ups don’t have sufficient financial resources, they had to identify financial source which could be loan from the banks, seed investments, business angels, venture capitals or the family, friends and relatives. Witnessed in the past six decades are major changes in the policies relating to industries and enterprise around the world. The policies aimed at reducing the entry barriers, reduction of compliance cost, created a competitive environment, increased transparency, accountability and facilitated to remove more restrictive policies towards start-ups. Particularly, there were reforms that substantially influenced the funding methods for the enterprises mainly start-ups to give rise to a strong state and economy simultaneously. One such framework formulated to encourage and fund the start-ups is crowdfunding. The paper explores the concept of crowdfunding and analyses the regulatory framework of USA.
Introduction

‘Champions are made from something they have deep inside of them - a desire, a dream and a vision’

- Finance Minister Arun Jaitley

Entrepreneurship is considered to be the fundamental phenomenon of economic growth, prosperity and development. It acts as a strong pillar for innovation and a source of change which promotes the level of production both quantitatively and qualitatively. It enhances the competitive spirit among the business community. It is the innovation that procures solution to issues that are left unresolved and also operates as a stimulator for formation of new business, provides new jobs, promotes productivity, thus is the means to attain the goals against varied social, global and economic challenges.

Turning back a decade, only politicians, economists and large corporations visualised and succeeded in creating an entrepreneurship. However, with the economic shift from industrial economy to innovation economy, there is a drastic rise in the grassroots communities whose visions and passions result in building their own empire by permutations and combinations thereby forming their own enterprises that could be termed as a Start-up.

One such framework formulated to encourage and fund the start-ups is crowdfunding. It proves to be an innovative funding vehicle and an alternative channel of capital rising. With the unprecedented and fast growth of the crowdfunding industry, the International Organisation for Securities Commission came up with the IOSCO Staff Working Paper to give an overview on crowdfunding. Crowdfunding is an umbrella term that basically involves the financing of a project or business through internet or any web based platforms by a large mass of individual or

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228 Speech of Arun Jaitley, Budget 2016-2017 (29 February 2016)
229 Daniel F. Spulber, 'The Economic Role of the Entrepreneur' (June 2008) 5
230 UNCTAD, Entrepreneurship and Economic Development: The Empretec Showcase (2004) 1
231 OECD, OECD Innovation Strategy 2015 An Agenda For Policy Action (June 2015) 3
234 The Board of IOSCO, Statement on Addressing the Regulation of Crowdfunding (December 2015) 1

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organisations by contributing small amount of capital in order to make an idea, an enterprise. With the advancement of technology, the securities market has currently become smarter, faster and more efficient whereby the new financing channels such as peer to peer lending and crowdfunding are now a reality. 236 Though it has become popular in a short span of time with mature internet systems, it is closely embedded with trust 237 from wide range of individuals for its permanence. The new establishments that come into being are considerably vulnerable in their formative days and thus fail to establish a prosperous business. 238 Hence, it becomes mandatory to understand the key factors behind the rate of success and failure of these establishments.

**Conceptual Analysis**

Crowdfunding, the online collection of small contributions from numerous individuals deemed to have its origin from an USA musician, Brian Camelio in 2003, when he launched a website called Artistshare. 239 Through this website, the so-called ‘crowdfunding pioneer’ encouraged his fans to fund the creation of new artistic works and other relevant projects directly. 240 It is this mechanism which was eventually developed as the crowdfunding model in the wake of global economic crisis and technology evolution which in turn promoted entrepreneurship and job creation. In modern crowdfunding, three sets of players namely the start-up venture or the entrepreneur, the crowdfunding platform or the online medium and the investor or the crowd 241 have an active role to perform in the entire process.

Pooling of resources from people for a particular cause is as old as entrepreneurship itself however the newness of the method lies in the technological involvement with legal sanction to raise funds. 242 Since crowdfunding primarily uses the social media and online platforms to pool

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237 The Growth and Emerging Markets Committee of the IOSCO, SME Financing through Capital Markets (July 2015) 32
238 Centre for International Trade in Technology, Indian Institute of Foreign Trade, A Pilot Study on Technology Based Start-Ups (August 2007) 9
funds, its reach to raise funds is not limited to the national frontiers and territorial borders\(^{243}\) but is extended to the universe in its eternity. Apart from fund raising, it helps in information dissemination, creating awareness about projects and products undertaken by the start-ups, provides an opportunity for the investor to give feedbacks to improve the product which as a consequence increases the commercial recognition\(^{244}\) and also acts as an effective marketing tool\(^{245}\) among the greater public. It thereby essentially encourages the direct participation of the customers in the market who in future are the deemed consumers of the product manufactured.

Precisely, the concept of crowdfunding involves tapping the wisdom of the right crowd to raise the requisite capital through an online medium in order to venture out any start-up. The success of crowdfunding depends on the motivation, mobilization and engagement of the crowd\(^{246}\). It is claimed that to crowdfund, the motives vary from being egoistic which involve a tendency inclined to help, a philanthropic and socially responsible attitude towards the society to being altruistic which tends to increase one’s own welfare or results from the combinations of both\(^{247}\). Based on these motivations and to effectively attract the crowd to invest in the start-ups through the new internet mechanisms formulated, the crowdfunding is classified into various types based on their inherent nature. The classification includes donation based, reward based, royalty based, peer to peer lending based and equity based models.

**U.S. JOBS Act, 2012 (Title III- Crowdfund Act)**

> 'It’s not a faith in technology. It’s faith in people' - Steve Jobs

The JOBS Act is an effective push to augment the funding opportunities after the global recession and it also acknowledged the fact that the options left for the start-ups to raise fund is minimal\(^{248}\). Hence, it included the means to offer and raise the capital from their family, friends

\(^{243}\) Tia Tuovinen, 'Crowdfunding For a Novelty Consumer Product, Case Study: Goodio Cools' 8 (Bachelor's thesis, Tampere University of Applied Sciences January 2014)

\(^{244}\) OECD, *New Approaches to SME and Entrepreneurship Financing: Broadening the Range of Instruments*, 54, para 242

\(^{245}\) European Commission, *Crowdfunding Explained- A Guide for Small and Medium Enterprises on Crowdfunding and How to Use it* 9

\(^{246}\) Alban Metelka, ‘Crowdfunding – Start-up’s Alternative Funding Source beyond Banks, Business Angels and Venture Capitalists’ (Master Thesis, Blekinge Institute of Technology, School of Management 9 June 2014)

\(^{247}\) Mart Evers, 'Main Drivers of Crowdfunding Success: A Conceptual Framework and Empirical Analysis', 24, para 4.3.1 (Master Thesis, Erasmus University September 2012)


and relatives through online mediums, the concept now familiarly called crowdfunding.\textsuperscript{249} Initially the JOBS Act did not contain the provisions relating to crowdfunding however Title III that deals with Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012 was brought in, through an amendment by the U.S. Senate.\textsuperscript{250} Crowdfunding thus became legal with the proper regulatory framework within the JOBS Act.\textsuperscript{251} It became an industry with wide growth by integrating and hybridizing of all the conventional financial methods thus providing viable opportunities for the start-ups and the small businesses.\textsuperscript{252} It is an encouraging and innovative method which gears the boom of the market and the economy. It is claimed as a creative marriage to connect the social media principles and small business capital formation tactics.\textsuperscript{253} The underlying theory is that an entrepreneurial person having ability to convince the larger public to be an investor of his business idea can utilize the activity of crowdfunding\textsuperscript{254} for the prospective development.

However, to legalize Title III of the Act, SEC had to make certain necessary amendment of the restrictions in the Securities Act, 1933 and made crowdfunding a reality.\textsuperscript{255} To eventually effectuate the smooth running of the crowdfunding, the Act came with its own set of requirements that has to be mandatorily followed to raise funds from the crowd and therein introduced three main participatory I’s- Issuer, Investor and Intermediary. The start-up company or the one with the new business ideas who seeks to raise fund is called the issuer.\textsuperscript{256} The investor typically is the one who act as a contributor to the capital of the company\textsuperscript{257} and would receive periodical returns for the same. The intermediaries in the case of crowdfunding act as major connecting and surviving link between the issuer company and the investors to

\textsuperscript{249} Patterson Belknap Webb & Tyler LLP, ‘SEC Adopts Final Crowdfunding Rules under the JOBS Act’ (November 2015)
\textsuperscript{250} The amendment was passed by the Senate on 22 March 2012
\textsuperscript{251} The JOBS Act 2012, s 301-305
\textsuperscript{252} Kevin Lawton and Dan Marom, \textit{The Crowdfunding Revolution Social Network meets Venture Financing} 10
\textsuperscript{255} U.S. Securities and Exchange Commission, \textit{Information Regarding the Use of the Crowdfunding Exemption in the JOBS Act} (23 April 2012)
\textsuperscript{256} The Securities Act 1933, s 4A (b)
ensure proper channelizing and collection of funds\textsuperscript{258} be it the funding portal or the brokers. These portals have to be registered from one self-regulatory organization and have to make prompt, effective and adequate disclosure as required by SEC. These participants work in synchronization to reduce the obligations in raising funds in comparison with the traditional methods of dealing with securities.\textsuperscript{259}

The concept of crowdfunding and the Act provides for a sequence of takeaways to work upon the principles of transparency and accountability. Issuer as defined under the Act includes any director, partner, principal executive or financial officer, controller or principal accounting officer of the issuer who offers and sells a security in any exempted transaction.\textsuperscript{260} It also clarifies the role and the requirements that are to be satisfied by the issuers. Firstly the issuer is under the obligation to disclose the investor and the intermediary all the basic information of the company including the name, legal status, directors, officers with their proportion of shareholding more than twenty percent, the nature of the business that is to be carried on along with the proper business plan and an explicit mention about the intended amount that is to be raised using the portal.\textsuperscript{261} Importantly the companies also has to give a full, fair, true and complete disclosure of the audit statements including the filing of the financial statements and tax returns for the preceding period of twelve months to raise the capital from the public.\textsuperscript{262} The Act provides an onerous liability for any material misrepresentation and omission recorded on the part of the issuer.\textsuperscript{263} Further it is considerate to be a domestic company to involve in the activity of crowdfunding and it has been held that the public companies, foreign issuers, investment companies, hedge funds, shell companies and the bad actors are barred entry and access into the crowdfunding market as the issuers.\textsuperscript{264}

The eligible criteria for the issuer as per the Act, is to offer securities and raise the aggregate capital up to $1 million within the period of twelve months.\textsuperscript{265} A similar limit has been placed on

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{258} The Securities Act 1933, s 4A (a)
\item \textsuperscript{260} The Securities Act 1933, s 4A (c) (3); The JOBS Act 2012, s 302
\item ibid, s 4A (b)
\item ibid s 4A (b) (D).
\item \textsuperscript{263} The Securities Act 1933, s 4A (c)
\item \textsuperscript{264} Alan J. Berkeley, 'Crowdfunding: What It Is and What It Isn't' (April 2015) The Practical Lawyer 2 <http://www.klgates.com/files/Publication/cb626e66-a1bb-402a-a818-fa6327f1559a/Presentation/PublicationAttachment/fa6790fc-b361-406b-adb4-01e449cb280e/Crowdfunding_article.pdf> accessed 15 February 2016
\item \textsuperscript{265} The Securities Act 1933, s 4(6)(A)
\end{enumerate}
\end{footnotesize}
the aggregate amount that can be invested by the individual investor during the twelve month period.\footnote{ibid, s 4(6)(B).} It is provided that where the annual income or the net worth of the investor is less than $100,000 and then the aggregate that the investor can invest should not exceed $2,000 or 5\% of his annual income or net worth whichever is higher. Where the annual income or net worth exceeds or remains equal to $100,000 then the aggregate of funding can be 10\% of the net worth or the annual income and should never exceed the maximum of $100,000. Any transaction with respect to raising funds through crowdfunding are either to be conducted through a broker or through the funding portal created for that purpose. Those brokers and portals are mandatorily required to comply with the conditions that are prescribed in Section 4A (a) of the Securities Act.\footnote{ibid, s 4(6)(C).} Similarly the companies and start-ups issuing the shares are to comply with the requirements of Section 4A (b) of the Securities Act, 1933.\footnote{ibid, s 4(6)(D).} The burden of ensuring that the investment falls within the brackets of the limits prescribed is imposed either on the issuer or on the investor and the intermediary does not play any role in determining the investment limits.\footnote{Zachary Robock (n 32) 5.} The investors under the crowdfunding regulations may be accredited as well as unaccredited whereby the cumulative limits vary in accordance to the nature of their investment.

One noteworthy exposition is that the crowdfunding transactions are to be conducted mainly through intermediaries who can be a SEC registered broker or a new type of entity registered for this purpose called the funding portal.\footnote{The Securities Act 1933, s 4A (a) (1)} Though these two entities have the same functional role in the offerings, it is claimed that the brokers would retain their broader role\footnote{Zachary Robock (n 32) 7.} in the securities markets as compared to the funding portals whose activities would be limited to the sphere of crowdfunding. Since the issuer is prohibited from soliciting and advertising his terms of offer, it becomes a mandate for them to approach the broker and the funding portals to attract investors.\footnote{KPMG, 'Defining Issues- SEC Proposes Crowdfunding Portals' (November 2013) 3 <https://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Newsletters/Defining-Issues/Documents/Defining-Issues-0-1311-48.pdf> accessed 16 February 2016} The portals are imposed with the positive morality and an affirmative duty to review upon the investor education standards thereby enabling the investors to understand the underlying risks in the investment, to explain the nature of the start-ups, the risks associated
with liquidity and other desired and considerable matters\textsuperscript{273} as brought before them from time to time.

The funding portals can be exempted from registration by the SEC under three conditions. The portals should readily accept the examination, enforcement and other requirements of the Commission as and when necessary or should be a member of the National Securities Association or should adhere to other requirements which the Commission finds desirable.\textsuperscript{274} The funding portals have certain restrictive limitations that have to be strictly adhered to. The limitations include a ban from offering investment advice and recommendations, neither solicit purchases and sales nor offer to buy the securities, should not hold, manage, posses or handle the investor funds and securities. They are further prohibited from compensating the employees for solicitation and offering a commission on the sale of the securities.\textsuperscript{275} The prohibitions on the portals necessities the portals to have a contractual and other business relationship with the bank and other qualified third parties in order to have effective operations of funding mechanisms in the securities market.\textsuperscript{276} This contractual relationship proves that front-office contact between the issuer and the investors is sustained by funding portal\textsuperscript{277} and back-office maintenance of funds and stocks are facilitated by the banks and third parties. The securities markets in U.S are protected by both the federal laws and the state laws are called the ‘Blue Sky Laws’.\textsuperscript{278} These laws are specially made with intent to protect the interest of the investors against the manipulative and fraudulent sales, practices and activities.\textsuperscript{279} The compliance of both the laws proved to be exorbitantly expensive for the small businesses and the start-ups.\textsuperscript{280} Hence, the amendment restricted its relevance solely to the securities that are being issued through the activities noted in the Crowdfunding Act.

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\textsuperscript{273} The Securities Act 1933, s 4(a)(4)  
\textsuperscript{274} The JOBS Act 2012, s 304  
\textsuperscript{275} The Securities Exchange Act 1934, s 3(a)(80); ibid.  
\textsuperscript{276} Latham & Watkins Financial Institutions Group, ‘SEC Adopts Final Crowdfunding Rules’ 1893 (10 November 2015) 9  
\textsuperscript{279} U.S. SEC, Blue Sky Laws (14 October 2014)  
Fraud involved in Crowdfunding

With the concept of crowdfunding gaining spotlight, there was substantial growth in the number of investors funding for the projects that interested them. With crowdfunding in its initial stage, it became a soft target for fraudulent and manipulative practices. One such fraud that recently came before the U.S. Federal Trade Commission is the case of Federal Trade Commission v Erik Chevalier. Working with such high reputation, Kickstarter involved in raising fund for ‘The Forking Path Company’ acted upon by Mr. Eric Chevalier. He started campaign to raise funds from the fund around May, 2012 for the purported board game ‘The Doom That Came to Atlantic City’. The sole purpose of raising the money was to potentially develop the game across the globe and rewards were mentioned to be granted for those who fund for the cause. The mission achieved tremendous success at the end of the day. However, when the actual time of the reward came, Chevalier gave varied excuses for non-delivery of the rewards and had promised to refund the amount back. With no positive move from Chevalier, Federal Trade Commission was aggrieved and filed a complaint against Chevalier in the US District Court in July 10, 2015.

Before the Federal Court, Chevalier neither did agreed to the charges nor did he denied the charges raised against him and also waived all the rights granted to him by the Court and subsequently agreed to enter into settlement with FTC. Thus the further action led to the preventive order stopping him from misleading consumers in any remote future and also ordered for the refund to the contributors approximately $111,793.71 with continual reporting requirement of 18 years. It thereby sets an example for the grooming investors to take due care and caution before funding. However, the judgment proves to take an effective step to protect the interest of the investors and the consumers and also encourage the innovation in the funding industry.

Following Chevalier another fraud is claimed to have been committed Ascenergy Oil & Gas due to which the SEC froze the assets of the CEO Joey Gabaldon and Ascenergy. The company

281 Federal Trade Commission v Erik Chevalier, also d/b/a The Forking Path Co., (Exhibit A) 1
283 FTC v Erik Chevalier (Complaint)
284 FTC v Erik Chevalier (Proposed Stipulated Order for Permanent Injunction and Monetary Judgment) 2, para 3-4
285 ibid 4, para V (B)
raised around $5 million from around ninety investors through crowdfunding to develop its undeveloped oil and gas company. However it is later found that the money was rather spent by the CEO Gabaldon on various other activities varying from foreign travel to buying personal care products. Hence there were several misrepresentations and manipulations regarding the utilization of the proceeds of the offer.\textsuperscript{287} When the information on misrepresentation reached the public and the commission, the remaining offer proceeds were transferred to California based company, Pyckl LLC that had no relationship towards the oil and gas activities.

Under Rule 506(c) the company Ascenergy claimed exemption to raise money from the investors and gave a general solicitation to purchase the overriding royalty interests. When the fraud has been alleged three substantial violations were raised against the CEO and the company namely, Section 17 (a) of Securities Act violation wherein fraud has been committed in the offer and the sale of securities, further fraud has been committed under Section 10 (b) of the Exchange Act and under Rule 10b-5, third claim is an claim of equitable relief against the relief defendants Pyckl and Alanah. It is classic example of siphoning of funds wherein the funds collected for one purpose has been diverted and used for the purposes not mentioned. If the defendant company and CEO fail to prove their stand against the fraud, this would be another major crowdfunding fraud in the short term and would threaten the investors.

**Conclusion**

Presently, the industry of crowdfunding denotes an unmarked territory and landscape in the view of regulators, issuers, investors and the intermediaries and hence the chances of fraud are certainly high which would go against the endurance of economic growth and job creation.\textsuperscript{288} Hence it is important for the investors of these funds to establish constant communication between the crowdfunding portals and the companies for which the fund is raised, which would sufficiently reduce the instances of fraud. For flawless funding mechanisms, the regulation of crowdfunding should promote the transparency while providing information about the investments and funds that are raised from the general public.\textsuperscript{289} It is well understood that the lifeblood of crowdfunding is the wisdom of the crowd.\textsuperscript{290} Therefore protecting this wisdom

\textsuperscript{287} Securities Exchange Commission v Ascenergy LLP and Joey Gabaldon (Pyckl LLC and Alanah Energy LLC- Relief Defendants), U.S. District Court of Nevada (Complaint) para 4

\textsuperscript{288} Andrew C. Fink, ‘Protecting the Crowd and Raising Capital Through the CROWDFUND Act’ (2012-2013) 90 (1) University Of Detroit Mercy Law Review 34 (HeinOnline)


\textsuperscript{290} U.S. SEC, *Proposed Rules on Crowdfunding* (File No. S7-09-13) 6
would not only allow legal rising of funds but also reduce the regulatory burden on start-ups\textsuperscript{291} and would facilitate smooth functioning of crowdfunding transactions.

\textsuperscript{291} KPMG Defining Issues (n 45) 1.
CROWDFUNDING AS A FINANCING TOOL: THE WAY FORWARD

SARTHAK MISHRA

Abstract
One of the features of the entrepreneurial landscape of recent years has been the transformation of the early stage risk capital market. This is reflected in two specific developments. First, following the post-2008 global financial crisis (GFC), there has been a sharp fall in the availability of bank lending to new and small businesses, to the extent that in the UK there is an estimated gap between the demand for and supply of SME lending of between £26 billion and £53 billion over a five-year period. Secondly, the restructuring of government support programmes as part of the post-GFC austerity economics, grant funding has been significantly reduced or eliminated. Although, the business angel funding continues to be available however, reflecting the further withdrawal of venture capital and private equity from this segment of the market, it is increasingly being deployed as follow-on investment in existing portfolio companies rather than into new ventures. This calls for an alternative to the traditional financial drives undertaken by the new ventures. Crowdfunding aims at the public as a source of raising capital for funding small time projects. Crowdfunding connects investors with small business start-ups and projects through an online transaction portal. At present, crowdfunding market is estimated of worth over $1 billion in the USA, the UK and a rapid growth can also be noted in other jurisdictions. Also, with gradual recovering of the global economy from the 2008 economic depression, this practice has a great potential to rise as it comes with the minimum risks of economic losses.

The current work attempts to throw light on the practice of crowdfunding which has been steadily gaining popularity among the new ventures and other small and medium scale undertakings. Further, an attempt has been done to draw out a comparison between the U.S. economy and the economies of the European Union (specifically the Western Europe economies) with regards to the practice of crowdfunding. Also, an attempt of prediction as to future prospects of this practice has been made.

Keywords

292 Year V, HNLU Raipur

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Introduction

Crowdfunding is the practice of funding a project or a venture by raising small amount of funds from a large number of people. Historically, crowdfunding is well known for helping to raise charitable donations. But now crowdfunding serves much more than just non-profits. It’s receiving very mainstream attention from both commercial and social entrepreneurs. Whether crowdfunding is directed at profit-oriented investment opportunities, charitable purposes, or artistic efforts, it is at its core a pooling of resources at the grassroots level with a framework for rewards and for the purpose of initiating an investment and where common desire and trust are the most important driving forces for participation.

After the recent financial crises, when small enterprises found it difficult to raise funds through other means, crowdfunding emerged as a viable alternative. Crowdfunding connects investors with small business start-ups and projects through an online transaction portal that removes barriers to entry. It was legalised in USA only recently, after the ‘Jumpstart Our Business Start-ups Act’ (JOBS Act) was brought about.

In the following sections of the paper an attempt has been made to discuss about the practice of crowdfunding giving historical references of the same and the trend of this practice that is being followed in United States. Although, it is not yet fully developed even in U.S., but, in comparison to other countries U.S. has the most developed legal framework for regulating this practice, this is major reason behind choosing United States as basis for reference.

RESEARCH QUESTION

- To discuss the basic concept of crowdfunding and try to analyse its current practical position in the United States and European Union.
- Secondly, to chalk out the major issues pertaining to the practice of crowdfunding and discuss the probable future prospects regarding practice of crowdfunding as a financing tool.

REVIEW OF LITERATURE

It’s receiving very mainstream attention from both commercial and social entrepreneurs now that social media, online communities, and micropayment technology make it straightforward for sourcing donations from a group of potentially interested supporters, or for raising capital from investors at very low cost for new business opportunities (Jason Best and Sherwood Neiss, 2014). Crowdfunding allows good ideas to attract cash through an approach to “the crowd.”
the appeal to the crowd is successful, an enterprise can not only secure seed funding to begin its project, but also obtain evidence of backing from potential customers and benefit from word-of-mouth promotion (Carl Esposti, 2013). Any crowdfunding arrangement in which people are asked to contribute money in exchange for a share of potential revenue or profits based on the work of others or contemplates a financial incentive such as an interest-bearing loan, would likely be considered a security (C. S. Bradford 2012). The solicitation of the investment would have to be registered with a regulatory agency unless it qualified for one of several exemptions (Joan MacLeod Hemingway, 2013; Jeff Lynn and Kristof De Buysere, 2014).

RESEARCH METHOD

The current paper employs a descriptive pattern of research wherein every single aspect has been discussed individually in a detailed manner.

DISCUSSION

CROWDFUNDING: AS A GENERALIZED CONCEPT
Crowdfunding sometimes called crowd financing or crowd investing is generally defined as the collective co-operation of people who pool their funds usually via the internet to support efforts initiated by other people or organizations. Thus, to be put in the simplest terms crowdfunding is pooling in the financial resources of many individuals to convert a new idea into a project or an undertaking. But, the most enterprising feature of this practice is that it can be used as a funding procedure in cases of start-ups or small business. On the basis of the above definition although this practice can be perceived as that of the ‘seed financing’, but in reality this is only a subset of the ‘Seed Financing’. The concept of ‘Seed Financing’ has a wider ambit and thus also enumerates other alternative practices of raising capital such as family funding, angel funding and raising of capital through the method of bootstrapping. Further, one more point of distinction between ‘Crowdfunding’ and ‘Seed Financing’ is that of the involvement of the general public. In case of Crowdfunding the general public is involved the process of raising the capital right from the initial stages. Whereas, on the other hand in case of seed financing it is

293 S. Dresner, Crowdfunding A Guide to Raising Capital on Internet, xi (1st ed., 2014)

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either the close friends or family members or the founding members of the company. Unlike the practice of crowdfunding the general public is not involved in the process of raising capital at the initial stages. Also, the practice of crowdfunding is carried out entirely through electronic medium, however, there is no electronic form involved in case of seed financing.

Historically crowdfunding has been well known for helping to raise charitable donations. In the present scenario with more and more influx of innovative ideas and start up business, the practice of crowdfunding has gone beyond its normal course of raising donations to creating an online platform of fund raising for more profit oriented purposes. Lately, it’s been receiving much mainstream attention from both commercial as well as social entrepreneurs for straightforward sourcing of donations or raising capital at very low cost for new business ventures from a group of potentially interested supporters.

**Crowdfunding as a source of Corporate Financing**

As a financing tool crowdfunding is one of the ways where a start-up can seek to finance a new product or expand their operations. This leaves a very important question with regards to what is the procedure for raising capital for financial purposes. As an answer to the above question, crowdfunding for any business/charitable purposes is largely carried out through internet via various crowdfunding websites.

For example if I have an innovative idea and I need funding for that so my course of action would be the following. Firstly, I would let the crowd know about my innovative idea. Thereafter, I give them the additional details with regards to how much funds I require to give a material form to my idea. This usually leads to gradual flow of funds in nature of small contributions. Here it is very important to take into consideration the fact that in case of crowdfunding it is situation of all or nothing situation. Thus, the role of entrepreneur in such a scenario becomes even more important as he/she has to sell out the idea to the contributor so as to ensure that the project gets fully funded. This is the normal scenario in which a project usually gets financed through crowdfunding practice.

**Key factors that have facilitated Crowdfunding**

Crowdfunding activity has been growing fast in most developed countries. The potential for growth acceleration of that activity, with an increasing role of social networks in an environment

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297 S. Dresner, Crowdfunding A Guide to Raising Capital on Internet, xii (1st ed., 2014)
of difficulties for traditional finance sources, have forced many countries to react and design specific regulation trying to maintain an adequate equilibrium between investor protection and not killing activity growth. The factors that have affected its growth are:

- **Trustworthiness:**
  The importance of trust is utmost in facilitating a healthy crowdfunding sector with wide-ranging participation among potential investors. Crowdfunding is “a socially mediated phenomenon which relies in great part on the intrinsic trust people place in shared connections on social networks, community affinities, and the ratings of others on trusted, mainstream websites.”

- **Entrepreneurial activity and Access to Capital:**
  The success crowdfunding lies in facilitating access to capital which is directly proportional to the culture of entrepreneurship that underlies it. Countries have to facilitate entrepreneurship to capture the benefits of crowd investing.

- **Social networks:**
  They are very important to the crowdfunding movement. It facilitates interaction and build networks around ideas, entrepreneurs and causes in ways we have never seen before. For example: Rewards-based crowdfunding is rapidly growing because it is one of the cheapest and easiest forms of capital formation ever.

- **Access to the viable knowledge of usage of Electronic means:**
  It’s a major source of growth of crowdfunding in other countries because they are aware about the benefits of crowdfunding.

**Why Crowdfunding is the need of hour?**

Crowdfunding has a number of advantages. Through this practice small business owners have the opportunity to bypass the small business administration and therefore can actually overcome the problems of facing the small business financiers that can significantly delay the fundraising process. Certain, advantages of Crowdfunding as a financial practice has been mentioned below.

- The biggest advantage of this particular practice over the traditional procedure for fundraising lies in the fact that it enables the entrepreneurs to gauge the public response for their proposed product or services and thus, raise funds for the same at very low rate.

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301 See W.M Cunningham, The JOBS Act: Crowdfunding for Small Business and Startups, 1, 69, (2012)
This also helps them in creating a positive impact on the minds of the public who can turn out be potential investor and in the best case scenario may also show interest in buying shares in the new venture.

Further, the concerns like fairness are also very well managed in the crowdfunding practice. This is because unlike the traditional venture capitalists approach of Venture Capitalist Network (a.k.a. VC Network) the crowdfunding seeks to create an authentic and diversified network of investors in a single (Emerging Growth Company (hereinafter referred as EGC) which nullifies the concerns of the particular company or business being run by any single venture capitalist. Thus, this practice therefore ensure accountability and thus prevents up to a large extent the direct intervention of a single investor.

Further, the practice of crowdfunding gives an enormous amount of control to the entrepreneur with regards to the financial processes involved in the business. In case of funds being raised through the crowdfunding the entrepreneur controls every single aspect of it from the determining the amount of dollar that is required to be sought to the timing of the issue, to the amount being paid for assistance. Thus, by providing a great deal of control to the entrepreneur the crowdfunding minimizes the outside interference to a great deal which often is a concern in cases where the capital is raised through traditional methods.

In addition to the advantages noted above, note that, in most cases, if the initial effort to raise capital is unsuccessful, a business owner can retool their approach, typically using feedback obtained from his or her unsuccessful campaign, and try again.

Major Legal and Ethical Issues concerning Crowdfunding

The number of investors one will have to deal with via crowdfunding is typically far larger than that with traditional business financing. This, too, can be stressful. With traditional business financing, the number of investors an entrepreneur has to deal with tends to be very small—one bank; one venture capital firm; or a few friend, family and/or angel investors.

In addition, despite the ethical issues noted above, for certain firms and in certain industries, the advice and counsel traditional investors provide can be invaluable. Considering advice from a thousand small investors may be, at best, impractical.

The crowdfunding market is also likely to become saturated with similar projects. Thus the manner in which one distinguishes oneself, without giving away the trade secrets,
therefore becomes a key question that is required to be sorted before going for raising capital.

Further, the lack of proper regulations with regards to the legal liability involved in cases of any fraudulent activity by a start-up or an EGC make the prospect of funding the project quite risky.

Now, that the basic idea behind the practice behind the idea of crowdfunding has been discussed, I would now like to move towards the questions raised in this essay. Firstly, as to what is the scenario of the practical application of crowdfunding as a financial tool in the U.S. and the European (especially the western European economies) where this practice is most developed.

**CROWDFUNDING AS A CAPITAL RAISING PLATFORM IN U.S. ECONOMY**

The practice of crowdfunding in one way or the other has found its way into the funding scheme of U.S. economy since early 1700s. In fact, in the modern era this practice was in a way initiated in U.S. only. In 1876, crowdfunding was used to finance one of the United States’ most iconic monuments, the Statue of Liberty. The citizens of U.S. had paid for the pedestal of the statue. Frederic Auguste Bartholdi, the architect of the statue gave a miniature version of the statue with the contributor’s name engraved upon it in exchange of a donation. At present the whole of the Crowdfunding scheme is controlled by the provisions of ‘Title III of the JOBS Act’ also known as “Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act” or the ‘CROWDFUND’ act. However, before explaining the crowdfunding scheme under the JOBS Act, 2012 it is important to have a brief overview about the situation prevailing before JOBS Act came into picture.

**Position of Crowdfunding in U.S. Economy before the enactment of JOBS Act, 2012**

Crowdfunding is uniquely positioned to assist two specific groups of entrepreneurs or business ventures. Firstly, those category of entrepreneur trying to turn an innovative idea into a viable business and secondly those category of small business that are in a state of struggle to keep their business afloat or to get themselves a better prospect of growth. The very basic and the major problem that these businesses faced before the enactment of the abovementioned was the problem of raising capital from conventional sources. This particular problem can be mainly attributed to the lack of credit, operating and untested track record of performance. Thus,

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302 Sherwood Neiss, *Crowdfunding: A Historical Perspective on Why it is Necessary – Part 1*, (29/01/2013); available at: https://www.returnonchange.com/blog/crowdinvesting-a-historical-perspective-on-why-it-is-necessary-part-1/ (last seen on 20/08/2015)

funding from traditional avenues such as bank loans becomes a hindrance in their carrying out of business.  

Before, the enactment of the JOBS Act, the security market in the U.S. economy was controlled by the Securities Act, 1933 which was enacted in the aftermath of the ‘Great Depression’ of 1929. Thus, keeping in mind the sequence of events that led to the enactment of the Act, the Congress had made the regulations under this act of a very stringent nature. Further the Sarbanes-Oxley Act, 2002 made the situation for the small start-ups companies even more difficult. It laid down very stringent and somewhat unreasonable regulations with regards to the Initial Public Offering. According to these regulations any enterprise irrespective of the nature and size of the companies going for such IPO’s were required to have a minimum issue size of $100 million. This particular regulation meant that any IPO under the mentioned amount was considered to not apt for the purposes of public financing by the company. Therefore, this had shut out the small businesses from making any public offering. Similarly Regulation ‘D’ of the Securities Act, 1933 provided that if a small business is raising securities of $5 million and wants to sell its stock to investors, then in such cases the no. of equity investors cannot exceed 35.  

Thus, to put all the above scenario in simpler terms would simply mean that through these stringent regulations the govt. shut down the security market for the small and medium enterprises.  

However, the enactment of the JOBS Act has given a fair amount of hope of solving the long standing constraints on the opportunities being given to the start-ups and the other existing small businesses. Now, moving on to the legal regime under the JOBS Act, 2012.  

‘Crowdfund under JOBS Act’: An Era of New Hope?  

Title III of the JOBS Act exempts the crowdfunding practice that would otherwise be violative of the federal laws concerning the sale of the equity securities. As any other transactional law the legal aspects of crowdfunding can be at times very complex especially in situations involving the purchase or sale of securities. These regulations are of very specific nature and therefore an entity or individual has to take specific legal authorization for different categories of  

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306 15 U.S.C. S. 77d (United States)  
Crowdfund schemes and are especially very much attentive towards the federal and the state security laws which are also known as the 'blue sky regulations'.

**Legal Requirements for the Issuers under the JOBS Act**

- The Crowdfund Act provides that EGC must provide a full set of information to the investors, funding portals and to the Security Exchange Commission. In addition to their official address the EGC's are also required to give a report with regards to the details pertaining to their branch offices, their members of the board, and any other individual who has a 'significant ownership interest' in the EGC.

- Further, EGCs are also legally required to provide for information with regards to the prices of the securities that is offered by them and other legal terms and conditions that have a potency to have an impact on the ownership stakes. In addition to this, the EGCs also have to give an assessment as to how the investors are going to be impacted if anything doesn't go in a manner that has been planned out by the entrepreneur this also includes the risks involved in the purchasing of the shares of the company.

Additionally there are certain other requirements such as:

- The issuers cannot advertise the terms of their offering except for the notices where the investors are directed to the crowdfunding portals.

- The issuer is required to ensure that in cases of promotional communication if any compensation has been given to any person then the receipt of such payment is disclosed by the concerned person. But, it is to be noted here that before any payment of compensation is done it has to be clarified that there is a specific arrangement with regards to such payment and further, such payment is consistent with that of the rules laid out by SEC.

- Apart, from this the issuer is also required to comply with any such prospective rules laid down by the SEC that deals with the financing of the EGCs.

**Legal Requirements for Portals under JOBS Act**

The “funding portal” means any person acting as an intermediary in a transaction involving the offer or sale of securities on account of others. The most important requirement for any crowdfunding portal to be allowed to act as an intermediary & to raise funds is getting

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309 15 U.S.C. S. 77a, Section 4A(3) (United States).
312 15 U.S.C. S. 77d, Section 301 (United States)
313 15 U.S.C. S. 78a, Section 3(a)(80) (United States)
registered with FINRA (Financial Industry Regulatory Authority) or any other self-regulatory organization.\(^\text{314}\)

The legal requirements that are required to be complied by the funding portals under the Crowdfund Act are summarised below:

- Apart from the registration requirements the funding portals are also required to provide the investors with information and disclosure concerning the risk of monetary loss. It is also the responsibility of the funding portal to ensure that the investor have proper understanding of the same.

- A funding portal is also required to take steps in order to carry out background check of the potential investor including the security enforcement regulatory history for such person who is holding more than 20% of the outstanding equity. This particular requirement has been included so as to minimize the chances of fraud.

- Portals also have to make sure EGCs are not funded until they reach monetary goals set at the start of the capital raise.

- Portals cannot compensate anyone for providing information on potential investors. Directors, officers, and partners in a funding portal cannot have a financial interest in EGC issuers launched on their portal.

**Limitation under the JOBS Act with regards to Investment**

- Under the Crowdfund Act, the entrepreneurs and the small business owners may utilize the crowdfunding exemptions to raise up to $1 million within a time span of 12 months without registering the sales with the SEC.

- Similarly, any investor (both accredited and unaccredited) may invest in the companies relying on the Crowdfund exemptions. However the amount of their investment would be dependent upon their income.
  
  a) If the investor has an annual income of under $100,000 then the investment made should be either $2000 or 5% of the total income, whichever is more. However, if the income of the investor is greater than $100,000 then in such cases the investment can be up to 10% of the total income.

Discussing all the above points makes it pretty clear that although the practice of crowdfunding is a rather new concept and is rather unpolished at the present moment but, comparing the older and traditional version of raising capital or funds the practice of crowdfunding under the JOBS

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\(^{314}\) 15 U.S.C. S. 77d, Section 301 (United States)

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Act provides a new leash of life to the start-ups to come up and have a taste of the mainstream business.

**Crowdfunding and European Scenario**

Given the commercial imperative for crowdfunding in Europe, it has been good fortune that the evolution of European regulatory systems occurred as it did. Unlike, the U.S. economy the structure of European regulation has opened the door to a range of crowdfunding models.\(^\text{315}\)

**Why is Europe a good breeding ground for the development of Crowdfunding practice?**

The answer to this question is rather fairly a simpler one. If the present economic situation, of Europe is analysed it can be seen that it provides a much congenial environment for the growth of the crowdfunding practice. Even in the absence of the regulatory context, Europe is a natural region for the emergence of crowdfunding. It has all of pre-requisites necessities required for the development of any new legal process like infrastructure, education, access to technology, stable governments and relatively free markets for entrepreneurship to thrive. And while culturally it has not traditionally embraced start-ups in the way that the United States has, that is rapidly changing as the old economic model driven largely by state organizations and large corporations is proving unsustainable and a new approach is being sought. It is therefore no surprise that the entrepreneurial ecosystem has started to boom across Europe over the past decade.\(^\text{316}\)

**Crowdfunding: A Noble act but a Regulated one**

It is one of the usual practice that the nobility of the work is often taken as a ground for letting the particular out of the ambit of legal regulatory framework. But, even if the nature of the crowdfunding practice is of a noble nature yet, it lies within the strict regulatory ambit of the various European legislations. Crowdfunding regulation in Europe based upon the balancing of two conflicting goals: fostering capital formation and investor protection.\(^\text{317}\)

SMEs face an enormous capital funding gap in meeting the demand of capital for early-stage (equity) financing.\(^\text{318}\) There have been many legal initiatives have been initiated in Europe to foster


crowdfunding and close the liquidity gap for SMEs. Following the development of various differing legal initiatives in Europe the result is a regulatory landscape that is fragmented.

**Regulatory framework of the Europe**

The public offering rules and the approach to platform regulation have thus far created a system in Europe that has permitted crowdfunding to flourish. As proven historically flexibility proves important in new areas of finance like crowdfunding. Presently, there is no clear category of regulated firm into which a crowdfunding platform would fall; instead, platforms have been able to seek general permission and then create a tailored list of permissions specifically applicable to them. The definition of an “offer of securities to the public” refers to a communication in any form or by any means presenting sufficient information on the terms of the offer and the securities to be offered so as to enable an investor to decide to purchase or subscribe for securities. Crowdfunding offerings made via a crowdfunding platform would typically fall within the scope of this definition. However, if it is established that there is an offer to the public, a number of exemptions from the prospectus requirement are listed in the Prospectus Directive. The most important “exemption” is actually a limitation of the scope of the Prospectus Directive rather than an exemption, as the Directive does not regulate public offerings which do not exceed a value of 5,000,000 €. Also, for any offering less 100,000 € the EEA members are not required to provide a prospectus. However, the problem is that for offerings between 100,000 € and 5,000,000 € the choice is left to the individual Member States whether they grant an exemption on offerings up to 5,000,000 € or not. This has resulted in differences among national regimes ranging from full prospectus regimes to complete exemptions.

**Regional Overview of Crowdfunding Regulations**

Due to its encouraging nature and micro-financing abilities the practice equity crowdfunding has been accepted as being beneficial by the members of the European Union. However, given

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319 Ibid at p. 205
320 Ibid
321 Art. 2(1)(d), Prospectus Directive (2003/71/EC)
324 § 21, Financial Services and Markets Act, 2000
the issues pertaining to the limited investor information, voting and exit rights, they have introduced restrictions on the offerings or on the companies making the offerings. By taking this approach, all these Member States researched aim at minimising investor losses without destroying its utility to entrepreneurs raising capital.

**FINLAND**

Finland does not provide any detailed harmonised disclosure requirements for equity crowdfunding.\(^{326}\) Under Finnish regulations the investors in public offerings without an obligation to publish a prospectus have to be provided with "sufficient information on factors that may have a material effect on the value of the shares". According to the Finnish guidelines, the level of the disclosure obligation should be considered in proportion to the target group’s investment experience, investors’ knowledge of the securities or issuers in question and any other specific features of the offer.\(^{327}\) The information to be provided will be almost the same as required for a Finnish national prospectus if a more limited level of information cannot be justified by the target group’s investment experience or knowledge.

**FRANCE**

The French national law provides for a light-prospectus\(^ {328}\) instead of a full-prospectus, which is required for transactions up to 1,000,000 €.\(^ {329}\) The light-prospectus is a statement prepared by the issuer that is published on his/her website and contains information.\(^ {330}\)

**GERMANY**

Similarly, Germany requires a small information leaflet to be published which is signed and distributed to investors investing more than 250 € in a project.\(^ {331}\) The usually leaflet contains key information on the offerer and offering in not more than just a few pages.

**SPAIN**

However, on the contrary, under the Spanish Law the crowdfunding platforms are obliged to publish on their website information on the project.\(^ {332}\) The said obligation is meant for the issuer\(^ {333}\) as well as to the particular offering of securities.\(^ {334}\)

**UNITED KINGDOM**


\(^{328}\) Art. 325-38, 314-106, AMF Regulations, 2014

\(^{329}\) Art. L.411.2 (1 bis) CMF Regulations (2014)

\(^{330}\) Ibid; Supra at 53

\(^{331}\) § 2(a)(3); § 13, Investment Products Act; German Crowdfunding Draft Law, pp. 47, 48

\(^{332}\) Art. 70, Spanish Crowdfunding Law(2015)

\(^{333}\) Ibid at Art. 78

\(^{334}\) Ibid at Art. 79
In the UK, the financial services regulatory regimes for corporate finance business and investment funds both tend to shape the structure of investment-based crowdfunding platforms. FSMA 2000 requires platform operators to become authorised by the FCA in order to conduct regulated activities. Conducting a regulated activity without authorisation is a criminal offence. Regulated activities associated with investment crowdfunding may include:

- bringing about transactions in securities issued by the party seeking funding;
- making arrangements with a view to transactions in securities;
- safeguarding and administering securities (custody).

Less commonly, the platform operator could become involved in advising on securities, managing securities or dealing in securities, depending on the business proposition. Where the party seeking funding does not issue shares in a company, platform operators may also need to consider whether they are carrying on the regulated activity of operating a collective investment scheme or operating an alternative investment fund.

**Crowdfunding: The Way Forward**

Many entrepreneurs, academics and analysts see crowdfunding as the future of finance, a democratic tool that could allow "the crowd" to allocate its money wherever it pleases, helping innovators to bypass, at least partially, VC and institutional investors. This could translate into greater democracy in entering the demand side of the financial market: anyone can post a crowdfunding project to a platform which needs to approve it, so innovative ventures and enterprise creation would be open to any person or group of people with a good idea, and not just to existing and established companies. At the same time, the fund supply could also become more democratic and more participative, since any private individual would choose to support the projects he/she believes in, without needing to be a professional investor such as VC and angel investors. Funders could support any project they believe in, becoming part of a community of like-minded individuals, and innovators could have faster and easier access to financial support. However, the future prospects of this practice is very much dependent on its cross-border aspect. This particular aspect has the potential to raise issues as to what extent contract law and regulation is harmonised. Further, insolvency of a cross-border platform could raise uncertainty especially in identifying which contract law may apply when the parties are

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335 § 19, Financial Services and Markets Act 2000
336 Art 25(1) Statutory Instruments 2001/544
337 Art 25(2), SI 2001/544
338 Art 40, SI 2001/544
339 Arts 37; 53, Statutory Instruments 2001/544
340 Arts 51ZC; 51ZG, Statutory Instruments 2001/544
domiciled in differing jurisdictions with differing legal systems. This will need to be addressed in the future if this industry is to be able to grow into a viable source of investment and credit provision internationally.

CONCLUSION

Although regulatory regimes are varied across jurisdictions, broadly speaking they can be classified into four regimes for regulating peer-to-peer lending: exempt market/unregulated due to lack of definition; regulated as an intermediary; regulated as a bank; and the US model, with a possibility of a fifth regime: regulating as a collective investment scheme. Crowd-investing has to educate its private investors in terms of knowing the risks of their investment. When investing in young companies and especially innovative start-ups it is inherent that many projects will not succeed. It is crucial that investors know their risks and that the platforms assure that the risk of investing is properly communicated. Investors must be aware of their risk profile and be enabled to properly allocated and spread their money in this high-risk asset class. This is important in order to assure that crowd-investing stays a way to attract private risk money into the ecosystem.

Overall, the evidence suggests that crowd-funding does not currently constitute a systemic concern, but if allowed to grow without proper management, and if the interconnectedness with other industries continues, then there is a possibility of it becoming an important issue, in a systemic context, in the future. Finally it can be said that the future of crowd-investing is still in a flux and in order to develop to a major financing instrument the players still have some way to go.

REFERENCES


MERGER OF SECURITIES AND EXCHANGE BOARD OF INDIA AND FORWARD MARKET COMMISSION

SHUBHAM RATHI AND ABHAS SHRIVASTAVA

Introduction

The paper deals with the merger of FMC i.e. Forward Market commission and SEBI i.e. Securities and Exchange board of India, FMC is the regulatory authority for futures market i.e. MCX which deals with metal commodities and NCDEX which deals with Agricultural commodities in India, while SEBI is the regulating body for securities market in India, the paper deals with the functions and object of both the bodies, reasons for the merger, and finally implications of the merger.

SEBI: Purpose And Role Till Now

Securities Exchange Board of India (SEBI) was set up in 1988 to regulate structurally as well functionally the dynamics and the functions of securities market. It was established with a crystal clear view to promote orderly and healthy development in the stock market. However, though instyututed after the famous Harshad mehta scam to prevent virtual atrocities of the players of seculies market but initially SEBI failed to exercise a complete and effective control over the stock market transact. It was left as a watch dog and as a scrutiny body. As a result of consequential failures SEBI was in May 1992, granted legal status.

With the growth in the dealings of stock markets, lot of malpractices also started in stock markets such as price rigging, unofficial premium on new issue, and delay in delivery of shares, violation of rules and regulations of stock exchange and listing requirements. Due

to existence and evolution of these malpractices Government of India decided to set up SEBI with its far and varied functions. SEBI objectifies inter alia to regulate the activities of stock exchanges, protect the rights of investors, prevent fraudulent and malpractices by having balance between self regulation of business and most importantly to regulate and develop a code of conduct for intermediaries such as brokers, underwriters, etc.

SEBI is laden with 3 principal functions which include Protective Functions, Regulatory Functions and Development functions. The protective functions include a check and prohibition of price rigging, insider trading, unfair, fraudulent and restrictive trade practices. Developmental Functions include training of various intermediaries and other players of the security market, and the promotion of various other development practices of the stock exchange. The regulatory functions of the SEBI include framing of rules and regulations for various securities transactions, formulation of code of conduct and professional regulation guidelines of stock-brokers, share-transfer agents, trustees, merchant bankers and other players associated with the working of stock market. As an effective and powerful regulator SEBI has been now conferred with the power to regulate the mutual funds and other matters pertaining to audit and inspection. SEBI from time to time have adopted many rules and regulations for enhancing and expanding the Indian capital market. The recent initiatives are: Sole Control on Brokers as under this rule every brokers and sub brokers have to get registration with SEBI and any stock exchange in India. Also for working as an underwriter an asset limit of 20 lakhs has been fixed.

From the above discussion it is now a settled position that SBI has till now efficiently and accumulatively addressed various key issues. It has changes as per time and has been very alert in its inception.

Futures Market & FMC

A futures contract is an agreement to make or take delivery of a specific commodity at a future point in time. The contract is in a standardized form except for the price. The price is

discovered through the market forces: supply and demand, which is often referred to as offers and bids. The contract states all the essential details like quantity as well as quality of the good, delivery time, date, and the location of delivery. Trading is done in contracts for future consummation. The actual sale or purchase of commodities does not take place. Neither title nor money changes hands. The particular commodity that the contract pertains to may not exist at the time that the contract is made. In a futures contract, the buyer agrees to buy something in the future from the seller.\textsuperscript{344} The futures markets hand out two major functions i.e. price discovery and risk management. Price discovery can be explained as revealing information about future cash market prices through the futures market. The future price of a commodity and the price, that market participants (like agents, hedgers etc.) suppose to prevail at the time of delivery of the commodities in futures contract, share a relationship. Futures prices serve an economic purpose as they help the market participants in making better estimates of future prices, which ultimately leads to making consumption and investment decisions more advantageously.\textsuperscript{345}

It has been repeated alleged that futures market involves a lot of manipulation hence FMC was established in the year 1953 under Forward Contracts (regulation) Act, 1952, which is overseen by the Ministry of Consumer Affairs and Public Distribution, Govt. of India. The objective of this was to exclude people with insufficient resources to participate and manipulation of price by the means of price discovery and risk management.

\textit{Challenges Faced by FMC}

Futures market faces number of irregularities for which only FMC was formed those irregularities includes

\begin{enumerate}
\item \textbf{Circular Trading} – As discussed, commodity market is on future transaction, but physical delivery may or may not be given or taken, here if two people transact on
\end{enumerate}

\textsuperscript{344} Bhattacharya Himadri, Commodity derivatives market in India.
\textsuperscript{345} http://www.sebi.gov.in/sebiweb/commodities/FAQ.jsp?scrttype=Futures SEBI website Last accessed on 29/2/16.
paper with the understanding that the goods sold will be taken back at the same price and report this as a transaction could create distortion, here fair information is not reached.

2. **Cartel Formation and Tax Evasion** – It has been seen at various instances that big players and speculators hijack the market, and use this platform as tool to fluctuate the price and earn undue profit, also the profit and loss accounting is used for tax evasion by recycling unaccounted money by misusing the various provisions under the Income-tax Act, which permits offsetting of speculative profits against speculative loss.

3. **Dabba Trading** - Another issue involved in future market is in respect to the dominance of speculators whose main purpose is to book profit arising out of price fluctuation, in the light of speculation most market players are involved in "Dabba trading" also known as bucketing. In dabba trading usually the broker on the behalf of client buys or sells with his own terminal. Dabba trading, although illegal, constitutes around 80 percent of the total amount of trading. In dabba trading most of the time neither written contract is not made nor is any invoice issued. In India, Gujarat and Uttar Pradesh are main centers for dabba trading.

Hence these were the main challenges before FMC to curb and ensure smooth functioning of market. However FMC failed to curb these and apart from these there is number scam in light of which there was need for merger.

**Need For Merger**

The need for the merger was felt 12 years ago but it is only after NSEL scam, Guar scandal and rise in Dabba Trading gave boost to the decision of merger.

**NSEL scam** – National spot exchange limited started at national level in 2008, providing a platform to various farmers and traders who want to sell, buy, process, or export to meet

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electronically. The actual problem was realized with respect to the electronic spot exchange when the Rs.5600 Crore fraud came to light and when NSEL failed to pay out its investors in commodity pair contracts. Here any contract which is “spot” must be settled within 11 days, but NSEL designed such mechanism where settlement may vary from 25 to 35 days, NSEL launched a number of one-day forward contracts, but some of them were being settled as many as 36 days after the date of transaction. The problem started in July 2013 where NSEL was directed to settle all the transactions till date and issue no further contracts, NSEL had a practice of deliver-now-pay-later contracts; the FMC wanted this practice to stop. The calls have come after the settlement which was originally due to happen on July 31 was first deferred to August 15 then extended to five months; the forward traders were not interested in spot trading and demanded immediate settlement. As a result, NSEL ran into payment trouble.

Dabba Trading – Under this technique, traders of different commodities trade with brokers on unregulated platform, i.e. the traders are not the registered traders, here broker get the margin money in cash on same conditions but does not deposit it with the clearing house, and on the expiry date difference is settled, it can be said as betting without any rules, dabba trading is illegal in India and is one of the major contributor of black money here, according the Nielsen survey dabba trading constitute three times of regulated trade. It also includes Client code modification involving transfer of money from big players account to small players, where unknown persons invest on their behalf, this is also known as white washing. The FMC investigations have revealed large scale misuse of CCM for massive tax evasion and money laundering. What is all the more surprising is that this illegal and fraudulent trade practice was going on without any timely interventions by the regulators and the central government.

Financial Sector Legislative Reforms Commission (FSLRC) headed by Justice Srikrishna, in its recommendations had endorsed a proposal to have a unified regulator for the securities

347 Pushpa. BV and Deepak R, An insight in NSEL scam.
349 Investors review, MCX guide.
350 Supra note 3.
and commodity markets along with insurance and pensions markets.\textsuperscript{351} Because of these irregularities policy-makers have been of the view that the FMC which had not been empowered like other regulators wasn’t equipped to handle the challenges of a growing market.\textsuperscript{352}

Apart from these reasons there were other factors influencing the merger which are:

- The trade of commodity and securities functions in a similar manner, further SEBI has been successful and is experienced in regulating securities market for a very long time.
- There would be economies of scale in using a common infrastructure, including exchanges, clearing corporations, depositories and brokerages.
- Stock prices of many companies are linked with that of commodities like the stock price of Indian Oil Corporation is dependent of the price of crude oil prevailing in the international market.
- International practice is to have regulators is followed by Australia, Hong Kong, UK, and Singapore.
- The basic issues and functions of both the markets are similar i.e. computerized Anonymous order matching for trades, linkage of clearing banks, risk management system etc.\textsuperscript{353}

However the merger is criticized by many experts also including former chairman of SEBI and RBI governor, Former SEBI chairman M Damodaran had said a few days ago that this was not a good idea and that the other counties like Britain had experimented with it. RBI Governor Raghuram Rajan had in the past criticised the approach of what we called ‘balkinisation’, saying that actually working in Silos would deprive regulators of synergies.\textsuperscript{354}

**Implications of merger on brokers**

\textsuperscript{351} SEBI FMC merger explained.
\textsuperscript{352} The Indian Express, Historic and challenging merger of FMC and SEBI http://indianexpress.com/article/explained/historic-and-challenging-merger-of-forward-market-commission-with-sebi/
\textsuperscript{353} Legislation Brief, The forward contracts (regulation) amendment act, 2006.
\textsuperscript{354} Supra note 9.
Option trading will now be allowed, earlier only futures trading was allowed.

Commodity indices would be traded (like that of Nifty in share market), this was one of the major drawbacks of today's commodity market.

Banks, Mutual funds and FIIs would be allowed to trade in the commodity market.

Today equity and commodity companies have to separate legal entities, they will likely be allowed to merge, providing better client service.355

**Necessary Amendments Made To Accommodate The Merger**

The merger of these two regulatory bodies was brought about by passing of a series of amendments in the legislations. It is interesting to note that the Legislature has merged FMC with SEBI whereby the duties and responsibilities of FMC would now be taken over and discharged by SEBI. Following were the changes brought into various laws that led to merger of the two bodies-

**Changes in FMC:**

The Forward Contracts (Regulation) Act, 1952 (FCRA) was repealed by the Government with effect from 29 September 2015, thus facilitating the merger of the FMC with the SEBI.

**Changes in SEBI:**

SEBI in order to effect the merger, has amended:

1. Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 (SECC Regulations)
2. SEBI (Stock Broker and Sub-Broker) Regulations, 1992;
3. SEBI (Regulatory Fee on Stock Exchanges) on 9 September, 2015.

These regulations ensure the orderly functioning of the commodities derivatives exchanges and its intermediaries under SEBI norms and regulations.356 SEBI has also created a separate

355 Manglik Jayant, The SEBI FMC merger, A business opportunity.
commodity derivatives market regulation department not limited to exchange administration, market policies, risk management and products and handling of inspections and complaints.

**Implications of The Merger**

The merger is inter alia supposed to have following major implications or impacts upon the markets.

**Boost to Economics of scope and Economics of Scale:** The merger is aimed at streamlining the regulations and curb wild speculations in the commodities market, while facilitating further growth there.\(^{357}\) Finance minister Arun Jaitley has quoted in reports that, "The merger will increase economies of scope and economies of scale for the government, exchanges, financial firms and stakeholders." As per the policy announcements made by the Government the commodities market will also be having index futures. Further, to ease up the business in commodity markets and easy flow of credit very shortly the banks and foreign portfolio investors will also be allowed to participate in the markets.

**Increased Investments**- Finance Minister Arun Jaitley in his Budget speech, said in February, 2015 about the merger that, "Markets thrive on confidence and integrity. These are crucial times for India, we can’t afford throwing away the opportunity presented by the advantages."\(^{358}\) The impotency of FMC to bring in foreign investments due to lack of investors confidence has paved the way to reconstitute FMC into a much powerful body. Investors often specify lack of stringency in the processes of FMC to be a primary reason of reluctance to invest in the commodity derivatives market. With this merger the Forward Contracts Regulation Act (FCRA) has been repealed, and the regulation of the commodity derivatives market is now under the sole administration and control of SEBI under the Securities Contracts Regulation Act (SCRA), 1956. SCRA is a stronger law, and gives more powers to SEBI than FCRA offered.

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\(^{358}\) Extracted Text- budget Speech.
to FMC. Market players feel that now with this security contracts administering commodity markets, it will now be better regulated, with more stringent processes — and will thus evoke greater confidence and will efficiently attract foreign investments due to quick, guaranteed and increased returns.

**Scope of Institutional Investors:** Foreign institutional investors till now only invested in Indian equities and debt markets, and the Indian commodity market has been an unexplored area for them because of prohibition on commodity trading at exchanges due to lack of legal infrastructure and RBI’s check on trading of valuable commodities. However, with this merger SEBI may allow FII participation in commodities trading going forward, which would provide more depth to the markets, and increase liquidity, investor participation and better price discovery. The introduction of Option Contracts (call and put options) in commodities trading, thereby providing better hedging tools to investors along with SEBI taking efforts to oversee price determination of commodities is an open invitation to the Institutional Investors whose major concern was an assurance from the Regulator about the price discovery.

**Unification of Regulation and easing of Procedures:** Stock exchanges will now become universal exchanges wherein every possible instrument having its virtual existence including equities, debt instruments and currencies are traded directly under the regulations of SEBI and in the nature of commodity, exactly the way a commodity could have been sold, had it been sold under the FMC. Stock exchanges already have depositories and clearing corporations that will cater to the needs of commodity traders as well. However, a close scrutiny of the organisational structure of both the regulators, is clear evident that the commodity exchange space will see consolidation, and taking over in all respects. With the dissolution of FMC now only three or four players will remain on the scene, as compared to six now, including existing large stock exchanges such as the National Stock Exchange

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359 http://indianexpress.com/article/explained/merger-of-sebi-and-fmc-what-it-means-for-market-players/ (last updated on 28th February, 2016)
360 Ibid.
362 Two Sides of the SEBI_FMC Merger
(NSE) and Bombay Stock Exchange (BSE), Multi Commodity Exchange (MCX) and National Commodity and Derivatives Exchange (NCDEX).\textsuperscript{363}

**FUTURE CHALLENGES TO SEBI**

SEBI has the resources to bring in people and develop the required infrastructure to improve the functioning of the commodity market and work on its expansion.\textsuperscript{364} However, being already laden with responsibilities of the security market it would not be an easy task for SEBI to give equal attention to commodities markets as well. Few of the possible challenges are discussed in this section as below stated.

1. The market operations, constitution, organisational procedure and decision making etc of both the organisations differ in many ways. FMC has its own investors, market, market players, subjects of regulations and SEBI has these categories specified as its own. Hence, it would be initially a tough task to bring unanimity in the administration and governance of these two distinct markets with like parameters. The problem becomes still more acute for the other side i.e. persons till now being familiar with the FMC regulations and compliances will now be subjected to an all together new compliances and regulations which on the onset are difficult to comprehend.

2. The another big challenge is to arrive at a fair price in the absence of a spot market. The price polling mechanism from different mandis and the Agricultural Produce Marketing Committee (APMC) will pose a huge challenge for the regulator.\textsuperscript{365} SEBI will need to evolve a transparent and robust mechanism to address the price polling issue because neither the commodity spot markets are operating in a pan-India electronic format, nor is the spot exchange under the purview of SEBI.

3. Commodity Trading is the essential mechanism of the Indian commodity market having its roots almost in all the conventional practices of Commodity trading.

\textsuperscript{363} Ibid,
\textsuperscript{364} http://www.businesstoday.in/magazine/focus/chairman-uk-sinha-has-a-tough-job-after-sebi-fmc-merger/story/224402.html (last updated on 28\textsuperscript{th} February, 2016)
\textsuperscript{365} Ibid.
related to grains. Warehouses, which are an integral part of this process are subject to the regulation of Warehousing Development and Regulatory Authority (WDRA). Till now there has been no clarification or a notification or departmental order that empowers SEBI to control over their functioning which otherwise is required.

**Conclusion**

The dynamics of the market are unpredictable and unwarranted. In this era of Globalization where transnational investments are common and where there is a internationalization of economics with various market evolving regularly, market dynamics can adversely affect the economy of the country. Therefore, an efficient regulation of the markets is required to maintain the market equilibrium. Commodities market and the securities market have their own arena of functioning. The merger of the two market regulators though has been effected on the ground of boosting up investor confidence, ease of doing business and generating up of foreign exchange by successfully channelizing FII now in commodities market. However, the merger has its own set of challenges that is currently the talk of the town in the capital market arena. Whether this merger will meet its very objective, how it will efficiently regulate the two markets, whether the shortcomings of FMC can be resolved by the merger and whether the Indian Commodity market which has been growing steadily will be rejuvenated are few questions which can be answered only with the passage of time. Yet the merger has been termed to be the need of the hour and Government has given assurances of its successes. We can only hope for the merger to succeed in the longer run.
THE ALTERNATIVE INVESTMENT STRUCTURE------REITS

SUBHALAGNA CHOUDHARY

Abstract
This short article looks into REITs as an alternative mode of investment. Today, REITs have been widely accepted across the world by conducive and successful tax regimes. A critical part of the Indian Corporate Law has in the modern day, attached lot of significance to the concept and thus the Income Tax Act and SEBI consequently have made an endeavour to relax the tax norms regulating the REITs. The main objective behind this is to enhance the popularity of its concept in the business world and also provide an alternative mode of investment. This article shall also talk in brief about the international aspect of REITs and how India has time and again tried to keep its regulation in consonance with the international financial laws so as to attract productive investments and provide the investors with secured lucrative structures, thus enabling them to foster the economic growth of the nation.

Introduction
A REIT or a ‘Real Estate Investment Trust’ is basically a company that essentially owns or finances income generating real estate. It has been fashioned after the system of mutual funds. REITs cater to investors of all types. They offer regular income and long term capital appreciation. The income of REITs is taxable. This is distributed as dividends to the shareholders. The shareholders are required to pay income taxes on these dividends that occur as sources of income to them. According to the guidelines, REITs must distribute 90% of the net distributable cash flows as dividends to the investors or the shareholders, every six months. If a REIT wants to invest in properties under construction, it can do so but this gets limited to 10% only. A REIT does not have to pay taxes on the income that it distributes to the investors. They can also provide liquidity to the investors just as mutual funds do. Most REITs tend to be traded on major stock exchanges, however there are public non listed

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and private REITs as well. REITs can be broadly classified into two types----Equity REITs and Mortgage REITs.

Equity REITs acquire commercial properties such as offices building, etc and lease out the space therein to tenants who pay the rent. After clearing of the expenses, they pay dividends to their shareholders from the bulk income. Equity REITs get an income from the sale of long term properties also. In case of timber REITs, dividend is available through the sale of timber.

Mortgage REITs earn from the investments in mortgages or mortgage securities related to commercial or residential properties. Mortgage REITs also earn from the sale of mortgages. The profit like any other business accrues from the difference of the income and the costs, including the cost of purchase. Equity and mortgage REITs can be held privately as well. REITs find an application in all sectors of the economy, like hotels, infrastructure, nursing homes, offices, shopping malls, student housing, storage centers, timberlands etc. For most countries in the global sphere, particularly the U.S. there are certain qualifications, that are essential for any company to qualify as a REIT.

- The company should invest at least 75% of its total assets in the real estate sector.
- 75% of the company’s income must be derived from rents accruing from real properties, interest on mortgages or the sale of real estate.
- The company must pay 90% of its taxable income as dividends to the shareholders.
- The company or the corporation must be taxable by the tax authorities
- There must be a board of directors and trustees, with a minimum of 100 shareholders
- There are certain benefits that a person might avail of due to investment in REITs that includes diversification, dividends, liquidity (stock exchange listed REIT shares have a free transaction in the market i.e. they can be easily bought or sold) and transparency. Globally, REITs invest in complete revenue generating real estate
assets. REITs exist in several countries including Japan, USA, United Kingdom, Singapore etc.

The term **UPREIT** is an abbreviation of Umbrella Partnership Real Estate Investment Trust. It implies a specific structure through which a REIT can hold its assets. In a typical **UPREIT** structure the REIT generally holds all of its assets through one OP or one operating partnership. In a typical OP structure, after an initial holding period, the holder’s OP units are redeemable for cash or REIT shares in a ratio of 1:1. A **DOWNREIT** is also similar to an **UPREIT** wherein both structures enable holders of real property to contribute that property to a partnership controlled by the REIT on a tax deferred basis. Also **DOWNREITS** hold their assets through multiple operating partnerships whereas **UPREITS** typically hold assets through one operating partnership.

India’s real estate sector along with it’s economy has witnessed tremendous growth in the past decades. The growing scale of commercial operations has led to the demand of warehouses, buildings etc. Against such a scenario, the emergence of REITs has become indispensible. After long discussions and debates, the finance ministry headed by Arun Jaitley finally approved the idea of REITs for India. In 2014, thus SEBI came up with detailed guidelines to monitor the working and operation or REITs. In the Indian context, the word ‘equity’ is replaced with ‘real estate’ and ‘stocks’ with ‘properties’. Real estate, in this context must clearly understood. It refers to land and any improvements or attachments to it that is of a permanent nature, whether on leasehold or freehold. It includes buildings, sheds, garages, fences, fittings, fixtures, car parks etc. and every asset that is incidental to the ownership of real estate. Thus as per the sebi regulations, 2014 reits would:

- Invest primarily in revenue generating real estate assets;
- Be professionally managed;
- Distribute a major part of their earnings to the investors.

After its introduction, one of the noted lapses was attributed to be the lack of clarity on taxation aspects. Experts had noted that REITs had been successful only in countries with
conducive tax frameworks. Under section 115 of the ITA (Income Tax Act), scheme for REITs and infrastructure investment trusts are to be made in accordance with the SEBI act, 1992. Consequently section 10(23fc) of the IT act exempts all those incomes of a business trust that accrues from interest. The capital gains earned by REITs shall be taxable only as per the applicable provisions of capital gains. There shall be no capital gains on shares allotted by a Special Purpose Vehicle to a business trust. Further, in case the trust sells the shares of the SPV, income arising from the shares will be subjected to long term or short term capital gains. Any other income though, shall be taxable on maximum marginal rate. Considering this one should also note that dividend distributions by the SPV is liable for a dividend distribution tax although the net income will not suffer any other tax at the level of REIT. From the asset owners’ perspective REITs, in business underlines the basis of a transaction scenario where asset owner shall contribute his assets in exchange of units of REITs and that this kind of exchange will not trigger current tax. Laws, exempting tax on REITs thus continue to remain one of the lucrative aspects for investors. Tax however may be imposed if the asset owner proposes to sell them in exchange of units on a future date. The real estate sector has always been more upbeat about making REITs a core area of Indian business. The sector sought tax incentives from the finance ministry which reportedly included—

- Lower stamp duties on all the properties under REITs
- Lesser tax to be paid by domestic investors
- Initial property valuations and approvals of large bank loans for the holding of trusts.

The Confederation of Indian Industries recently took to this issue of capital gains tax exemption for REITs. The union budget of 2014-2015 notified the regulations where REITs were provided the pass through status in matters of taxation in order to invite foreign investments apart from domestic ones. In the union budget of 2015-16 the finance minister proposed to rationalize capital gains regime for REITs. Tax pass through status was once more highlighted here. Today in India, REITs hold great importance in macro as well as micro level. The REIT regulations have been conceived to revive the investment scenario in the Indian markets by providing diversification of investments, better liquidity situations in the real estate industry and also greater FDI in the real estate sector in India.
Regulation of REITs

- REITs can invest in commercial real estates directly or may invest through SPVs, that is Special Purpose Vehicles. In this case, 80% of its assets are invested in properties. It must be mentioned that the Indians usually invest in real estate properties for capital gains. The idea is to buy property that shall yield a considerable appreciation of value. However SEBI’s regulations treat REITs as income avenues. REITs in India, promise to generate income that is inflation adjusted. That being said, it specifically implies that its rental income shall escalate with the rising prices in the economy or in case of inflationary pressure. The vision is that even with a small amount of money in hand (2 lakh at least) one is able to invest in the property market. Like mutual funds REITs pool in money and issue units in exchange. This fund, is then invested in the commercial properties that generate income.

- The REIT is mandatorily required to be registered and funds are raised through the IPO or Initial Public Offer. Units of REIT are traded as securities. SEBI has clarified that the minimum permitted asset sizes to be listed in India at Rs 500 crore. The minimum issue size of the Initial Public Offer should by no means be below 250 crore.

- Though, the minimum subscription for the primary market must be Rs. 2 lakhs and for the secondary market, Rs. 1 lakh. REITs shall essentially have to invest in two projects and no more than 60% of the value assets shall be in a single project. Thus diversification seems prominent here.

- Assets to be invested in complete and revenue generating properties should not be less than 80%. The remaining 20% can be invested in under construction companies, mortgage backs securities, list or unlisted debt of companies in the real estate sector, equity shares of listed companies deriving at least 75% of the operational income from the real estate, money market instruments and cash equivalents.

- The maximum borrowing that is permitted is 49% of the value of the REIT assets.
In India, REITs have been set up as trusts under the Indian Trusts Act 1882, and registered with SEBI. It has three parties—trustee sponsor(s) and managers. Sponsors are required to hold 25% of the units for the first 3 years and after that period, they are required to hold 15% to ensure their commitment. Thus all in all, considering the statistics, risk factor in reits is at a much lower level. This was exactly the reason why SEBI considered to bring forth REITs in India in 2014. Manager assumes the operational responsibilities and is eligible for the post only after having five years of minimum work experience. REITs are given a ‘pass through status’ from the Income Tax Authorities. This signifies that the trust is exempted from paying the tax that actually gets distributed as dividends. Thus it’s the ultimate beneficiary who is taxed, the entirety of which does not lie on the Trust. The union budget of 2015-’16 proposed that the rental income of the REITs shall have the pass through facilities.

The International Aspect In Brief

Business law essentially operates to facilitate the flow of trade across borders. One of its main functions is to improve the general finance structure. Thus regulation of REITs, from an international point of view has also been designed to serve this end. Publicly Traded REITs offer investors the dual benefits of real estate investment along with the advantages of publicly traded stock, from a commercial point of view. The income producing real estates further provide the investors with long term returns that in turn compliment the returns from stocks and bonds. Historically too, REITs have time and again produced a steady stream of income in a various swings of market conditions. Most REITs operate in a comprehensive and understandable business model. Its reliable income is generated from not only rents paid to the owners of commercial properties where tenants sign leases essentially operating for long periods, but also from interest payments from the financing of those properties. From an international standpoint, REITs must follow the same rules like all other unit investment trusts. This implies a very basic thing i.e. REITs should first be taxed at the trust level and then at the level of the beneficiaries. When it comes to valuation and accounting, the rules remain same as applicable to corporations, but here the cash flow is
passed on directly to the unit holders instead of passing through profits (pass-through rate is the rate on a securitized asset pool that is passed through to investors once management fees and guarantee fees have been paid to the securitizing corporation). However REITs come up with certain extra regulations over other unit investment trusts. Enumerating them below—

- In case of REITs, the rent is considered to be the income of the business by the government. Thus expenses related to rental activities can now be deducted as business expenses and can be written off by a corporation.

- The current income that is distributed, is not subjected to taxation but if the income is distributed to a non-resident beneficiary then it must be subjected to a 30% withholding tax for ordinary dividends and a standard 35% for capital gains.

But, it’s important to note that practically, for general purposes REITs are exempted from taxation as long as they distribute 90% of their income to their unit holders. This unique tax advantage by REITs translate into superior yields for investors who seek higher returns with relative stability. Also internationally, where federal law prevails, the majority of the states conform to the federal income tax laws when it comes to the treatment of REITs.

**Concluding Words**

REITs in our country, is believed to improve the position of the investors significantly. The developers of the real estate industry shall also be at an advantageous state as REITs shall provide them with relief by reducing debt. The investor’s ability is significantly improved as he is given an opportunity to invest in the commercial properties of the country that previously had been out of his reach. His portfolio is evidently enhanced in such a case and guarantees a regular income to him. Investors further have an authority to remove manager, auditor, etc. An annual meeting of the investors shall be mandatorily convened by the Trustee where matters like latest annual accounts, valuation reports, performance by REITs shall be explicitly discussed. In order to ensure that a related party does not influence any kind of decision, it is ensured that a party to a transaction does not get the right of voting on the specific issue. Because transparency has been the cornerstone of REITs globally,
there is a prior requirement of detailed disclosure of documents to the investors. Certain event-based disclosures have been specified by SEBI as well.

Assets of REITs in India have been estimated to escalate up to $20 billion by 2020. An amount of $12 billion dollars could be raised in the initial three to five years. Lastly, what makes REITs such an indispensable part of the Indian economy is the fact that it shall generate huge transparency in the commercial sector. The reliance on banks for financing shall be significantly reduced that’ll go a long way in curbing and thus controlling the monopoly of the banking sector. REITs shall in the long run help the investors in making more analytical decisions and informed investments. Thus technically it aims to bring a much needed revolution in the Indian market.

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ARTICLE 12: TEXT VERSUS TELEOLOGY
SUDHANSHU GUPTA AND AKANSHA ANAND

Abstract

Undeniably legal persons are of two kinds: natural persons and juristic persons. Even though the Constitution of India does not explicitly define the term ‘Juristic’ entity, they have become an intrinsic reality of everyday life. With the emergence of privatization in the municipal arena India is facing drastic changes in the nature and role play of the ‘State’. What is ubiquitous is the emergence of legion corporate bodies who now exercise profound functional and social control in the Indian economy. The study is circumscribed to the status juristic bodies enjoy in India vis-à-vis Constitutional perspective. In the instant essay the author shall endeavor to enunciate the scope of their accessibility to Fundamental Rights, the attitude of the Courts, extent of flexibility provided to them by the contemporarily existing laws in their working and administration, nature of limitations imposed upon them. The judicial approach in classifying between natural and juristic bodies is perhaps a complex task. The essay shall be generally confined to the private law but shall attempt to illustrate the tumultuous evolution of juristic entities from the perspective of public law. Moreover the present essay shall canvass the judicial interpretations of ‘other local authorities’ enshrined in Article 12. The author shall also bring into limelight the status of juristic bodies in the global arena.

367 Year II, NUSRL Ranchi

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Introduction

Modern constitutional law, especially in free representative democracies, lays the greatest emphasis on fundamental human rights but there has been controversies galore regarding the access to these fundamental rights. The exact scope of these rights has been fraught with uncertainty. Juristic persons are creatures of law rather than individuals. A layman may vehemently argue that fundamental rights are only available to human beings or rather say natural persons but the legal standpoint potentially catapults a great deal of estimations regarding corporate rights and obligations.

Juristic persons may be defined as things, mass of property or an institution upon whom the law confers a legal status and who in the eyes of law possess rights and duties as a natural person. The Courts in India adopt the doctrine of *ejusdem generis* for interpretation of “other authorities”.

It has also been observed that a corporation deemed to be “State” within the meaning of Article 12 of the Constitution and acting as an agency of the government, which would be subject to the same limitations in the field of Administrative or Constitutional law as the government itself, though in the eyes of law they would be distinct and independent legal entities.

The conception of legal personality is extensive in application. There are several distinct varieties of such persons, notably:

The first class of legal persons consists of corporations, namely those which are constituted by the personification of groups (corporation aggregate) or series of individual (corporation sole). Incorporation adds immortality to companies. It has perpetual succession and remains in existence however often its members are changed, until it been dissolved by liquidation. Meanwhile, it is also commonly understood that friendly societies and registered trade unions are also legal persons, though not registered as corporations.

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368*Dr. Paranjape N.V., Studies in Jurisprudence, Legal Theory 4rth Ed.(Reprint 2006), Page 315*

369*R.D.Shetty v. International Airport Authority, AIR 1979 SC 1628.*

370*State Trading Corporation of India V Commercial Tax Officer, AIR 1963 SC 1811*
The second class is that in which objects or corporations selected for personification are not a group or series of persons but an institution. The law may, if it pleases, be regarded a church, a hospital, a university or a library as a person. The vital characteristic of a corporation aggregate is that it possesses a personality distinct from that of its members. This doctrine was first approved by the House of Lords in *Soloman v. Soloman & Co. Ltd.*

It is hence inferred that attribution of *persona iuris* is confined not to any group of persons connected with the institution but the institution itself. In India, institutions like a university, a temple, public authorities, etc. are considered to be legal persons. But it does not infer that the Vice Chancellor or Professor of a University automatically personifies the legal status and rights of the University itself, as it is the University only which enjoys legal status.

Indian courts have also recognized the judicial personality of a company or corporation distinct from the members which compose it. The decision of the Calcutta High Court in *Kondoli Tea Co. Ltd., Re* seems to be the first on the subject. In this case certain persons had transferred a tea estate to a company and claimed exemptions from *ad valorem* duty on the ground that they were themselves share-holders in the company and it was hence nothing but a transfer from them to themselves under another name. Rejecting this, the Court observed that “the company was a separate person a separate body completely from shareholders and the transfer was a conveyance, a transfer of the property, as if the shareholders had been downright unlike persons”. In various other cases this principle has been recognized.

The third kind of legal person are those whose corpus is certain fund or estate meant for special uses a charitable fund for example, or a trust estate, or of a bankrupt, or the property of a dead man.

However, it is pertinent to note that there exists no strait-jacket formula for labeling whether any person or authority suits the description of ‘State’ within the meaning of Article

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371 (1897) AC (22)
372 *Bansidhar v. University of Rajasthan*, AIR 1963 Raj 172
373 *Baba Kishore Dev v. State of Orissa*, AIR 1964 SC 1501
374 (1886) ILR 13 Cal 43
12, what is required is to look into the Constitution of the body, the purpose for which it has been constituted, the manner of its working including the mode of its funding and ultimately its suitability to specific criterias laid down by the Courts from time to time.

**Tumultuous Evolution Sui Juris**

Juristic or corporate liability has its origin in ancient law and became the center of doctrinal discussion at the end of the 19th century. Corporations existed in Ancient Rome and were known as *Gildoe* or *Universitatis*; and a large Part of Roman law is concerned with the regulation of trading companies and guilds. By the Roman law a corporation consisted of a number of individuals united by public authority in such a manner that they and their successors constituted as one person in law, with rights and liabilities distinct from those of its individual members. Cities, Hospitals, Colleges were generally authorized to make by-laws for the administration of their own affairs, so far as they were not contrary to the constitution.375 Eventually the existence of juristic persons and their capacity of getting sanctioned for their *delictual* acts were realized. The sanctions could be fines, dissolution and spiritual sanctions upon the members of the corporations, such as the loss of the right to be buried, or excommunication.376 The later development of Roman *universitates* fell in place within the Germanic concept of corporate or juristic responsibility.

German law considered that both the corporations and the individual were real subjects of law. The rationale for collective responsibility under German law was that if damages resulted from an individual action, a sanction was imposed to repair the damages. As the property was owned by the collectivity, it was only logical that the collectivity should pay the damages.377

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375 *Das Satyaranjan, On The Law Of Ultra Vires (Tagore Lecturers) 2nd Ed. (1981) Page 9*

376 *Pop Al. Criminal Liability of Corporation: Comparative Jurisprudence, King Scholar Program. Michigan State University College of Law, USA; 2006.*

377 *Pop Al. Criminal Liability of Corporations: Comparative Jurisprudence, King Scholar Program. Michigan State University College of Law, USA; 2006.*
In the 14th century, the hesitancy to actuate liability upon juristic persons had been cast off. Corporations were now liable for the actions of their members. In France, the requirement for liability to the juristic personality was that a crime committed must have been the result of the collectivity's decision. Meanwhile in 16\textsuperscript{th} and 17th centuries, corporations in England became more common and their importance had been spiralled.

\textbf{Citizenship Status: A Conundrum}

In an attempt to illustrate the rights, liabilities and status of juristic persons in the Constitution, the eventual gambits ascends with Article 11, \textit{i.e.}, whether juristic persons enjoy the status of an Indian citizen.

\textbf{Section 2(1) (f) of the Indian Citizenship Act, 1955}

“person” does not include any company or association or body of individuals incorporated or not;

Neither the provisions of the Constitution, Part II, nor of the Citizenship Act aforesaid, either confer the rights of citizenship on, or recognize as citizen, any person other than a natural person.\textsuperscript{378}

No provision in the Constitution can be relied upon in support of the juristic personality being treated as citizen. Out of the various articles contained in Part II of the Constitution, which cannot be disregarded when dealing with such rights of a juristic personality, Article 5 of the Constitution covers only natural persons.\textsuperscript{379} Besides the above stated legal standpoint, the Courts has also gone further holding that the more reasonable approach will be to hold juristic entities comprised wholly of Indians can be vested ‘citizenship’ for the purpose of Part III of the Constitution.\textsuperscript{380}

‘Citizenship’ and ‘Nationality’ and their interchangeability is a legal maze. While ‘Nationality’ as inferred from Private International Law largely covers the international arena ‘Citizenship’ on the other hand is circumscribed to the municipal arena. If there is no

\textsuperscript{378}\textit{State Trading Corporation of India V Commercial Tax Officer}, AIR 1963 SC 1811
\textsuperscript{379}\textit{Andhra Pradesh Non Gazetted v. State Of Andhra Pradesh}, (1960) ILLJ 156 AP
\textsuperscript{380}\textit{Kochuni v. State of Madras & Kerela}, AIR 1960 SC 1080
difficulty in assigning nationality to juristic bodies then there must lie no inherent difficulty in assigning citizenship too.\textsuperscript{381}

Parliament under Article 11 has the power to legislate and enlist criterias for citizenship whenever required. Perhaps these criterias are not conclusive and subject to amend by the Parliament. Though the chances are very less but a day may come when juristic persons shall enjoy the status of ‘Citizens’ in India. But that in turn will attract intense pandemonium for instance regarding voting rights.

\textit{Soupçoning Equity}

Article 14 is available to any person including legal persons viz. statutory corporation, companies, etc. Article 14 applies to all the persons and is not limited to citizens. A juristic person is entitled to the benefits of Article 14\textsuperscript{382}, as enunciated by the Supreme Court of India. The underlying principle of Article 14 is that all the persons similarly circumstanced shall be treated alike both concerning-

- privileges conferred,
- liabilities imposed.

State is not a juristic entity for the reason that it does not partake the characteristic of or satisfy in whole the meaning of a corporation. Ministers are appointed by the President or the Governors and are officers within the meaning of Article 53 and Article 154 of the Constitution. They are in law, subordinate to the executive head and so are not personally liable for their acts of commission and omission. They are not directly liable in a court of law for their official acts. They have no legal or constitutional entity. Any person aggrieved by them can bring a suit against the Union of India or the State as the case may be. Consequently they are not corporation sole. Like any other servant of the Government the Ministers are not liable personally.\textsuperscript{383} In either case it is the state whether at the center or

\textsuperscript{381} B. Errabi, Problem of Juristic Personality of a Corporation, Indian Law Institute, Page 163
\textsuperscript{382}Chiranjit Lal Chowdhary v. Union of India, AIR 1951 SC 41
\textsuperscript{383}State of Punjab v Okara Grain Buyers Syndicate Ltd, AIR 1964 SC 660
in the federated units which is liable in torts\textsuperscript{384} and contracts.\textsuperscript{385}

\textbf{Liberty To Manifest}

When the interpretation of exhaustive or abstract laws is carried out with extreme rigidity the obvious conclusion that follows is that law becomes a deadletter. As it is already known that juristic bodies are not explicitly endowed with any fundamental rights of freedom as embodied in Article 19, this was the cause of ramifications meted out by juristic bodies in the post-independence era. They were denied access to freedom of expression and could not voice their grievances pertaining to such matters in the Courts. Gradually the Courts came to their rescue.

While addressing a writ petition challenging the restriction imposed on the printing and publication of the newspaper held that individual rights of freedom of speech and expression of editors, directors and shareholders of a newspaper are exercised via newspapers and therefore such restrictions in turn violate their freedom of speech and expression. The fact that the petitioners are a corporate body does not prevent the Court from providing relief of any sort.\textsuperscript{386} These decisions were also distinguished by placing reliance on the dicta in \textit{Express Newspapers}\textsuperscript{387} and \textit{Sakal Newspapers}\textsuperscript{388} symbolizing the distinction being artificial and not withstand scrutiny.

\textbf{Yielding Legality To Religious Entities}

One substantial question that arises while dealing with the nature and variety of juristic entities in India is whether in a country where predominance of diverse religions harvests religious entities and trusts galore, are such entities juristic in nature as far as Article 25 and 26 is concerned. To answer the same the author places strong reliance to the case of \textit{Shriomani Gurudwara Prabandhak v. Shri Som Nath Dass & Ors}\textsuperscript{389} the respondents was that the Guru Granth Sahib was only a sacred book of the Sikhs and it would not fall within the

\begin{footnotesize}
\textsuperscript{384}State of Rajasthan v. Vidyawati, AIR 1962 SC 933
\textsuperscript{385}New Marine Coal Co. V Union of India , AIR 1964 SC 15
\textsuperscript{386}Bennet Coleman & Co. v. Union of India & Ors, 1973 AIR 106
\textsuperscript{387}Express Newspapers Ltd. V. Union of India, AIR 1958 SC 578
\textsuperscript{388}Sakal Newspapers Pvt. Ltd. V. Union of India, AIR 1962 SC 305
\textsuperscript{389}2000 (2) SCR 705.
\end{footnotesize}
scope of the word, juristic person. Faith necessitated the creation of a unit to be recognized as a Juristic Person. All this shows that a Juristic Person is not roped in any defined circle. With the changing thoughts, changing needs of the society, fresh juristic personalities were created from time to time. It was contended that an idol is a juristic person but a temple cannot be a juristic persons. It is not necessary for Guru Granth Sahib to be declared as a juristic person and to be equated with an idol. The further difficulty the learned Judges of the High Court felt was that there could not be two juristic persons in the same building. This they considered would lead to two juristic persons in one place viz., gurudwara and Guru Grant Sahib. Upon extensive deliberation the Court went on to hold that even if one holds a Gurdwara to be a juristic person, it is because it holds the Guru Granth Sahib. So, there do not exist two separate juristic persons, but one integrated whole. Similarly, an idol becomes a juristic person only when it is consecrated and installed at a public place for public at large. Every Guru Granth Sahib cannot be a juristic person unless it takes juristic role through its installation in a gurudwara or other recognized public place.

Coming to the issues whether the several boards functioning in the country are legal person distinct from its members the answer as derived from the judicial precedents is presumably no. It has a distinct name because statutory convenience mandated it as a requirement for registration under the Societies Registration Act, 1860; the property 'belonging' to the society was vested in the trustees and the society was not a corporate body to hold or acquire property. Since the legislature had no intention of clothing such entities with a corporate status with power to hold property and to sue and be sued in their registered names, it was necessary to provide for the vesting of their property in trustees and to permit them to bring or defend legal proceedings in respect of that property on behalf of the Board. Hence a registered society was not a juristic person distinguishable at any at any moment of time from the members of which it was composed.

**Probing The Corporate Veil: On The Qui Vive**

No functioning body, be it natural or juristic ought to be given power carte blanche. It is in

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390 *The Board of Trustees, Ayurvedic Andunani Tibia College, Del v The State of Delhi*, 1962 SCR Supl (1) 156.

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this vein that the author urges that even the fundamental rights given to juristic bodies should be sentineled. The concept of instrumentality or agency of the Government depends upon identifying the real source of governing power, if need be, by piercing the corporate veil of the entity. The concept of lifting the corporate veil is a changing concept with unlimited frontiers. It depends primarily on the realities of the situation.\textsuperscript{391} In certain exceptional cases the court is entitled to lift the veil of corporate entity and to pay regard to the economic reality and hence the courts and legislatures have often done so in the interests of justice, equity and good conscience.\textsuperscript{392} It is not open to the company to ask for unveiling its own cloak\textsuperscript{393} and examine as to who are the directors and shareholders and who are in reality controlling the affairs of the company. The doctrine of lifting the veil of corporate personality advocates going behind and looking behind the juristic personality. In one of the cases the Court held that\textsuperscript{394}

“A careful consideration of the principles of law noticed leave no room for any doubt as to the identity of the appellant-company being "other authority" and consequently "the State" within the meaning of Article 12 of the Constitution of India. The said definition has a specific purpose and that is part III of the Constitution, and not for making it a Government or department of the Government itself. The concept of instrumentality of the Government is not to be confined to entities created under a particular statute or order but would really depend upon a combination of one or more of relevant factors, depending upon the overwhelming nature of such factors in identifying the real source of governing power, if need be, by piercing the corporate veil of the entity concerned.”

In \textit{Tata Engineering & Locomotive Co. V State of Bihar}\textsuperscript{395}, the petition was filed by the company and some shareholders also joined it. They argued that though the company was not a citizen but its shareholders were citizens and if it was shown that all its shareholders were citizens the veil of corporate personality might be lifted to protect their fundamental rights. The court rejected this argument and held that “If this plea is upheld, it would really mean that

\begin{itemize}
\item \textsuperscript{391} State of U.P. v. Renusagar Power Co., (1992) 74 Comp. Case 128 (SC)
\item \textsuperscript{392} The Deputy Commissioner V Cherian Transport Corporation, (1992) 74 Comp. Case 563 (Mad)
\item \textsuperscript{393} Sugar India Ltd. v. Chander Mohan Chadha, AIR 2004 S.C. 4368
\item \textsuperscript{394} Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers’ Association, AIR 2002 SC 609
\item \textsuperscript{395} AIR 1965 SC 40
\end{itemize}
what the corporations and companies cannot achieve directly can be achieved by them indirectly by relying upon the doctrine of lifting the corporate veil”.

Codicil

It is however, vital to note that the above mentioned are not the only provisions dealing with the working and administration of business entities. Article 300 for instance prescribes the way in which suits and proceedings by or against the Government may be instituted. It enacts that the Government of India may sue and be sued in the name of the Union, a state may sue and be sued by the name of the state. There is a difference between the "Government of India" and the "Union of India". The Union of India is a legal entity but the Government of India is not a legal entity. Likewise, each State has been endowed with juristic entity, with power to sue and the liability to be sued. Except as provided in Article 131, suits or proceedings by or against the Government or its officers will be brought in the ordinary courts.

Similarly, Article 300A vests a right on all persons to hold and enjoy property. Thus a person cannot be deprived of his property save by authority of law. Any violation of this right can be challenged in the court of law. The protection of Article 300A is available to any person, including juristic person and is not confined only to a citizen. However, the same cannot be sought to be enforced by a petition under Article 32 of the Constitution, since it is not a fundamental right but merely a Constitutional Right. This judgment of the Supreme Court has strengthened the position of big multinational companies and organizations, which primarily rely upon information technology for its effective functioning.396

The General Clauses Act, 1897, which is resorted to under Article 367 of the Constitution, for the purpose of interpretation of certain provisions of the Constitution, defines the expression “person” as inclusive of “any company or association or body of individuals” notwithstanding incorporation. By virtue of Article 367, the definition given in the General Clauses Act are applicable to the interpretation of the Constitution also and hence the expression "any person" or 'all person' include any company, or association or body of

396 Dharam Dutt v. Union of India, 1964 SCR 885
individuals whether incorporated or not. Similarly, State is a "person" within the meaning of "any person" or 'all person'. In Article 13 to 32 of the Constitution of India, some of the Fundamental Rights mentioned there are applicable to every citizen with some being accessible to a restricted lot. Protection of life and personal liberty etc., which all are applicable to any or all person will be covering even companies, meanwhile Articles 19 for instance, exercising freedom of speech covers only the citizens not companies.

In August 2015, after numerous hearings in a batch of writ petitions challenging the constitutionality of the Aadhaar scheme, a three-judge Bench of the Supreme Court referred the petitions to a larger Bench on the question of whether Article 21 of the Constitution encompasses within its ambit the right to privacy also. It is pertinent to note that Article 21 of the Constitution, unlike Article 19, is not limited in its application to a natural person. In other words, even 'juristic persons' are entitled to invoke Article 21. Such being the case, if the right to privacy receives the imprimatur of the Apex Court as a fundamental right, the larger question that is of interest is whether such a result would effect a sea change in our attitudes towards other rights and issues which are related to or flow from the concept of privacy. The question that arises is, are juristic persons such as corporations too entitled to similar expectations of privacy and protection of data if the right to privacy under Article 21 is ultimately recognized by the Supreme Court?

Relative Exploration

Making a piercing inquiry into the codifications of the existing countries is unequivocally exhaustive. The author observes amalgam of codifications which truly canvass the accurate meaning of juristic entities. While majority of the Constitutions hold similar definitions of the term ‘Juristic Person’, several others embody certain novel approaches to deal with these bodies.

The fundamental flaw in the arguments raised against granting corporations the protections of the Constitution is that they are founded on a mistaken understanding of the nature of the Bill of Rights and the Fourteenth Amendment—are intended to protect individual autonomy and freedom and since corporations are legal entities, not individuals, they have...
no claim to the protection of the Constitution.\textsuperscript{397}

In \textit{Boston v Bellati}\textsuperscript{398} Massachusetts had passed a statute prohibiting corporations from spending money to influence popular votes, unless the matter “materially affected” the corporation’s business interests. The Court stated that question is not whether corporations ‘have’ First Amendment rights coextensive with those of natural persons. Instead, the question is whether the law abridges the expression that the First Amendment rights was meant to protect. “The Court went on to strike down the law, emphasizing that critical role that all speech played in the democratic process, and highlighting the dangers affecting the government.\textsuperscript{399} One germane point which arises for consideration is whether legal entities situated out of United States are entitled to constitutional protection, the answer is generally no.\textsuperscript{400}

Nonetheless, the Supreme Court has, in the recent decades consistently permitted such bodies which are legally within the country to claim protection of the Constitution and has not only granted constitutional protection but also declared unconstitutional the discrimination against legal residents aliens by state governments.\textsuperscript{401} It is therefore well established that the Constitution of the United States also protects noncitizens. In this light we may infer that the Constitution is best read to protect citizens as well as aliens and the otherwise would empower the government in ways that are inconsistent with the democratic polity that our Constitution makers were seeking to create. Similarly, the Constitution of China has enshrined the following definition:

\textit{“A juristic person shall be an organization that has capacity for civil rights and capacity for civil conduct and independently enjoys civil rights and assumes civil obligations in accordance with the law.”}

Some countries, including France, Germany and Spain, have treated juristic persons as real,

\textsuperscript{397} Ashutosh Bhagat, The Myth of Rights: Purpose and Limits of Constitutional Rights, Oxford University Press.
\textsuperscript{398} 435 U.S. 765 (1978)
\textsuperscript{399} Id. at 776-777. Reaffirmed in \textit{Citizens United v. F.E.C.}, 558 U.S. 310
\textsuperscript{400} United States v. Verdugo Urquidez, 494 U.S. 259 (1990)
\textsuperscript{401} Zavydas v. Davis, 403 U.S. 365(1971)
natural persons. In United States and England, the use of this terminology does not mean that artificial legal entities are considered human beings. It is a "legal meaning" where "a 'person' is any subject of legal rights and duties." Because artificial entities have legal rights and duties, they are considered persons. In Italy trade unions have legal personality, as stated in Article 39 of the Constitution\(^\text{402}\).

Exploring the status and role of Juristic persons is a study deserving immense endeavor and endless manifestation. Due to paucity of expression on this comprehensive matter the author seeks to conclude the study.

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\(^{402}\) "Registered trade unions are legal persons. They may, through a unified representation that is proportional to their membership, enter into collective labour agreements that have a mandatory effect for all persons belonging to the categories referred to in the agreement."
THE GROWTH AND OBJECT OF TRIBUNALS IN INDIA: A CRITICAL ANALYSIS

SUKRITI SINHA

Abstract

The focus of the preliminary study was primarily to study the growth and object of Tribunals in India. This paper is a critical analysis of the topic. It also tries to trace the origin and history of tribunals in India and their path of development. An analytical and factual approach has been adopted to complete this paper. The essence of the meaning of the word ‘tribunal’ which can be culled out from the various Supreme Court authorities is that they are adjudicatory bodies (except ordinary courts of law) constituted by the State and invested with judicial and quasi-judicial functions as distinguished from administrative or executive functions. Presently, tribunals occupy an important place in the sphere of adjudication of disputes. The tribunals have original jurisdiction over many matters. As there are aspects which are different in the functioning of a tribunal from the courts, because it is a quasi-judicial body, there arises certain problems as well. They provide greater flexibility in administering justice and provide relief to the courts. But at the same time they suffer from some limitations as they sometimes violate the principles of natural justice, lack uniform pattern of administering justice and also suffer from the lack of a proper background on law or judicial work. However, with certain safeguards it is possible to rectify some of these limitations. The administrative tribunals should have people with legal training and experience. A code of judicial procedures should be devised and enforced for their functioning. This paper discusses the various types of tribunals and their status and working in India. The paper proceeds to analyze the position of law with regard to the tribunal system in India, its growth, development, advantages, disadvantages and object.

403 Year II, NLU Odisha

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Introduction

Tribunals are a “Judgment seat; a court of justice; board or committee appointed to adjudicate on claims of a particular kind.”

Welfare nature of government is the evolutionary goal of probably every kind of government these days. The development of welfare led to an increase in governmental functions and the executive saw in this a need to perform a number of quasi-legislative and quasi-judicial functions, thus blurring the traditional positions of the government under the doctrine of separation of powers, under which the powers of the government were divided between the legislature, executive and the judiciary which were to be entrusted with the power of making law, executing it and interpreting the law respectively.

Today, over and above ministerial functions, the executive performs several quasi-legislative and quasi-judicial functions also. The governmental functions have increased and even though according to traditional theory, the function of adjudication of disputes is the exclusive jurisdiction of the ordinary courts of law, but in reality, many judicial functions have come to be performed by the executive, example imposition of fine, levy of penalty, etc.

The traditional theory of “laissez faire” has been given up and the old concept of “police state” has now become “welfare state”. Owing to this radical change in the philosophy of the role of the state, its functions have expanded. The issues arising there from these functions are not purely legal issues. It is not possible for the ordinary courts of law to deal with all these socio-economic problems. For example, industrial disputes between the workers and the management must be settled as early as possible. However, it is not possible for the ordinary court of law to decide these disputes expeditiously, as it has to function, controlled by certain innate limitations. Administrative tribunals are, therefore, established to decide various quasi-judicial issues in place of ordinary courts.

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Defining Tribunals

It is not possible to define the word “tribunal” precisely and scientifically. According to the dictionary, “tribunal” means “a seat or a bench upon which a judge or judges sit in a court”, and “a court of justice”, but this meaning is very wide and includes even ordinary courts of law; whereas, in administrative law, this expression is limited to adjudicating authorities other than ordinary courts of law.\(^{405}\)

In *Durga Shankar Mehta v. Raghuraj Singh*\(^ {406}\), the Supreme Court pronounced that:

“The expression “tribunal” as used in Article 136 of the Constitution does not mean the same thing as “court” but includes, within its ambit, all adjudicating bodies, provided they are constituted by the state and are invested with judicial as distinguished from administrative or executive functions.”

Also, in *Bharat Bank Ltd. v. Employees of Bharat Bank Ltd.*\(^ {407}\), the Supreme Court observed that though tribunals are clad in many of the trappings of a court and they exercise quasi-judicial functions, they are not full-fledged courts. Thus, tribunals are adjudicating bodies, which decide controversies between the parties and exercises judicial powers as distinguished from purely administrative functions and thus possesses some of the trappings of a court, but not all.

According to H.M. Seervai, ‘they are agencies created by specific enactments to adjudicate upon disputes that may arise in the course of implementation of the provisions of the relevant enactments.’\(^ {408}\)

Historical Development

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\(^{405}\)webster'snewworlddictionary1517(1972);conciseoxforddictionary,1530-1531(2002).

\(^{406}\)durga shankar mehta v. Raghuraj singh, air 1954 sc 520.

\(^{407}\)bharat bank ltd. v. Employees of bharat bank ltd., air 1950 sc 188.

\(^{408}\)h.m.seervai,constitutionallawofindia(1968ed.).
Administrative adjudication, in India, increased after independence and several welfare laws were promulgated which vested the power on deciding various issues in the hands of the administration. The modern Indian Republic was born a Welfare State and thus the burden on the government to provide a host of welfare services to the nation was immense. These quasi-judicial powers acquired by the administration wing led to a huge number of cases with respect to the manner in which these administrative bodies arrived at their decisions. The Courts held that these bodies must maintain procedural safeguards while arriving at their decisions and observe the principles of natural justice and the opinion of the Courts was substantiated by the 14th Law Commission Report.  

In order to avoid clogging the judicial machinery with cases which would have arisen by the operation of these new socio-economic legislations, a number of adjudicating bodies called tribunals were established by the government. These tribunals were established with the object of providing a speedy, cheap and decentralized determination of disputes arising out of the various welfare legislations.

Another reason was that law courts because of their elaborate procedures, legalistic fronts and attitudes can hardly render justice to the parties concerned, in technical cases. To meet this requirement, a number of administrative tribunals have come into existence. In India, tribunals were set up immediately after independence. In fact, statutory tribunals were created by the legislature to adjudicate upon certain disputes arising from administrative decisions or to determine issues judicially. The Railway Rates Tribunal, the Income Tax Appellate Tribunal, Labour Tribunals, the Companies Tribunal, various Compensation Tribunals, Revenue Courts of various States, etc., are a few examples of such tribunals.

Regarding the problem of backlog and delayed disposal of cases, the Government set up the Administrative Reforms Commission in 1967. Its aim was to examine the problem, suggest solutions and also to recommend the suitable areas in which tribunals could be set up according to this commission.

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411 Supra note 1, at 66.
Period of emergencies played a crucial role in the evolution of tribunals in India. There were clear signals that the executive did not want the judiciary to interfere with their developmental plans and other such decisions, such as removing disputes regarding elections to the office of President, Prime Minister and Speaker of the LokSabha beyond judicial scrutiny.\textsuperscript{412} Hence, in 1976, the issue was discussed at the Conference of Chief Secretaries and from amongst all these discussions and the reports of the various bodies stated above, Parliament enacted the 42nd Constitution (Amendment) Act, 1976 inserting Articles 323A and 323B in the Constitution which provided for the establishment of administrative and other tribunals to deal with the matters specifically provided for.

In pursuance of Art 323A, the Parliament passed the Administrative Tribunals Act, 1985 covering all matters falling within the clause (1) of Article 323A. This Act authorizes the Central Government to establish administrative tribunals for central services and, on the application of States, even for States services as well as for local bodies and other authorities including public corporation.\textsuperscript{413}

\textbf{Growth of tribunals in India}

The reasons for the growth of administrative tribunals in India are can be summarized as follows:

1) Inadequacy of the traditional judiciary to effectively decide administration-related matters especially when it came to technicalities in cases.

2) The traditional judiciary was seen to be slow, costly and excessively procedural.

The Commission also recommended the establishment of independent tribunals in the following areas:

a) Service matters and dispute of employees under the state; and


\textsuperscript{413}abhishek kumar jha, administrative tribunals of india - a study in the light of decided cases, (october 20, 2013).

Http://www.academia.edu/4614327/administrative_tribunals_of_india_a_study_in_the_light_of_decided_cases

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Orders of assessment on adjudication under Customs, Central Excise, Sales Tax and orders under the Motor vehicles Act.\textsuperscript{414}

According to Seervai, “the development of administrative law in a welfare state has made administrative tribunals a necessity”.\textsuperscript{415} Administrative tribunals are authorities outside the ordinary court system, which interpret and apply the laws when acts of public administration are questioned in formal suits by the courts or by other established methods. Tribunals are neither a court nor an executive body. Rather, they are a mixture of both. Tribunals are judicial in the sense that they have to decide facts and apply them impartially without considering executive policy. They are administrative because the reasons for preferring them to the ordinary courts of law are administrative ones. The Supreme Court in \textit{Jaswant Sugar Mills v. Lakshmi Chand}\textsuperscript{416} has laid down the following characteristics or tests to determine whether an authority is a tribunal or not:

1. Power of adjudication must be derived from a statute or statutory rule.
2. It must possess the trappings of a court and thereby be vested with the power to summon witnesses, administer oath, compel production of evidence, etc.
3. Tribunals are not bound by strict rules of evidence.
4. They are to exercise their functions objectively and judicially and to apply the law and resolve disputes independently of executive policy.
5. Tribunals are supposed to be independent and immune from any administrative interference in the discharge of their judicial functions.

\textbf{Types of Administrative Tribunals}

There are over 75 types of tribunals and Administration tribunals are used more frequently than most others. Nearly all the Administration tribunals are created by

\textsuperscript{414}id at pg 4.
\textsuperscript{415}supra note 5.
\textsuperscript{416}jaswant sugar mills v. Lakshmi chand, air 1963 sc 677 at 687.
statute and are the enforcement of social and welfare rights. There are different types of administrative tribunals, which are governed by the statutes, rules, and regulations of the Central Government as well as the State Governments.

1. Central Administrative Tribunal (CAT)
   The CAT was established in 1985. This Tribunal consists of a Chairman, Vice-Chairman and Members, who are drawn from the judicial as well as the administrative streams. An appeal against the decision of the CAT lies in the Supreme Court of India.

2. Customs and Excise Revenue Appellate Tribunal (CERAT)
   The Parliament passed the CERAT Act in 1986. The Tribunal adjudicates disputes, complaints or offences with regard to customs and excise revenue. Appeals from the orders of the CERAT lie in the Supreme Court.

3. Election Commission (EC)
   The Election Commission is a tribunal, which adjudicates matters pertaining to the allotment of election symbols to parties and other similar problems. The decisions of the commission can be challenged in the Supreme Court.

4. Foreign Exchange Regulation Appellate Board (FERAB)
   The Foreign Exchange Regulation Appellate Board has been set up under the Foreign Exchange Regulation Act, 1973. A person aggrieved by an order of adjudication for causing breach or committing offences under the Act can file an appeal before the FERAB.

5. Income Tax Appellate Tribunal
   The tribunal has been constituted under the Income Tax Act, 1961. It has its benches in various cities and appeals can be filed before it by aggrieved persons against the order passed by the Deputy Commissioner or Commissioner or Chief Commissioner or Director of Income tax. An appeal against the order of this Tribunal lies to the High Court. An appeal also lies to the Supreme Court if the High Court deems fit.

6. Railway Rates Tribunal
   This Tribunal was set up under the Indian Railways Act, 1989 to adjudicate matters pertaining to the complaints against the railway administration. These may be
related to the discriminatory or unreasonable rates, unfair charges or preferential
treatment meted out to the people by the railway administration. The appeal against
the order of the Tribunal lies in the Supreme Court.

7. Industrial Tribunal

The Tribunal has been set up under the Industrial Disputes Act, 1947. It looks into the
disputes between the employers and the workers in matters relating to wages, the
period and mode of payment, compensation and other allowances, hours of work,
gratuity, retrenchment and closure of the establishment. The appeal against the
decision of the Tribunal lies in the Supreme Court.
Constitutional Status Of Tribunals

The status of tribunal has been recognized by the Constitution. Article 136 of the Constitution empowers the Supreme Court to grant special leave to appeal from any judgment, decree, determination, and sentence or order passed or made by the any tribunal in India. Likewise, Article 227 enables every High Court to exercise power of superintendence over all tribunals throughout the territories over which it exercise jurisdiction. The Constitution (42\textsuperscript{nd}) Amendment Act, 1976\textsuperscript{417} has inserted Articles 323A and 323B by which Parliament has been authorized to constitute administrative tribunals of disputes and adjudication of matters specific therein.\textsuperscript{418} However, the Supreme Court held in Union of India v. Delhi High Court Bar Association\textsuperscript{419} that the legislatures can establish tribunals outside the scope of Articles 323A and 323B as long as there was legislative competence under the Seventh Schedule.

The main distinction that can be made out between both the articles is that while Article 323A allows the Parliament to, by law, provide for administrative tribunals to adjudicate disputes; Article 323B allows any “appropriate legislature” to, by law, create an administrative tribunal for the adjudication of disputes. However, it was only in the year 1985 that, in exercise of its powers under the aforesaid Article 323A, Parliament enacted the Administrative Tribunals Act. Article 323A was to be effective only if the Parliament implemented a law in this regard.\textsuperscript{420}

42\textsuperscript{nd} and 44\textsuperscript{th} Amendment

The Constitution (42\textsuperscript{nd}) Amendment Act, 1976 was the most debatable and controversial amendment in the Constitutional history of India. So far as administrative tribunals are concerned, the amendment made two main changes:

1. It took away the power of superintendence of High Courts over the administrative tribunals which they possess under Article 227 of the Constitution.
2. After Part XIV of the Constitution, it inserted Part XIVA (Articles 323A and 323B) by

\textsuperscript{417}42nd amendment act, 1976.
\textsuperscript{418}m.p. Jain and s.n. Jain, principles of administrative law, vol.i, 713 (6\textsuperscript{th} ed., 2007).
\textsuperscript{419}Union of India v. Delhi High Court Bar Association, AIR 2002 SC 1479.
\textsuperscript{420}D.D. Basu, Commentary on the constitution of India, vol. 9, 10647 (8\textsuperscript{th} ed., 2011).
enabling the Parliament to constitute administrative tribunals for purpose specific therein.421

Article 323A empowers the Parliament to set up tribunals for dealing with disputes and complaints related to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

Article 323B, on the other hand, empowers appropriate legislature, Central or State, depending upon the legislative competence a proposito the subject matter, to set up tribunals for dealing with matters such as tax, foreign exchange, import and export, industrial and labour disputes, land reforms, ceiling on urban property, elections to Parliament or State legislatures, production, supply and distribution of foodstuffs and such other good, as may be declared by the President to be essential goods. Tribunals under Article 323B can be authorised to try certain categories of criminal offences and thus impose penal sanctions on the offenders. This is an innovation in the Indian legal system for till now criminal punishments were imposed only by courts and not by non-judicial bodies.422

By the Constitution (44th Amendment) Act, 1978, Article 227 was amended and the jurisdiction of High Court over administrative tribunals was restored. No amendment, however was made in Part XIVA, as inserted by the Constitution (42nd Amendment) Act, 1976, and exclusion of jurisdiction of all courts and tribunals constituted in exercise of powers under Articles 323A and 323B.


422 See Dr. Ashok K. Jain, administrative law- supplement 2010, ascent publications, ch.8- tribunals, p. S-120.
Constitutional Validity of the Administrative Tribunals Act, 1985

The constitutional validity of this Act was challenged for the first time before the Supreme Court in *S.P. Sampath Kumar v. Union of India* on the ground that the exclusion of judicial review of the High Court violated the basic structure of the Constitution. The Apex court held that no matter what the judicial review, which is the basic feature of the Constitution, cannot be violated; but it is within the power of the Parliament to amend the Constitution so as to substitute, in place of High Court, another alternative mechanism of judicial review, provided it is not less efficacious than the High Court.

This question of constitutionality of the Administrative Service Tribunals Act, 1985 once again arose before the Supreme Court in the landmark case of *L. Chandra Kumar*. The court in this case held that *Sampath Kumar* was decided against the background. First, it was held that the power of judicial review was vested with the Supreme Court and the High Court under Articles 226 and 32 as the constitutional safeguards which ensured the independence of the higher judiciary were not available to the lower judiciary. The court also reiterated that judicial review was a part of the inviolable basic structure doctrine. The court restated that an 'exclusion of jurisdiction' clause enacted in any legislation under the ambit of Articles 323A(2)(d) and 323B(3)(d) were unconstitutional. Secondly, it was held that the power of superintendence of the High Courts over the lower judiciary within their territorial jurisdiction was part of the basic structure. Thirdly, that the setting-up of tribunals was founded on the premise that those with judicial experience and grass-root experience would best serve the purpose of dispensing speedy justice. The Supreme Court in the instant case also clarified that tribunals would continue to act as courts of first instance in respect of the areas of the law for which they have been constituted.

However, when certain civil appeals came up for hearing before a three-judge Bench of the Supreme Court, it felt that *Chandra Kumar* had not addressed the issue of: to what extent

423 S.P. Sampath Kumar v. Union of India, AIR 1987 SC 386.
427 Massey, supra note 14.
the powers of the High Court, except judicial review, could be transferred to the tribunals and whether there was a demarcating line for the Parliament to vest intrinsic judicial functions traditionally performed by courts in any tribunal. Hence the three-judge Bench directed the appeals to be heard by a Constitution Bench, and in *Union of India v. R. Gandhi*, these issues were addressed.

First, it was held that the Constitution contemplates judicial power being exercised by both courts and tribunals and hence if jurisdiction of High Courts could be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references and it also be followed that the legislature has the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Secondly, it was held that while the legislature could make a law providing for constitution of tribunals and prescribing the eligibility criteria and qualifications for being appointed as members, the superior courts in the country could, in exercise of the power of judicial review, examine whether the qualifications and eligibility criteria provided for selection of members is proper and adequate to enable them to discharge judicial functions and inspire confidence.

Moreover, the Supreme Court has now finally settled the question of jurisdiction of the tribunals in labour matters by holding that an administrative tribunal has no jurisdiction to adjudicate upon the finding of an Industrial Tribunal that a person is a workman. A tribunal cannot assume jurisdiction by holding that the department in which the employee was working was not an industry. Thus the duality of jurisdiction in labour matters has now been obliterated. Furthermore, the Supreme Court has also authoritatively laid down that the doctrine of precedent applies to the administrative tribunals. It has been held that whenever an application under Section 19 of the Administrative Tribunals Act, 1985 is filed which involves a question already concluded by an earlier decision, the tribunal must take into account that decision as precedent and decide accordingly. If the tribunal dissents then the matter must be referred to a larger Bench.

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The role of Tribunals

Tribunals were set up in India to reduce the workload of ordinary courts, to expedite decisions and to provide a forum which would consist of both lawyers and experts in the areas falling under the jurisdiction of the tribunal.⁴³¹

Administrative tribunals have been established by statute primarily to resolve:

1. Disputes between a private citizen and a Central Government department, such as claims to social security benefits etc;
2. Disputes which require the application of specialized knowledge or expertise, such as assessment of compensation following the compulsory purchase of land; and
3. Other disputes which, by their nature or quantity, are considered unsuitable for the ordinary courts, such as fixing a fair rent for premises or immigration appeals.

Advantages of Tribunals

The main advantages of the administrative tribunals are:

Flexibility

Administrative adjudication, not restrained by rigid rules of procedure and canons of evidence, unlike ordinary courts of law, can remain in tune with the varying phases of social and economic life. Administrative adjudication has thus brought about flexibility and adaptability in judicial as well as administrative tribunals.

Adequate Justice

In today’s fast changing world, administrative tribunals are not only the most appropriated means of administrative action, but also the most effective means of giving fair justice to the individuals.

Less Expensive

Administrative adjudication, in most cases, requires no stamp fees. Its procedures are simple and can be easily understood by a layman. Hence, administrative justice ensures cheap and quick justice.

Relief to Courts

Since the very object of tribunals was to reduce the workload of courts, the system gives the much-needed relief to ordinary courts of law, which are already overburdened with ordinary suits.

Disadvantages of Tribunals

Some of the main drawbacks which the system suffers or the dangers it poses to a democratic polity are:

1. Administrative tribunals, with their separate laws and procedures often made by them, put a serious limitation on the celebrated principles of Rule of Law.
2. Administrative tribunals, in most cases, do not have set procedures and sometimes, they violate even the principles of natural justice.
3. Administrative tribunals often hold summary trials and they do not follow any precedents. As such it is not possible to predict the course of future decisions.
4. Administrative tribunals are manned by administrators and technical heads, those who may not have the background of law or training of judicial work. Some of them may not possess the independent outlook of a judge.
5. A uniform code of procedure is not followed in administrative adjudication.

The Working Of Tribunals In India

It has been held in J&K Iron and Steel Co. v. Mazdoor Union432 that tribunals cannot act beyond the scope of law. It can decide the disputes on the basis of the pleadings and have no power to reach a conclusion without any evidence o

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432 J&K iron and steel co. v. mazdoor union, AIR 1956 SC 231.
The tribunals are expected to hold the proceedings in public and to follow fair procedure and decide disputes impartially and independently.

All tribunals in India are arranged on the following basis:

a) Created by a statute;

b) Subject to the writ jurisdiction of the superior judiciary and to judicial review;

c) Manned by experts and persons with judicial experience;

d) Subject to the superintendence of the concerned High Court under Article 227 of the Indian Constitution;

e) Decisions may be final or appealable within the tribunal or, in certain cases, to the High Court. Appeals against orders of the tribunal may be heard by the Supreme Court by special leave under Article 136 of the Constitution.

Administrative tribunals must act openly, fairly and impartially. They must give a reasonable opportunity to the parties to represent their case and adduce evidence.

In *Union of India v. T.R. Verma*\(^{434}\), the Supreme Court held the following to be a part of natural justice:

a) Parties must be able to adduce all evidence being relied upon.

b) Evidence must be taken in the presence of both the parties.

c) Must be given an opportunity to cross-examine.

d) No material must be relied upon without giving the party an opportunity to explain the evidence.

Tribunals are free to evolve their own method of procedure as long as they conform to the basic principles of natural justice. The procedure prescribed by Evidence Act or CPC does not apply.

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\(^{433}\) *supra* note 6.

The Supreme Court held in *Dhakeswari Cotton Mills Ltd. V. CTI* that the Income Tax Officer was not fettered by technical rules of evidence and pleadings, and was entitled to act on materials which might not be accepted as evidence in a court of law.

In *State of Haryana v. Rattan Singh*, it was observed that the essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice.

In the leading case of *Union of India v. T.R. Varma*, the Supreme Court rightly observed that the law requires Administrative Tribunals to observe the rules of natural justice in the conduct of the enquiry before them. If they do so, their decisions are not liable to be impeached on the ground that the procedure followed by them was not in accordance with the procedure followed by a Court of Law.

**Power of declaration as to constitutionality of laws**
Administrative Tribunals are competent to exercise all powers which the respective courtshad, including declaration as to constitutionality of relevant laws. In short, the jurisdiction of Tribunals is not supplementary but a complete substitute of the High Courts and Civil Courts. The tribunals can declare unconstitutional any statute or subordinate legislation relating to the dispute before it, which contravenes provisions of the constitution.

In *State of Mysore v. Shivabasappa*, the Supreme Court observed that "The only obligation law casts on Tribunals is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it."

**Power of Review**
There is no inherent power of review with any authority and the said power can be exercised only if it conferred by a relevant statute. As a general rule, an administrative tribunal ceases to have control over the matter as soon as it makes an order and thereafter cannot

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435 *Dhakeswari Cotton Mills Ltd. V. CTI*, AIR 1955 SC 65.
439 See S.P. Sampath Kumar v. Union of India, AIR 1987 SC 386.
review its decision unless the said power is conferred on it by statute, and the decision must stand unless and until it is set aside by appellate or revisional authority or by a competent court.

In the Leading case of Northern India Caterers (India) Ltd. v. Governor of Delhi,\(^{442}\) Pathak J rightly observed:

“Whatever the nature of the proceedings, it is beyond disputed that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.”

However, this does not mean that in absence of any statutory provision administrative tribunals are powerless. An administrative tribunal possesses those powers which are inherent in every judicial tribunal. Thus, it can reopen ex-parte proceedings if the decision is arrived at without issuing notice to the party affected, or on the ground that it had committed a mistake in overlooking the changes in the law which has taken place before passing the order, or to prevent miscarriage of justice, or to correct grave and palpable errors committed by it, or what the principles of natural justice required it to do.\(^{443}\)

The tribunal system has been growing haphazardly with the lack of any overarching plan.\(^{444}\) There is no uniform administration of these tribunals and there is flexibility in the standards of natural justice which have to be followed.\(^{445}\) The Supreme Court expressed the problems related to tribunals by stating that:

“Tribunals have been functioning inefficiently ... The situation at present is that different tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some tribunals have been created pursuant to the Central legislations and some others have been created by State legislations.” \(^{446}\)

\(^{442}\)northern india caterers (india) ltd. V. Governor of delhi (1980) 2 scc 167, 172: air 1980 sc 674, 678.
\(^{443}\)shivdeo v. State of punjab, air 1963 sc 1909, 1911.
\(^{445}\)id at 867-868.
Also recently, the Supreme Court has expressed its concerns over the ‘bureaucratic attitude’ in the functioning of several tribunals pronouncing that it was very unfortunate that the court had to interfere for the provision of infrastructure and manpower.\(^4\)\(^4\)\(^7\) Hence, there are a lot of issues surrounding tribunals which need to be addressed. These issues cause inefficient functioning of the tribunals, and the lack of a uniform procedure in adjudicating disputes.

There have been examples of interlude in the tussle between judiciary and the legislature on the “tribunalisation” of courts. A Division Bench of the Madras High Court struck down key provisions relating to the Intellectual Property Appellate Board (IPAB) established under the Trade Marks Act, 1999, as unconstitutional.\(^4\)\(^4\)\(^8\) The validity, character and competence of several of the tribunals in India have been a subject matter of much concern. The Supreme Court has, in several decisions, articulated the principles that a tribunal has to abide by in order to be constitutionally valid. A Vidhi Centre for Legal Policy report (2014) has identified about 29 different tribunals set up under various Central legislations, and found several of them to be inconsistent with the parameters laid down by the Supreme Court.\(^4\)\(^4\)\(^9\)

The Supreme Court in *Chandra Kumar* (1997) suggested that the tribunals which were replacing the jurisdiction of the Courts should enjoy the same constitutional protections as them. Henceforth, when the jurisdiction is being transferred from a court to a tribunal, the members of this tribunal should hold a rank, status and capacity as close to those of the judges in a court as possible. The Supreme Court in a recent judgment struck down the National Tax Tribunals (NTT) and also clearly spelt out the parameters to test the constitutionality of tribunals. Hitherto, little effort has been made by the legislature to make the law consistent with these constitutional principles. Instead, the honourable judges have

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\(^{449}\) *id.*
noted that the government continues to be “furtive” and “reticent” about these precedents while the tribunals usurp judicial powers.450

Despite three landmark judgments, there are a lot of issues regarding the tribunal system in India. First, the delivery of speedy justice was one of the reasons for the establishment of tribunals but if the decisions of these tribunals were subject to judicial review, the High Court would have to hear those cases when already the Supreme Court had the power to do so and hence it would lengthen the judicial process. Second, the independence of the tribunals is under question as administrative or technical members are, in most instances, appointed by the Executive and many tribunals consist of members from the Executive. Third, there is no uniformity in administration among the tribunals and the functioning of most of the tribunals is in a very bad state.

Conclusion
The tribunal system in India has evolved to a great extent since independence till today. These changes in the system are clearly observable from the pre-independence period and the post-independence period to the 42nd Amendment Act and further by the constitutional position of these tribunals upheld in the judicial pronouncements from Sampath Kumar to Chandra Kumar. The problems arising out of this development have become the most important issue of law and its administration in the present era. They have affected many aspects of the legal system. The tribunal system faces a lot of issues. Owing to the important sphere that tribunals occupy in both administrative law as well as constitutional law, these issues form a vital part of the discourse in these areas.

Though there are a number of tribunals functioning in the country, very few of them have been able to arouse confidence in the public. Tribunals have shown lack of competence and objectivity in determining disputes. The constitution of the tribunals and the method of appointment of the personnel is another reason for their failure. Tribunals are meant to provide specialized adjudicatory services but the persons appointed lack the requisite expertise and are on the tribunals merely because of political pressure and executive interference. Persons with expertise and the right qualifications are unwilling to sit on these

450id.
tribunals thus leading to their unsatisfactory functioning. The uncertainty of tenure, unsatisfactory service conditions, interference by the executive and political interference has further hampered the proper development of tribunals in India. They do not follow any uniform procedures but only the principles of natural justice, regarding which he case law is inconsistent and the courts have not laid down any basic guidelines. This makes it problematic for the persons affected and the adjudicators to understand the procedures which have to be followed.

Tribunals are established to serve as alternative mechanisms to High Courts. Therefore, they must be able to inspire public confidence by proving themselves to be a competent and expert mechanism. To attain this, first, it is essential that the members of the tribunal are equipped with requisite judicial acumen and expertise. Second, as recommended by the Supreme Court in Chandra Kumar, the Ministry of Law and Justice should appoint an independent supervisory body to oversee the working of the tribunals, to keep the administrative justice system under review and to consider ways to make the system accessible, fair and efficient. Third, the recommendations of the Law Commission Report of 1958 must be implemented for the formulation of minimal norms of procedure to be followed. The Commission recommended that there should be a legislation for the functioning of tribunals which provides for a simple procedure reflecting the principles of natural justice and brings uniformity in their administration.

In view of that, the overall picture regarding tribunalisation of justice in the country is far from satisfactory. Though the reasons for setting up of tribunals are very relevant, the system faces a lot of issues. A fresh look at the system of tribunals in India is required to serve the purposes of its establishment so as to ensure speedy justice arising out of administrative disputes which is essential for the development of the nation.

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‘SOCIAL ENGINEERING’ IN HUMAN MILK BANKING: A PRISMATIC APPROACH TO THE CORPORATE SOCIAL RESPONSIBILITY

SUSMITA HALDAR

Abstract

The corporate sector acts as the ‘helpmate’ of the Government in complying with the common needs of the society. Raising the nutrition level of the people and improvement of public health is one of the primary duties of the State Government (Article 47). ‘Formula’ milk cannot be the substitute of own mother’s milk; the only substitute is another mother’s milk. The human milk banking has been launched in the practical field to promote the optimum nutrition to the infants; but launching such banking is highly expensive. So the developing countries like India cannot take much initiative regarding this. During the discussion on the motion for consideration of the Companies Bill, 2011 it was argued that the issue of Corporate Social Responsibility (CSR) would be taken up in the new Companies Act of India to engage the corporate profit in the development of this country. Beneficial measures for the employees, consumers, projects on gender justice, education, general health policy etc. have much generality as CSR policy measures under the Corporate World. Recently the Human Milk Banking has become a new issue in the CSR policy of some Indian Corporations. This paper proposes to explore the ‘social engineering’ in human milk banking as both the State policy and corporate social responsibility policy in the Indian context from Constitutional and Jurisprudential perspectives.
Introduction

Dharmena ca dravyavriddhava:tiṣṭhed yatnamuttamam/
Dadya:cca sarvabhu:ta:na:mannameva prayatnatah//

[The Manusamhita, IX. 333]

The Manusamhita holds that the Vaishyas can make profit only in accordance with religious norms, i.e., they cannot gain in an immoral way; they should provide food for all since it is their social duty. So the concept of social responsibility is not new in India. During the freedom-movement, Gandhiji introduced the notion of ‘trusteeship’ in which industry-leaders should manage their wealth so as to benefit the people. He took initiatives through ‘sarvodaya’ for the upliftment of the society, especially the oppressed. During 1960s to 80s Public Sector Undertakings were set up to ensure suitable distribution of resources, e.g., wealth, food etc., to the needy. Thus the corporate sector becomes the ‘helpmate’ of the Government in complying with the common needs. Raising the nutrition level of the people and improvement of public health is one of the primary duties of the State Government (Article 47). As reported in THE HINDU (May 2, 2012) India has the highest premature baby deaths (3,519,100) in the world largely because of malnutrition. ‘Formula’ milk for infant nutrition cannot substitute own mother’s milk; the only substitute is another mother’s milk. The human milk banking has been launched to provide the optimum nutrition for the infants especially for the neonatal babies; but such banking is highly expensive. So the developing countries like India cannot take much initiative regarding this. During the discussion on the motion for consideration of the Companies Bill, 2011 it was argued that the Corporate Social Responsibility (CSR) would be taken up in the Companies Act of India to engage the corporate profit in the development of this country. Beneficial measures for the employees, consumers, projects on gender justice, education, general health policy etc. have much generality as CSR policy measures under the Corporate World. Adoption of the Human Milk Banking as the CSR policy has become one new trend in the Indian Corporate Sector which is parallel to the State initiatives. This paper proposes to explore the State-Society-Corporations triangular relationship through the ‘social engineering’ of human milk banking as a ‘corporate’ social responsibility policy in the Indian context from Constitutional and Jurisprudential perspectives.
Objectives

i. To determine the increasing popularity of Human Milk Banking and its viability in the practical field through the light of Constitutional framework, International order and Jurisprudential perspective;

ii. To search for the undocumented jurisprudential analysis behind every State Policy;

iii. To study on the role of the Corporate Governance within the territory of the State Governance;

iv. To analyse the impact of the Principles of Roscoe Pound’s (an eminent jurist of the ‘Sociological School’) ‘Social Engineering Theory’ in the State practice and Corporate Management.

Part I

The Concept of Human Milk Banking System:

The human milk banking system ‘collects, screens, processes, and dispenses by prescription human milk donated by nursing mothers who are not biologically related to the recipient infant.’ These offer a solution to the mothers who cannot supply their own breast milk to their child, for certain circumstances, e.g., a baby being at risk of getting diseases and infections from a mother with some dangerous diseases, a child is under the condition of necrotizing enterocolitis, etc. According to World Health Organisation guidelines infants up

to two years should be fed by breast milk. Artificially pumped breast milk is to be stored according to the medical expert guidelines.\textsuperscript{454}

\textit{Necessity of Human Milk Banking System:}

As per the United Nations Guidelines regarding the infant food production, the best food for a baby who cannot be breastfed is milk expressed from the own mother’s breast or from another mother having good health.\textsuperscript{455} However, direct breastfeeding by another woman may not be possible in all circumstances; so the preservation of such milk is necessary. The basic reasons behind such a project are pointed below:

\begin{itemize}
  \item [a)] \textbf{Easily digestible composition of human milk:} Human breast-milk is different in composition from the other mammals’ milk. Cow milk contains little amount of \textit{iron}, retinol, \textit{vitamin E}, \textit{vitamin C}, \textit{vitamin D}, \textit{unsaturated fats} or essential \textit{fatty acids} for human babies and too much \textit{protein}, \textit{sodium}, \textit{potassium}, \textit{phosphorus} and \textit{chloride} which may put a strain on an infant’s immature \textit{kidneys}. So Infants’ digestive system cannot absorb cow’s milk.\textsuperscript{456}
  \item [b)] \textbf{Breast-milk is the optimal nutrition of the infant.}
  \item [c)] \textbf{Breast-milk is the medicine for ill and premature babies.}
  \item [d)] \textbf{Formula milk is incapable of becoming the substitute of breast-milk.}
\end{itemize}

The composition of the milk of every mammalian species exclusively suits their infants. So human milk banking is purely guided by the Law of Nature. It also helps those mothers who produce an excess of milk. Pumping extra milk from the breast protects them from breast abscess often causing cancer. Further with the development of IVF and practice


of surrogacy, Human Milk Banking obtains a special importance to protect both the surrogate mothers and the babies. Moreover, if informal practice of milk sharing which was an age-old custom in many countries is allowed to be carried on without formalisation, communicable diseases like AIDS will spread rapidly. One source reports that the adult cancer patients are advised to take breast milk in an attempt to improve their immune systems and reduce the side effects of chemotherapy. One milk bank in California has taken initiatives to supply 28 adult patients in the past four years with donated breast milk. So at this present stage of development in all spheres requirement Human Milk Banking has become an international concern.

The Dimensions of Corporate Social Responsibility:

The Corporate Social Responsibility represents the mechanism of corporate management in the business market to produce an overall positive impact on the society. It maintains sustainability in business by balancing the economic, social and environmental responsibilities.

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458 ibid.
Holme and Watts define that corporate social responsibility is ‘the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.’

Corporations are assumed to be the citizens of India like the natural persons. The concept of CSR policy reflects that the corporations have to abide by the Fundamental Duties of an Indian citizen as enshrined under Part IVA (Article 51A). The relation between the corporations and the society has an octagon-shape (as represented below).

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According to Denning, L.J., in the eye of the law, the corporation is its own master and is answerable as fully as any other natural person [mentioned in The State Trading Corporation of India Ltd & Others v The Commercial Tax Officer, Visakhapatnam and Others 1963 AIR 1811, [1964] 4 SCR 89].

It should be mentioned that the Scholars have presented three models (Carroll’s pyramid, Intersecting model and Concentring model) on the dimension of four corporate social responsibilities (economic, legal, ethical and philanthropic) on the basis of their importance within the societal plane. Amongst them the Intersecting Model shows a favourable approach to the sustainable business; but in the practical field the Concentring Model helps to maintain the sustainability.

462 For convenience, on the basis of the Corporate Governance in practice, the Corporate Social Responsibility is theoretically assumed to have four dimensions: economic, legal, ethical and philanthropic. Maintaining the flow of money within a society is the economic responsibility. The legal responsibilities are formed from the ‘codified ethics’. To pay tax to the Government, to provide sickness, maternity, medical benefits etc. for the employees, not to adulterate the foods or not to use unfair and corrupt trade practice, etc. are the well-known legal responsibilities of the corporations. All the legal responsibilities are also ethical in nature; but in case of qualitative legal responsibilities the decision making, action-plans and their practical implementation involve the ethical responsibilities which may not purely legal within the strict words of the paper rules. Philanthropic responsibility is discretionary or voluntary in nature and may have no connection with the main object of the business. Donating money or other resources for charitable purposes, initiating orphan school programme, conducting an in-house programme for making awareness regarding the use of drugs, sponsoring civic events, etc. are the examples of such responsibility.
From Figure 4 it is clear that the concentrating model shows an integration of four responsibilities. Modern Corporate Governance makes it evident that adoption of this model is easier in the practical field. Through this model a viable relation between the State, Society and the Corporations can be maintained.

**PART II (CORPORATE-STATE RELATIONSHIP)**

**Corporations as the Helpmate of State in Securing Social Justice:**

Undoubtedly there are inherent difficulties in a regime of justice according to law...We must pay a price for a balance of security, justice in the sense of
the ideal relation among men, and morals in the sense of the highest individual development... - Roscoe Pound

In the Preamble of the Constitution of India it is resolved to secure to all the citizens ‘JUSTICE, social, economic and political’. Article 38, directs that the State shall strive to promote the welfare of the people by securing and protecting as effectively as possible. By invoking the ‘Social Contract Theory’ it can be said that people constitute State for good governance, which means that State has also social and philanthropic responsibility which is clothed by its political identity. Part IV of the Indian Constitution through the Directive Principles of State Policy provides a guideline for the State Governments as well as the Central Government in order to comply with social responsibilities. Article 37 says that Part IV is not enforceable before any Court of Law in India; but according to the view of the founding fathers if the present Government fails to discharge these responsibilities, it will have to pay for the same within this ‘DEMOCRATIC’ and ‘REPUBLIC’ State. On the other hand under the Indian Laws the philanthropic responsibility of CSR policy has been made mandatory only in respect of the highly profit making Corporations; but the practice of Corporate Governance in India shows that the small corporations also have much enthusiasm in implementing such policy to ensure viability of the business. The Public Sector Undertakings are the most effective instrument of Government for such cases. In National Textile Workers’ Union etc. v P R Ramkrishnan and Others, it is held that the socio-economic objectives set down in the directive principles of the Constitution should guide and shape the new corporate philosophy. Similarly, the apex court in Consumer Education & Research Centre v Union of India, and LIC of India v Consumer Education and Research Centre Anr., has stated

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464 AIR 1983 SC 75.

465 JT 1995 (1) SC 637.

466 AIR 1995 SC 1811.
that the corporations are also bound by the directives contained in Part IV.\footnote{467} In *Dwarkadas Marfatia & Sons v Board of Trustees of the Port of Bombay*,\footnote{468} it is held that the Corporation must act according to certain constitutional conscience which must be discernible from the conduct of such Corporations.

Thus the Directive Principles of State Policy along with the Legal Framework on the CSR policy draws a triangular relation among the State, Society and Corporations.

This jurisprudential analysis clarifies that Corporations can act as the helpmate of the State — another corporate personality.

**Law on the Corporate Social Responsibility:**

Indian legislative measures on the implementation of the CSR policy can be divided into - i) Corporate Legislations and ii) Other Legislations. Amongst the Corporate legislations the *Companies Act, 2013* deserves mention. This Act for the first time has used this term under Section 135. Before 2013, the legislative measures did not intend to include the philanthropic responsibilities of a company within the legal purview; but the Act of 2013 has framed this Section in a way to include the philanthropic responsibilities also, though not by a direct approach. According to Section 135, every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. The CSR committee will make measures in formulating the CSR policies. The Board of every company shall ensure that the company spends, in every financial year, at least two percent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

\footnote{467} See also *Bears Cave Estate v The Presiding Officer, Labour Court, Salem, W P No 802 of 2009.*

\footnote{468} [1989] 2 SCR 751.
The Companies (Corporate Social Responsibility Policy) Rules, 2014 has mentioned in detailed the procedural formalities to be followed to discharge the corporate social responsibility. It has given much stress on the CSR reporting which is to be included in the annual report of the concerned company (Rule 8)\(^{469}\) and on the display of the CSR activities in the official website of the company (Rule 9). The other legislative measures are shown in brief in Figure 5.

\(^{469}\)The format of the annual report on CSR activities to be included in the Board’s report is given in the Annexure (Part II).
PART III (SOCIAL ENGINEERING IN HUMAN MILK BANKING)

Human Milking Banking in India- State and Corporate Initiatives:

Practice of milk sharing through fosterage was very common in ancient India. But in India baby-food producers have replaced this practice partially by initiating production of various baby foods. Meanwhile, they tend to ignore both the spirit and letter of the WHO code promoting breast-feeding and violate even the recommendations of their own working group. Since 1989 this scenario is changing vary slowly. The first mother’s milk bank in Asia started at the Lokmanya Tilak Municipal General Hospital (LTMGH) in Mumbai in 1989. The milk bank at LTMGH feeds over 30 sick and premature babies each day. Since then, some 25 human milk banks across India, especially in Maharashtra and Gujarat, have been serving premature babies requiring temporary intervention in cases of delayed lactation, abandonment or illness. In 2013 two human milk banks started in Mewar and in Kolkata at SSKM hospital. The then Health Minister, Government of West Bengal, Chandrima Bhattacharjee commented that establishment of such a bank in Kolkata is the first ever Public Sector initiative of setting up a modernized and advanced breast milk bank. On April 2014 it was reported that Vijaya Hospital set up the first private sector human milk bank of Chennai. In 2015 Rajasthan’s first State-run human milk bank, ‘Jeevan Dhara’ was inaugurated by the Health Minister Rajendra Rathore at the Mahila Chikitsalaya. The first mother’s milk bank in this State was opened by a Non-Governmental Organisation in a Government hospital in Udaipur. Doctors hope that such banking system and the States’


initiatives can go a long way in saving lives in India, where infant mortality rates are among the world's worst - 57 deaths per 1,000 live births and infant deaths in the newborn's first month is a disquieting 43 per 1,000. On January 2016 it is reported that 'PATH' (Program for Appropriate Technology in Health), an international health sector (non-profiting) has taken initiative to promote human milk banking in Uttar Pradesh.

**Human Milk Banking as the CSR Policy:**

The evolution of the Corporate Social Responsibility at the international level can to a large extent be linked to three major events occurred in 1970s including the boycott of Nestlé for its practices in marketing breast-milk substitutes. Nestlé in the promotion of breast milk substitutes in developing countries targeted low-income consumers who were then unable to buy sufficient quantities of infant formula, and used polluted water to dilute the milk. This event hit the root of production and marketing of the formula milk. UNO and WHO initiatives on the promotion of breastfeeding at this era have opened the path of launching human milk banking.

A move has been initiated by the Tata Motors Hospital to bring down the infant mortality rate in Jamshedpur. In 2011 The Steel City-based leading hospital has taken

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474 It was reported that in Rajasthan besides two, ten more milk banks would be set up in district hospitals in Alwar, Beawar, Banswara, Bara, Bhilwara, Bharatpur, Bundi, Chittorgarh, Churu and Tonk before March 2016 [See G S Pillai, '10 more milk banks to come up in Rajasthan' THE TIMES OF INDIA (Jaipur, 3 September 2015) <http://timesofindia.indiatimes.com/city/jaipur/10-more-milk-banks-to-come-up-in-Rajasthan/articleshow/4878321.cms> accessed 21 May 2016].


initiatives to set up a breast milk bank that would serve the infants, particularly, motherless children in the state. In 2013 the donation of equipment worth Rs 15.06 lakh to the State-run Sasson General Hospital, for setting up the human milk bank, as part of the Corporate Social Responsibility (CSR) initiative was approved by the Mumbai head office of Bank of Baroda. Recently in March 2016 MILMA, the Kerala Cooperative Milk Marketing Federation Ltd, is set to join hands with the Netherlands to produce nutritious, high-quality ‘organic milk’. According to the Managing Director for MILMA, the organic milk project is not just for profit making. They are planning it under our corporate social responsibility programme. The first pasteurised human milk bank, ‘Amaara’, in Delhi and National Capital Region has been opened at Fortis La Femme in New Delhi on the 26th April, 2016, as a part of Corporate Social Responsibility (CSR) initiative.


Though the number of Corporations taking human milk banking as the CSR policy is very little in India, it establishes a new relationship between the State and the Corporate Sector by reshaping the concept of corporate citizenship.

Social Engineering in Human Milk Banking: Involvement of Corporations:

Roscoe Pound in his ‘Social Engineering Theory’ says that, the words ‘social engineering’ mean a system mechanism found by reason, tested by experience, promulgated by the authority of politically organised society and backed by the force of that society, for the purpose of securing the maximum of human interests and satisfying the maximum of human demands with a minimum of friction and waste. So for securing justice, balancing individual interest and social interest is required. Social Engineering is the mechanism of balancing between individual interest and the social interests. The working principle of this theory follows the principles of the working of the Class I Lever. The comparative study between these two principles is represented in the following diagram.

<table>
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<tr>
<th>Functioning of the Class I Lever</th>
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<tr>
<td><strong>The balanced stage</strong></td>
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<td><strong>The unbalanced stage</strong></td>
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Class I levers have the fulcrum placed between the load and the effort; the two arms of the lever are of equal length. In the balanced stage the effort is equal to the load.

<table>
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<tr>
<th>Mechanism of Social Engineering</th>
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<tr>
<td><strong>The balanced and approved stage</strong></td>
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<td><img src="#" alt="Diagram of the balanced and approved stage" /></td>
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<tr>
<td><strong>The unbalanced and unapproved stage</strong></td>
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<tr>
<td><img src="#" alt="Diagram of the unbalanced and unapproved stage" /></td>
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</table>
It is impossible to fulfil all the desires of a human being, but to fulfil the desires of maximum people in society this concept was merged by Pound. According to him, a lawmaker acts as a social engineer by attempting to solve social problems using law as a tool. Human Milk Banking Project mainly deals with the individual interest. Breast-feeding right is a child’s right to life. In ‘the right to life’, the right to healthy development is also incorporated. Through breast-feeding a child’s healthy growth is possible which cannot be substituted by...
any other alternative. But in certain situations when a child’s own mother’s milk is not available or cannot be consumed, the child is required to be fed by another mother’s milk. By shifting the view to society the social interest can be revealed. Then this milk sharing cannot be surrounded within the individual child interest; the focal point automatically shifted to the border of these individual interest and social interest. Pound insisted that the individual interests should be weighed ‘on the same plane’, as they were. For balancing one should transfer those interests involved on the same ‘plane’, preferably in most cases to that of the social plane, which is the most general. Balancing these two interests becomes necessary to avoid the conflict that arises between the individual child-interest of breast-feeding and the social interest to protect all children within the State jurisdiction. The human milk banking project balances them, as well as the interest of the lactating mothers and the infants.

The social engineering as a principle for practical mechanism is represented in the following diagram with a flow chart.

![Diagram](image)

(1. It should be determined where the individual interests and the social interest share the common focus.)

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(2. Only the area where the social interest and individual interests overlap should be taken into consideration for policy making.)

↓

(3. Ultimately it can help the policy maker to get the balanced result)

Fig. 7

In the tough and tight competitive market of the corporate management, human milk banking, as a CSR policy, acts like the first class lever as it brings common people closer to the corporation; thus the corporation can establish new consumer-relationship. In such case the corporation-society relationship has a two folded shape — i) the corporation and milk donor relationship and ii) the corporation and milk consumer relationship.

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482 Here this consumer holds a general expression, not the specific expression covered by the Consumer Protection Act, 1986.
Fig. 8

Thus it widens the marketing field of the corporate business and maintains the balance between the individual needs, social needs and the corporate interests. Though Pound’s theory have been criticised for its abstract approach, it has a notable impact in the State practice and Corporate Management especially in the developing States like India.

Legal Support behind the Human Milk Banking: National and International:

**Indian Constitutional and Legislative Framework:**

The right to healthy development is one of the fundamental rights of the infants protected under Article 21. So the breastfeeding right of a child is protected by this Article. Article 47 of the Indian Constitution directs that the State shall regard among its primary duties raising the level of nutrition and the standard of living and the improvement of public health. Human Milk Banking Policy initiates the re-opening of the unregulated informal form of the age-old custom of milk sharing in the implementation of Constitutional Framework of the Directive Principles of State Policy.

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483 In *Laxmi Mandal v Deen Dayal Harinagar Hospital & Ors* W.P.(C) 8853/2008 (The Delhi High Court), right to food was seen as an integral part of the right to life.
Breastfeeding is a recognised strategy of reducing infant mortality rate. In India breastfeeding is culturally deep-rooted, accepted as the natural function; but since the late 20th century especially in urban areas a decline in breastfeeding became evident causing malnutrition and infant mortality rate. In 1983 the Government of India being a signatory to the International Code of Marketing Breast Milk Substitute, 1981, adopted the Indian National Code for Protection and Promotion of Breastfeeding. In 1992 the Infant Foods, Breast Milk Substitutes and Feeding Bottles Act, 1992 has been enacted to 'provide for the regulation of production, supply and distribution of infant milk substitutes, feeding bottles and infant foods with a view to the protection and promotion of breastfeeding and ensuring the proper use of infant foods and for matters connected therewith or incidental thereto.'

Support of the International Laws:

The first evidence of legal sanction of such practice is documented in the Code of Hammurabi (1790). There is no single international instrument which solely and directly deals with this project. However the sources of international support behind it can be listed as below:

a. The Charter of the United Nations (1945), Article 55,

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484 Under Section 6 of The Hindu Minority and Guardianship Act, 1956 it is clearly mentioned that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. This strengthens the breastfeeding right of a child. Breastfeeding is also encouraged by The Holy Quran.

485 Section 194 says that if a man has given his son to a wet-nurse to suckle, and that son has died in the hands of the nurse, and the nurse, without consent of the child's father or mother, has nursed another child, they shall prosecute her; because she has nursed another child, without consent of the father or mother, her breasts shall be cut off.

486 This Article provides for promoting 'higher standard of living'. The Human Milk Banking provides the same for the infants. So it can be assumed that the UN Charter indirectly supports this scheme.
b. The Universal Declaration of Human Rights, 1948 (Article 25.2, which provides that motherhood and childhood are entitled to special care and assistance);  
c. The International Covenant on Economic, Social and Cultural Rights, 1966, (Articles 11, 12);  
e. The World Health Organisation Resolutions on the infant and young child nutrition; etc.

Thus the Human Milk Banking project has obtained both the constitutional support and the support of the international laws in its implementation.

Factors behind the Controversies regarding Human Milk Banking:

Human Milk Banking is obviously one of the best ways to balance between the active breastfeeding and marketing the breast milk substitutes. The engineering behind this balance is the passive consumption of breast milk. Balancing via scientific engineering cannot be purely correct in its practical application; likewise ‘social engineering’ behind human milk banking is also affected by some external social factors. These factors raising controversial issues regarding human milk banking are mentioned below:

a. Commodityisation of the human milk: There is no law regulating the human milk banks. The tendency of the national and international authorities leans towards the approval of donation of human milk rather than its commoditisation. However, the private sectors in some countries do business with it.

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487 This Article has also the force of Jus Cogens, the peremptory norms or the fundamental, overriding principles of international law, from which no derogation is permitted. Moreover, the UDHR has been passed by 48 votes.

488 The Human Milk Banking project helps to reduce the infant mortality rate, to prevent certain diseases of infants and to promote a healthy development of the children. So these two Articles indirectly support this scheme.
b. **Unregulated online selling of human milk:** This spreads communicable diseases like AIDS, which raises question against the welfare motive behind the scheme.

c. **Insufficient source of breast milk:** The ratio of lactating mothers and infants shows imbalance, for which the implementation of this scheme becomes weak.

d. **Social orthodoxy:** Conservatism and orthodoxy in society takes a biased view against the scheme.

e. **Safety of the women:** Though breast-pumping is a matter of informed consent, there remains the question of the women’s safety during the process.

f. **Expensive mechanism:** Due to expensive mechanism behind this scheme, it is unpopular in developing countries.

g. **Limited distribution of human milk:** The facility is limited to some highly specialised healthcare institutions in urban areas; the rural areas cannot afford to it.

**Conclusion:**

Launching such a project is the State responsibility; but it is highly expensive. So for the developing countries like India it is not possible to implement such a project using only the State fund. So involvement of private corporators is necessary. Thus the corporate initiative in taking and implementing such a project as the CSR policy also helps the State economy in promoting distributive justice by restricting the concentration of wealth in one hand. Moreover, in this way the corporations can help the State in making aware its people regarding the benefits of breast-feeding and the mother’s nutrition. Corporate interference will help the State in launching this project in the interior areas also. Further in such case there is a two-fold possibility of restricting unregulated actions of the corporations in implementing this project as CSR policy by initiating action against it. The insiders in whose view it is violating the legal norms can take actions provided by the corporate legislations and the outsider who are affecting can proceed in accordance with the legal and remedial machineries. Moreover, the State can initiate action against such corporations.
It should be noted that this project is very much sensitive and controversial. So if it cannot be regulated with much technicality it will affect the social character of the State as well as the Corporations. If the corporations are left at liberty to take the same as the CSR policy without any intervention of the State it will lead to the commoditisation of the human milk, unregulated online selling of human milk, etc. Thus the question of both the infants' and the women's safety will arise which can also shake the root of the political personality of the Government. So to regulate such a critical project at first the Parliament should take initiatives. The Human Milk Banking via milk sharing process has originated 100 years ago; since then it is proliferating in the States and now it has achieved the international support. But implementation procedure of this scheme is very week. Except France, most of the States show an indifferent attitude in preparing proper statutory rules for such implementation. At the international level also this scheme faces the similar problem. Both the national and international authorities show an encouraging attitude to the implementation of this scheme; but they are interested to allow this scheme to be implemented through a customary practice rather than through the ‘paper rules’. But a ‘living law’ is always more changeable than a ‘paper rule’. So as a tool for ‘social engineering’ ‘paper rule’ is more acceptable than the ‘living law’. The Social Engineering theory has directed that first the tool for social engineering should be launched and then only the balance will be achieved. Though absolute balancing is not possible there is no denying that through the State-Society-Corporations triangular relationship Human Milk Banking may succeed in providing the optimum nutrition for the infants if the legal framework strengthens its implementation scheme.
ANNEXURE

Part I

Guidelines for the Storage of expressed breast milk

<table>
<thead>
<tr>
<th>Place of storage</th>
<th>Temperature</th>
<th>Maximum recommended storage duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>In a room</td>
<td>10°C-29 °C or 55°F-85 °F</td>
<td>3–4 hours optimal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6–8 hours acceptable under very clean conditions</td>
</tr>
<tr>
<td>Blue-ice pack in a small cooler</td>
<td>15°C or 59°F</td>
<td>Up to 24 hours</td>
</tr>
<tr>
<td>In a refrigerator (either by evaluating the bactericidal capacity of stored milk as a marker for milk quality or by measuring bacterial growth in the stored milk samples)</td>
<td>≤4 °C or 40 °F</td>
<td>72 hours optimal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5–8 days under very clean conditions</td>
</tr>
<tr>
<td>Freezer</td>
<td>≤17°C or 0°F</td>
<td>6 months optimal</td>
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<tr>
<td></td>
<td></td>
<td>12 months acceptable</td>
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</table>


Part II

The Companies (Corporate Social Responsibility Policy) Rules, 2014
Format of the Annual Report on CSR Activities to be Included in the Board’s Report

1. A brief outline of the company’s CSR policy, including overview of projects or programs proposed to be undertaken and a reference to the web-link to the CSR policy and projects or programs.
2. The Composition of the CSR Committee.
3. Average net profit of the company for last three financial years.
4. Prescribe CSR Expenditure (two per cent. of the amount as in item 3 above).
5. Details of CSR spent during the financial year.
   (a) Total amount to be spent for the year;
   (b) Amount unspent, if any;
   (c) Manner in which the amount spent during the financial year is detailed below.

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<tr>
<td>S. No.</td>
<td>CSR project or activity identified</td>
<td>Sector in which the Project is covered</td>
<td>Projects or programs identified</td>
<td>Amount outlay (budget) project or programs wise</td>
<td>Amount spent on the projects or programs</td>
<td>Cumulative expenditure up to the reporting period</td>
<td>Amount spent: Direct or through implementing agency</td>
</tr>
<tr>
<td>Local area or other</td>
<td>Specifying the State and district where projects or programs was undertaken</td>
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<tr>
<td>TOTAL</td>
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</tbody>
</table>

*Give details of implementing agency:

6. In case the company has failed to spend the two per cent of the average net profit of the last three financial years or any part thereof, the company shall provide the reasons for not spending the amount in its Board report.

7. A responsibility statement of the CSR Committee that the implementation and monitoring of CSR Policy, is in compliance with CSR objectives and Policy of the company.

Sd/-
(Chief Executive Officer or Managing Director or Director)

Sd/-
(Chairman CSR Committee)

Sd/-
[Person specified under clause (d) of sub-section (1) of section 380 of the Act]

(wherever applicable)

ABBREVIATIONS:

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Page | 238
TABLE OF CASES

- Bears Cave Estate v The Presiding Officer, Labour Court, Salem W P No 802 of 2009.
- Chiranjit Lal Chowdhuri v Union of India 1950 SCR 869.
- Consumer Education & Research Centre v Union of India JT [1995] 1 SC 637.
- Dwarkadas Marfatia & Sons v Board of Trustees of the Port of Bombay [1989] 2 SCR 751.
- Laxmi Mandal v Deen Dayal Harinagar Hospital & Ors W.P.(C) 8853/2008.
- LIC of India v Consumer Education and Research Centre Anr. AIR 1995 SC 1811.
- National Textile Workers' Union etc. v P R Ramkrishnan and Others AIR 1983 SC 75.

BIBLIOGRAPHY:

A. Primary Sources:

i. Constitution:


ii. Domestic Legislations and Rules:

   c. The Hindu Minority and Guardianship Act, 1956 (32 of 1956).

iii. UN Documents:

b. The International Covenant on Economic, Social and Cultural Rights, G A Res 2200A (XXI); 21 UN GAOR Supp (No 16) at 49; UN Doc a/6316 (1966).


d. The Universal Declaration of Human Rights, G A Res 217A (III); U N Doc A/810 at 71 (1948).

iv. Books:


e. Mahajan V D, JURISPRUDENCE AND LEGAL THEORY (5TH EDN, ebc 1987).


B. Secondary Sources:

i. Ancient Texts:


ii. Articles and Thesis paper:


iii. News and Reports:


iv. Other Sources:


v. Website used:

a. <https://indiankanoon.org/>
COMPARATIVE ADVERTISEMENT ON THE INTERNET:
TRADEMARK DISPARAGEMENT

TIJA GOSWAMI

Abstract

E-commerce, has gained grounds manifold in the past decade making the web next best alternative platform for promotion of business. Advertisements have always been employed as a tool to lure and create an impact on consumers towards ones products, and the internet is proving to be a very efficient mode of reaching the target markets. However, comparative advertising issues have multiplied as a reason of the shift to the virtual world and pose new challenges which are difficult to address because of the technicalities involved. Adware pop-ups and paid comparative reviews available on the internet give rise to new disputes relating to trademark disparagement planting the seeds of unfair competition which affects consumers as well as the competitors. Although the High Court of Calcutta, in the case of Reckitt & Colman of India Ltd V. M.P. Ramachandran & Another [1999 PTC(19) 741] has laid down the guidelines as to permissible limits of comparative advertising, yet the rules of the game has changed with the change in the medium of advertising.

This paper is a study of the emerging disputes in trademark law as a result of interplay between internet and comparative advertising. Lack of specific legislation on comparative advertising and disparity in judicial pronouncements also makes it imperative, that an analysis of the need for legislation and the extent of regulation be made, so as not to prove to be a hindrance to competition.
Introduction

Businesses that are well established and carry goodwill, for them trademarks facilitate consumer’s association with the business and to establish a brand whereas for a newly established business it proves to be an accessory to establish its distinct position in the market so that it can create a niche. Trademarks are symbols that a consumer can associate with a business and it has three fold purposes. The symbol serves a consumers interest because it helps them distinguish between competing products or services. Also, the business itself establishes a distinct identity which it can protect as its property from its competitors. Competitors in turn have their own interest as they can make fair use of its contemporary’s marks to establish its own mark. These marks have an economic value which adds to the growth or decline of a business. When we consider all trademarks at equilibrium with each other, we understand that for a business to succeed in creating a position in the market it needs to create awareness about itself. And this is done through advertising. Advertisements are a one of the best modes of reaching the masses. Over time, advertising has undergone transformation in the modes adopted to advertise as well as methods. It began with posters and newspapers and now the latest platform for advertisements is the internet. With transformation of modes of advertising, a demand arises for new legislations to tackle with problems trailing the new means of advertising. The conflicts regarding advertising mostly arise in the case of comparative advertising. And when comparative advertising meets the internet the conflicts increase manifold.

The paper is an analysis of the trends in comparative advertisement, how the problems arise when a competitor’s mark is used by an advertiser and if our legislation is adequate to answer the questions that might arise in a court of law regarding the same.

Comparative advertising – what is it?

The primary objective behind a business advertising its brand is to make consumers aware of the availability of the product in the market and to appeal to their senses or vanity etc so as to give them a push towards its consumption by portraying that it is something that they need or would wish to possess. Businesses employ various methods of undertaking this exercise, with its modest beginnings of advertising through pictorial representation in
newspapers.\textsuperscript{490} With the advent of time a method of advertising gained popularity wherein the producer compares his product to his competitor’s in a bid to showcase the superiority of his own product and hence the better option for the consumer. This method of advertising is termed as comparative advertising.

Comparative advertising is “any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.”\textsuperscript{491}

In India, the development of laws on comparative advertisement is a relatively recent phenomenon and has gained momentum in the Indian business in a very short period leaving no time for the legislative and the judiciary to keep pace with it. Hence, the abundant judgments delivered in the courts of England and the United States play a major role in the advancement of the laws relating to the field in India.\textsuperscript{492}

Comparative advertising primarily has two components, namely, puffery and disparagement. When a producer states unverifiable facts which are mere assertions of opinion regarding the marketed product, it amounts to puffery. When puffery leads to putting competitor’s product in a negative light, it amounts to crossing the limits of tolerance which is not permissible by law which then is said to be denigration or disparagement.\textsuperscript{493} Therefore, the most debated question regarding comparative advertising is as to what limit is puffery permissible so as not to amount to denigration. To draw a clear understanding of the subject, the interest of the advertiser, consumer as well as the competitor has to be taken into account.\textsuperscript{494} The aim of the advertiser, as we have understood, is to gain market by projecting his products in a manner that would draw consumers whereas the competitor

\textsuperscript{491} Directive 2000/114/EC of the European Parliament and of the Council of 12 December 2006 Concerning Misleading and Comparative Advertising, L(376) 21, Art. 2 (c)
\textsuperscript{492} ASHWANI K BANSAL, LAW OF TRADEMARKS IN INDIA WITH INTRODUCTION TO INTELLECTUAL PROPERTY, U76-77 (2d, 2009)
\textsuperscript{494} Id
would always try to put off any advertising tactics used by advertiser that would, in any way, tarnish the image of its product or use his product as a standard which the advertiser claims to exceed. The interest of the consumer lies in being aware of the genuineness of the advertisements and not be bogged down by bogus claims.

Moreover, any attempt to legislate a law in India with this regard has to be made in tandem with Art. 19(1) (a) of the Constitution of India although initially, as observed in the case of *Hamdard Dawakhana v Union of India*, Supreme Court was of the opinion that advertisements did not come under the ambit of ‘free speech’. However, a shift from the established view was made in *Tata Press v Mahanagar Telephone Nigam Ltd* wherein the Apex court observed that advertisements benefited consumers because of the free dissemination of information, increasing public awareness in a free market economy stating that advertisements are the “life-blood” of free media. And hence, it reversed the position taken in the former case and held that advertising constituted “commercial speech” and hence it merited Constitutional protection under Article 19 (1) (a).

India incorporated provisions dealing with comparative advertisements after the amendments made to the Trade Mark Act in 1999. Before the commencement of the Competition Act, 2002, matters related to misleading and fallacious advertisements was dealt with under the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 after amendment made in 1984 led to the inclusion of the chapter dealing with “unfair trade practices” wherein Section 36A of the Act enumerated several acts that would amount to “unfair trade practice”. If any party was adjudged to have been involved in any such practice, then the offending party was ordered to cease and desist practice. Presently, the Consumer Protection Act, 1986 vests the authority with consumer grievance forums established under the Act to address complaints of unfair trade practices. The Act has imported the definition of “unfair trade practice from Section 36 A of the MRTP Act and incorporated the same into Section 2 (1) (r) of the Consumer Protection Act. However, since these forums are

495 Id
496 Art. 19 (1) (a) ‘Protection of certain rights regarding freedom of speech etc.’
497 *Hamdard Dawakhana v Union of India*, AIR 1960 SC 554
499 Gokhle, Supra note 5
concerned with the grievances of the consumers, the interests of the competitors are not addressed and hence the Act is not equipped to wholly address the problems entailing comparative advertising.

Hence, the Advertising Standards Council of India\(^{500}\), in the absence of a regulatory framework, has adopted a self-regulating model. Chapter IV of the ASCI Code for Self Regulation in Advertising deals with rules regarding comparative advertising. The code permits comparative ads so as to promote healthy and free dissemination of information, on the fulfillment of certain pre-requisites\(^{501}\) –

a) The subject matter of comparison between the advertiser’s and competitor’s products must be explicit.

b) The comparisons made must be verifiable, based on facts rather than fiction and capable of substantiation.

c) The subject matter under consideration must not give an obvious advantage to the advertiser over the competitor.

d) The consumer must not be misled by the comparison made. Even mere likelihood of misleading is to be taken into account.

e) The advertisement must not directly or indirectly denigrate, attack or discredit competitors’ products.

In Britain, the advertising industry adopted a self-regulating system when they saw the threat of external regulation after the Monoley Committee on Consumer Protection, 1962 made recommendations that an independent body should be established to regulate the industry. The industry established the Advertising Standards Authority (ASA) with the object to ensure that the advertisements that are broadcasted are “legal, decent, honest and truthful”.\(^{502}\)

The Federal Trade Commission (FTC) is the leading regulatory body in the United States and its primary objective is protection of the consumer from unfair and/or deceptive market commerce.

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500 It is a non-statutory tribunal established in 1985 and comprises of an association of advertisers.
501 Gokhle, Supra note 5
502 TOM CRONE, LAW AND THE MEDIA 204-07 (1996)
practices and to promote healthy competition. However, FTC, like the consumer grievances forums, is unable to provide relief to aggrieved competitors. So, it becomes essential that the distressed competitors directly approach the Court for relief by seeking injunction under Section 43 of the Lanham Trademark Act, 1946 which prohibits a person from making “false or misleading representation of fact” in “commercial advertising or promotion” that represents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities. Through judicial pronouncements, the Court has restricted the relief granted under the provision only to competitors and consumers are excluded from seeking reprieve under the same.

However, the non-inclusion of all three stakeholders, namely, the advertiser, competitor and consumer in the redressal systems made it necessary that a uniform system be involved wherein everyone's interests maybe safeguarded. This has led to various judicial decisions that have tried to consolidate the interests of the three groups.

The De Beers Abrasive v International General Electric Co was the case wherein the initially the common law position on the subject was brought into question. The Court in this case held that simple puffery was permissible and the only substantial limitation imposed was that the advertiser was barred from making active claims that would disparage the product of the consumer. Puffery as an element was discussed in detail in the case of Reckitt & Colman of India Pvt. Ltd v MP Ramchandran & Anr for the first time in Indian courts. This case paved the way for all subsequent cases dealing with issues of comparative advertising in India. In this case, the parties were manufacturers were cloth detergent manufacturing brands – 'Robin Blue' and 'Ujala' – plaintiff and defendant, respectively. The plaintiff contended that the defendant had made use of an unmarked bottle in its advertisements which was deceptively similar to the bottle in which the plaintiff’s product was packaged and on which it had a copyright (designs right). Further the contention was that the defendants used the price at which the plaintiff sold its product to state that it was uneconomical. Also, the

503 Gokhle, Supra note 5
504 KENT MIDDLETON, BILL CHAMBERLAIN & MATTHEW BUNKER, PUBLIC COMMUNICATION 335-337 (1997)
505 De Beers Abrasive v International General Electronic Co, 1975 (2) All ER 599
506 Reckitt & Colman of India Pvt. Ltd v MP Ramchandran & Anr, 1999 PTC (19) 741
defendant, in its advertisement stated that the product to which it was comparing its own product, referring to it as “Blue” was of obsolete technology and hence left patches of blue on the white clothes because the blue drops did not dissolve in the water. The defendant argued that the advertisement was a mere attempt at establishing to the consumers the technological superiority of their own product over their competitors and that there was no resemblance to plaintiff’s product in the advertisement and denied allegations of disparagement.

The Court relying on the observations made in the De Beers\textsuperscript{507} case laid down certain rules/principles to consolidate the law on the subject –

i. Producer/ manufacturer/ service provider etc. are allowed to make superficial statements to portray their goods/services as the best in the world although it might not be true.

ii. The advertiser can also make claims that his products are better than his competitors’ although it might be untrue as well as unverifiable.

iii. Comparison of one’s products to his competitor’s to establish that his products/services are the best is also permissible. Such comparisons may as well be untrue.

iv. Puffery is only permissible as long as the advertiser only portrays his own goods as superior. However, if the advertiser, in anyway, denigrates the goods of his competitor it would amount of defamation of the competitor as well as his goods/services and hence is not permissible.

v. In case there is an established case of defamation caused to the competitor and his goods/services, then the court can grant injunction restraining the repetition of such defamatory actions as a relief to the aggrieved party.

Therefore, in the present case the Court observed that there was evident denigration of the competitor’s product as it stated that the competitor’s product was uneconomical as well as ineffective. Hence, an order of injunction was passed against the defendant.

The judgment delivered in this case although largely protected the interest of the advertiser and competitor, however, put a market component, i.e., the consumers at a

\textsuperscript{507} \textit{Supra} note 17
very disadvantageous position as the guidelines laid down by the court permitted puffery to a great extent. So, the primary objective of harmonizing the laws to address the interests of all three stakeholders in this subject matter yet again failed to materialize. However, the Court identified the lacunae in the guidelines laid down in the *Ramchandran*\textsuperscript{508} case. Hence, a significant deviation could be observed in the case of *Colgate Palmolive (India) Limited v Anchor Health and Beauty Care Private Ltd.*\textsuperscript{509} from the established views in which the Court introduced the component of consumer protection in the law regulating broadcasting/publishing untruthful advertisements. The Court observed that with the introduction of the Consumer Protection Act, 1986, which regulates “unfair trade practices”, it would anyway be impossible for the producers/service providers to make false, misleading and harmful’ statements regarding their products or services. Hence, the judgment made in this case nullified the extant rights of puffery vested in the advertisers as a virtue of the *Ramchandran*\textsuperscript{510} case.

Subsequent cases made the position regarding the correlated interests of the advertisers, competitors and consumers even clearer. Nevertheless, with the entry of the internet in the commerce of goods and services and the overwhelming effect of the pervasion of internet in all areas of commerce has changed the game of advertisement to a great extent more so in the case of comparative and competitive advertising.

In compliance with TRIPS\textsuperscript{511} obligations, India amended its trademark laws to legislate the Trademarks Act, 1999 and the Trademarks Rules, 2002. Section 29\textsuperscript{512} and 30\textsuperscript{513} of the TM Act, 1999 provide grounds that restrict detrimental use of a competitor’s marks. Yet, the grounds are not sufficient to meet the challenges of an ever transitioning economy and market scenario. The introduction of the internet in India in 1999 did not impact the commercial state of affairs of India. However, when IRCTC\textsuperscript{514} introduced its

\textsuperscript{508} *Supra* note 18
\textsuperscript{509} *Colgate Palmolive (India) Limited v Anchor Health and Beauty Care Private Ltd* 2009 (40) PTC 653
\textsuperscript{510} *Supra* note 18
\textsuperscript{511} TRADE REALTED ASPECTS OF INTELLECTUAL PROPERTY
\textsuperscript{512} S. 29 Infringement of registered trade marks
\textsuperscript{513} S. 30 Limits on effect of registered trade mark
\textsuperscript{514} Indian Railway Catering and Tourism Corporation, is a subsidiary of the Indian Railways that handles the catering, tourism and online ticketing operations of the railways.
online ticket booking system in 2002, it brought in a significant change to the use the internet was to be put to subsequently. But, it was the introduction of Flipkart\(^{515}\) that actually brought in with it the wonders and problems of e-commerce as it was soon followed by a large number of services being offered online. The huge popularity of e-commerce led to unfair trade practices which included problems regarding comparative advertisement as well.

**Internet, The Advertisers, Competitors And The Consumers**

With the overwhelmingly large number of products, markets and websites available in the internet, it becomes difficult for a consumer to get the right “keywords” so as to find what they are looking for. It, at times, is like searching for a needle in the hay. It is vital that the advertisers or product marketers, who use the internet as a platform to reach consumers, go to great lengths so as to ensure that their search engines are very easy to find.\(^{516}\) However, certain business persons tend to get carried away and get involved in unfair trade practices. When it comes to the internet, the means of conducting the unfair trade practices becomes a little complex.

1. Understanding Meta Tags And Trigger Ads:

   It is imperative that we understand what meta-tags are and how they work before we can get into the legal implications of meta-tags on trademarks. A meta-tag is a special hypertext markup language (HTML) that instructs web browsers as to the manner in which a website is to be displayed.\(^{517}\) The primary purpose of meta-tags is to facilitate a search engine so that the website gets detected. Meta-tags, essentially, are not visible to a web surfer, yet it plays a very pivotal role as, when a surfer makes

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515 Flipkart is an e-commerce company founded in 2007 by Sachin Bansal and Binny Bansal. It is registered in Singapore and it operates in India, where it is headquartered in Bangalore, Karnataka.


a search using a search engine, the search engine makes use of these meta-tags to categorize and index it among other websites. Meta-tags are of various types but the meta-tag relevant for our understanding its relation to comparative advertising is “keyword meta-tag”. These meta-tags

2. Disparagement of competitor’s mark and deceit caused to consumer:

The problem of use of meta-tags arises when the competitor’s trademark is used as a meta-tag so as to lure the consumers to their website. Another advertising practice commonly referred to as “keying” or “triggering, entails the same problems as that evidenced with “keyword meta-tag”.  

Although their technical working methods differ, yet they serve the same purpose and effect in conjunction with search engines. When a search engine sells a keyword to an advertiser, so that when a surfer enters the keyword for surfing the net, ad pop ups and advertising banners would also be displayed along with the chief search results, the whole transaction is termed as “triggering”. The problem with “triggering” occurs when a search-engine sells the advertiser a competitor’s keyword. So, each time a surfer enters the keywords to search for products made available by the competitor, the advertiser’s links pop up as well. Although this in itself does not entail “unfair trade practice”, yet a chain of activities create a ripple effect which would amount to “unfair trade”.

For keyword meta-tag and triggering to lead to a case of trademark infringement it is imperative that grounds of infringement are present. The first test of infringement is advertiser’s use of competitor’s mark in a manner that is likely to create confusion or deception to the target customers.

On occasions, when there is no likelihood of confusion created, the said Act protects a competitor’s marks from dilution under Section 30 (2). Section 30 impliedly regulates comparative advertising. Dilution, in the Lanham Act has been defined as “the lessening of the capacity of a famous mark” by a subsequent user of the mark.

518 Ibid.
519 Parker H. Bagley & Paul D. Ackerman, Trigger Happy: The Latest Internet Assault on Trademark Rights, 16 COMPUTER LAW. 1, 2 (1999).
520 Indian Trade Marks Act Section 29 (1) (1999)
It has been observed by Courts that dilution can occur through “blurring”\textsuperscript{522}, “elimination”\textsuperscript{523} or “tarnishment”\textsuperscript{524,525}. These grounds of test for trademark infringement as a reason of comparative advertisement, however, poses difficulties while dealing with elements like meta-tags and triggers since they are very different from the conventional visually present marks. The Courts encounter the problem of application of the doctrines typically applicable to marks hidden in HTML source codes.\textsuperscript{526} Indian courts have not yet been approached with such problems as yet. However, a handful cases in foreign jurisdictions have brought in a uniform view of courts to light.

In cases of meta-tags, courts have consistently held that advertisers making use of competitor’s trademark as keyword is an infringement.\textsuperscript{527} It can be presumed from the existing practices that the owner of a website, with the intent to deceive surfers, knowingly, makes use of competitor’s trademark as keyword meta-tag.

In the case of Brookfield Communications, Inc. v. West Coast Entertainment Corp\textsuperscript{528}, the plaintiff’s trademark “moviebuff” was being used by the defendant as a keyword meta-tag for its website. The court stated that although, since the plaintiff uses a separate prominent name for its website, hence likelihood of confusion was less, however, it held that the defendant’ act of making use of the said keyword meta-tag could be concluded to have been to create “initial interest confusion”\textsuperscript{529}. The question of the degree of application of “fair use” doctrine was also decided in this

\textsuperscript{522} J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.03 (4th ed.)
\textsuperscript{523} Panavision Int’l, L.P. v. Toeppen, 945 F. Supp. 1296 (C.D. Cal. 1996), aff’d, 141 F.3d 1316 (9th Cir. 1998).
\textsuperscript{524} Ameritech, Inc. v. American Info. Techs. Corp., 811 F.2d 960, 965 (6th Cir. 1987)
\textsuperscript{525} Supra note 29, p.45
\textsuperscript{526} Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036 (9th Cir. 1999).
\textsuperscript{527} J. DIANNE BRINSON & MARK F. RADCLIFFE, INTERNET LAW AND BUSINESS HANDBOOK, 383-91 (2000)
\textsuperscript{528} Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1043 (9th Cir. 1999)
\textsuperscript{529} Underlying principle of Lanham Act in reference to “point of sale” as discussed in the case of Blockbuster Entertainment Group v. Laylco., Inc., 869 F. Supp. 505 (E.D. Mich. 1994) also entails “initial interest confusion”.

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case. The court noted that, the defendant, as per the Act, could use the plaintiff’s for comparative advertising but failed to address the problem of whether this would enclose using of plaintiff’s mark as a keyword meta-tag for the purpose of comparative advertising.

The Playboy Enterprises, Inc v Netscape Communications\(^{530}\) and Estee Lauder, Inc v. The Fragrance Counter\(^{531}\) cases dealt with “trigger ads”. In Playboy Enterprises\(^ {532}\) the plaintiff brought a case against Netscape for selling the keywords “playboy” and “playmate” to a competitor. This led to the competitors’ mark being displayed at the top of the browser. The Court held that opined that although the trigger words were associated with plaintiff yet, the words being generic in nature could not be construed to cause “likelihood of confusion”. Playboy also failed to establish alleged dilution of their mark.

However in the Estee Lauder\(^ {533}\) the defendants although had no association with plaintiff, yet, they were sold the trigger words associated with Estee and hence the plaintiff alleged trademark infringement and unfair competition. The case settled with Excite, the search engine that sold the trigger words, agreeing to remove the plaintiff’s keywords from its list of sale.

However, It can be noted that, the Courts were unable to give a very comprehensive judgment as it failed to answer the question of fair use in the context of “fair use” of keywords in meta tags or triggers.

3. **Section 29 R/W Section 30 Of The Trademarks Act 1999**

In India, Section 29 and Section 30 are encompassed in the Chapter 4 of the Trade Mark Act, 1999 that deals with the “effects of registration”. Indian Courts are yet to encounter the problems of meta-tags and triggers in relation to comparative advertising. Our legislation, to the extent of dealing with problem of unfair trade practice, infringement, dilution and initial interest confusion, is well equipped after

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\(^{530}\) Playboy Enters., Inc v. Netscape Communications Corp., 55 F. Supp. 2d 1070 (C.D. Cal. 1999), affirmed by 202 F.3d 278 (9th Cir. 1999)


\(^{532}\) Ibid note 42

\(^{533}\) Ibid note 43
the amendments were made to our trademarks related laws in 1999. However, when the internet comes into play our legislations fail to address the problems.

**Conclusion**

The complexities of IP laws increase manifold with the internet coming into play. Although international as well as domestic laws are trying to address the problems relating to the same yet the efforts don’t seem to be adequate enough.

In a fast paced economic and technological scenario, where things change in a matter of hours, it is ill-advice to wait for problems to catch up with you and then to search for the solutions.

Hence, when the legislature has still time in hand to address problems that entails the intermingling of internet and comparative advertising, it should look into the problems faced by the Courts in foreign jurisdictions. As observed, although problems regarding meta-tags, triggers and ad-pops are yet to knock the doors of the Court it would be advisable if a *sui generis* system is adopted to deal with related matters or amendments are made in the Information Technology Act as well as the Trade Marks Act, 1999 so that we are able to answer the necessary questions regarding “fair use” of trademarks in meta-tags and trigger words for comparative advertisements.

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LAW – BINDING SOCIAL MEDIA MARKET?

GAUTAM MISHRA

Abstract

This article will attempt to describe the emergence of Internet and widespread of the same. Internet is spreading in this world like a fire. Everyone in this world directly or indirectly is connected to Internet. When there is something that has some good effect on the society, same thing starts to show its bad effects also. Internet is showing its bad effects in the way of cyber crime. We will here discuss about the cyber crime in the aspect of social media marketing and Intellectual Property Rights, social media marketing can either be the tool or the sufferer of the cyber crime, in both cases the Intellectual Property Rights are infringed of a person or a business. So, here in this article we will talk about the cyber crimes, Intellectual Property rights, Social media, social media marketing and relation of all these things in one. After which we will discuss the condition of India with respect to cyber crimes, its ranking in the world compared to other countries in the protection of cyber crime and the enactment of cyber laws through The Information Technology Act, 2000 and its progressive amendment in the field. This article discusses about some suggestion regarding improvement of the cyber laws.
Introduction

The Internet has now become wide, touching lives of every human being directly or indirectly. Without under-estimating the power and benefits of Internet we should also consider its demerits one of which is cybercrime i.e. mainly due to its anonymity.

Now, when talking about the Internet first word that comes into our mind is WWW (World Wide Web) Internet in literal sense also is a big Web which exists around the whole world.

World Wide Web is a complex environment that involves communication between people, software and services. It is sustained by the distribution of data, communication devices and networks.

With the aid carried by the high-tech progress of the technology, the information superhighway today has become a common highway used by everyone either it is citizens and businesses or military and governments that makes it difficult to create clear barriers among these different groups. It is expected to become even more complex in the near future. The more complex it will become the more of cyber crime will increase.

Cyber Crime

It is one of the most complex global legal problems that can be committed in a place without being physically present in it. It can be originated from any computer device in this world, even a small bar phone can also be used for cyber crime because of which the identification of the cyber criminal is very weighty process. Technology provides opportunity for offenders as well as for the crime preventers, as computer is the one who helps to creates cyber crime same is the one that helps to prevent it.

The name cybercrime is also used to all those activities, misuse or abuses that are either piloted in the cyber world, or with the help or against the computer. Cyber crimes can be unlawful acts where the computer is either a instrument or a target or both of a crime. There are many acts where the computer is an instrument for an unlawful act which literally involves a change of a usual crime by using computers.
“Any illegal behaviour directed by means of electronic operations that targets the security of computer systems and the data processed by them is termed cyber crime”  

Cyber crimes are the latest and most specialised wrong having its origin in the computers itself. Computers hacking, spoofing, e-mail bombing, internet time theft, web hacking, cyber stalking, pornography, software piracy and cyber terrorism are some of the examples of cyber crimes.

**Increasing cyber crime**

The rate by which the cyber crime in India is increasing is frightening. A rough count shows that the rate at which incidents are increasing yearly is 107 percent. Due to the increase in Internet users there is an increase in cyber crime. Though the growth in cyber crimes and internet user base are not similar, they follow a same trend as per the data, while cyber crimes have increased to more than 50% in both 2012 & 2013; the internet subscriber base has grown to 27% in 2012 and to 53% in 2013. In 2011 to 2013 there were 9023 cases registered under IT Act and out of which 4804 were arrested. The number of cases registered under the IT Act has been increasing continuously and rapidly. The union also accepts that with the introduction of technologies, devices including smart phones and complex applications, and increase in usage of cyber space for businesses, cyber crimes are on the rise in the country.

**Social Media**

These are the third party tools that provide public and businesses to create, exchange and communicate information, ideas, media in virtual groups and networks. Social media cannot easily be defined because this is not static since it is emerging, but it includes internet based application that allows the user to connect to public, create and share information.

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536 Unstirred Question Number 364, Ministry of Communication & Information Technology, Answered on 25-02-2015 in the Lok Sabha AND TRAI Reports
To define “social media” for our current purposes, we synthesize definitions presented in the literature and identify the following commonalities among current social media services:

1) Social media services are (currently) Web 2.0 Internet-based applications.

2) User-generated content is the lifeblood of social media.

3) Individuals and groups create user-specific profiles for a site or app designed and maintained by a social media service.

4) Social media services facilitate the development of social networks online by connecting a profile with those of other individuals and/or groups.537

Talking about the positive aspect of social media, social media is a tool to store memory, learn and explore new information, advertising oneself and forming friendship.

So many people are increasing their businesses, marrying, getting connected with their family and friends, learning techniques across the globe and many more such things only with the help of social media.

According to a survey, internet users in America use at least one social networking site which has increased from 10% to 76% and there is no gender difference when it comes about social media usage. Women are even more active on social media to 68% where as men are 62%.538

When there is positive aspect of a thing, there obviously will be a negative aspect of the same which also receives criticism, for example privacy issues, cyber crime, internet fraud, data overload, etc. Aggressive and emotional communication can lead to interaction out of the virtual world, which can take the user into problematic situations.

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538 Survey of Pew Internet Research 2015
Social Media Marketing

“Social media marketing is the process of gaining website traffic or attention through social media sites. Social media marketing programs usually centre on efforts to create content that attracts attention and encourages readers to share it across their social networks.”

Social media marketing is working as useful source of gaining market information and customers view on it. Businesses today are very easily able to analyse the customer’s view on particular product or service for their marketing purpose. Likewise social media users are also able to very easily gain the information about the newly launched product and services and market situations for making their choice. Blogs, micro blogs and forums are the places where individuals share their reviews and comments of brand, companies, product and services.

Social media is also being used by the businesses as the communication channels where the companies interact directly with their customers. Facebook, Twitter, Linkedin are the chief social media platforms where the companies interact directly with their customers. Business leaders like Bob Langert Vice President McDonalds and Steve Jobs CEO Apple Computers post regularly on their social media connections or blogs to encourage their customers to interact and express their views on their products and give suggestions.

Companies also run campaigns on the social media platform for the promotions of their products, for example In early 2012, Nike introduced its Make It Count social media campaign. The campaign kickoff began YouTubers Casey Neistat and Max Joseph launching a YouTube video, where they traveled 34,000 miles to visit 16 cities in 13 countries. They promoted the #makeitcount hashtag, which millions of consumers shared via Twitter and Instagram by uploading photos and sending tweets. The #MakeItCount YouTube video went viral and Nike saw an 18% increase in profit in 2012, the year this product was released.

539 Social media marketing – Wikipedia.org
540 Social media marketing – Wikipedia.org

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Cyber Crime & Social Media Marketing

Till now it looks very much entertaining, fruitful and easy OMG! I got 380 Likes on my Facebook post, 920 People are following me on Instagram, our product sales increased by 55%, our 60% of profit is through social media advertisements and sales but what comes next Life is not a bowl full of cherries, there’s good and bad stuff.

Social media marketing is as seen as a risk rather than an opportunity by the recent 150 of the top senior marketing executives in the UK met at the IDM (The Institute of Direct Marketing)\(^5\)

A SWOT analysis done on Facebook by a website records its Threats as

- Increase in no. Of mobile internet users
- Users have ad-block extensions
- Online marketing’s slow growth rate
- Privacy issues like identity theft
- Weak business model
- Getting negative comments\(^5\)

Due to anonymity on social media and high amount of people using it, an advertisement on social media that uses fake or fraudulent promises to solicit investments or loans, or that provides for the purchase, use, or trade of forged or counterfeit securities. Products or services that individuals buy online are never delivered. Investors are charmed to invest in these fake & fraudulent schemes by the promises of strangely high benefits.

**Emergence and Need of IT Act, 2000**

New networking protocol and digital technology have sparked a revolution in the way people transact businesses. Businesses and consumers are highly using this technology to create, transmit and store data in the electronic form keeping aside the traditional way of

\(^5\) http://www.jeffbullas.com/2010/06/20/the-top-20-threats-to-social-media-marketing/

\(^5\) Pestleanalysis.com
documenting data in papers. Information in electronic form has its own merits, that it is cheap, easy to store and easy to communicate but with great power comes great responsibility i.e to be safe from cyber crime and not being the reason behind the cyber crime.

With the initial step to protect general public and businesses from this evil The United Nations Commission on International Trade Laws (UNCITRAL) adopted the model laws on electronic commerce in 1996. The General Assembly of United Nations by its Resolute No. 51/162, dated 30th January, 1997, recommended that all state should give favourable consideration to the said model when they enact or revise their laws. The model law provides for equal legal treatment of users of electronic communication and paper based communication. After which the considering the model law necessary and urgent in 2000 the government of India enacted The Information Technology Act, 2000.

Social Media and IT Act

Social media is not as such defined in the IT Act, 2000 but is included in a word defined under section 2(w) as, “intermediary”, with respect to any particular electronic records, means any person who on behalf of another person reieves, stores, or transmit that record or provide any service with respect to that record and includes telecom service providers, network service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes; by this definition the government included social media websites such as Facebook, Twitter, linkedin, Instagram, etc. Under the provisions of this act and have tried to cover all the wrongs being done through or with the help of these websites. Other provisions that included the crimes through social media were introduced with the IT (Amendment) Act, 2008.

Intellectual Property Rights

543 As substituted by the Information Technology (Amendment) Act, 2008 (10 of 2009), section 4(H), for clause (w).
Intellectual property rights are the legal rights that cover the privileges given to individuals who are the owners and inventors of a work, and have created something with their intellectual creativity. Individuals related to areas such as literature, music, invention, etc., can be granted such rights, which can then be used in the business practices by them.  

Social media marketing is mainly affected by the cyber crime due to the IP (Intellectual Property) issues, the criminals are using the Trademarks, Names, Brand of big companies selling their clone products or with the help of these big brand names they are trying cheat the general public which is widely using the social media without hesitation, as the internet which have converted the physical market place into the virtual market place. Now a day it is difficult for every business to create effective and collaborative Intellectual Property Management and safe guard strategy. The every expected threat in virtual world can thus be monitored and restricted.

Various approaches and laws have been designed by the law makers to deliver a secure configuration against these cyber attacks. There is a thrashing increase in such cases

**Beachbody, LLC v. Cornel Ungureanu/Cyberland LLC**

Here, the Respondent’s use of the Domain Name is commercial, and there is no assertion that the Respondent or its business has been known by a corresponding name. While the Respondent may well engage in an Internet and social media marketing business, the use of a misleading Domain Name exploiting another party’s trademark should not be considered a use “in connection with a *bona fide* offering of goods or services” for purposes of the second element of the Complaint. The offering cannot be considered to be made in “good faith” if it is deliberately mislabelled, misleading, and apparently infringing, a point explored further below in connection with the “bad faith” element of the Complaint.  

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544 Tutorialspoint.com

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India for tackling from such cases has amended the IT Act, in 2008 adding some of the cyber laws for betterment of the social media marketing.

Many of such crimes cannot be solved due to lack evidences and in many cases this is due to the fact that Internet Service Provider failed to preserve the record belonging to relevant time. Section 67 C after the amendment is very helpful in collection of evidences that can prove indispensable in cybercrime cases. According to this section intermediaries shall be bound to save and sustain such data as may be prescribed by the Central government and for such time period and format as it may be prescribed. Intermediary contravening this provision knowingly shall be liable in conviction for imprisonment for a term not exceeding 2 years or fine not exceeding one lack or both.

As a result of amendments in 2008, Section 69 B gives the central government authority to appoint any agency to look after and collect rush data or information created, received, or saved in any computer resource in order to enhance its cyber security and the intermediary must cooperate with the appointed agency failing such cooperation intermediary in this respect will be punished with a term which may extend to 3 years and imposition of fine.

The section of IT Act, 2000 before amendments makes a network service providers liable for the third party content only when they fails to prove that the offence was committed without their knowledge or that they have exercised due diligence to prevent the commission of such offences.\textsuperscript{546}

India is improving itself to fight from the cyber crimes

\textsuperscript{546} IT Act 2000 vs 2008- implementation, challenges, and the Role of Adjudicating officers, National Seminar on Enforcement of Cyberlaw, New Delhi on 8\textsuperscript{th} May 2010
India is an important regional economy, with a strong interest in ICT services development. The law in India has not entirely kept pace with developments in cloud computing, and some gaps exist in key areas of protection; notably, India has not yet implemented effective privacy legislation. India’s cybercrime legislation also requires updating to conform to international models. Some laws and standards in India are not technology neutral (e.g., electronic signatures), and these may be a barrier to interoperability.

However, in 2012, India finally updated its copyright laws to cover modern copyright issues such as rights management information and technical protection measures. India is now expected to ratify the WIPO Copyright Treaty. This makes a significant positive impact on India’s score in the 2013 report.

The development of India’s technology sectors remains challenging, with low levels of broadband and personal computer penetration. Overall, India’s ranking in the 2013
Scorecard improved by two spots — from 19th to 17th — based on its updated intellectual property laws and enhancements to its infrastructure.\textsuperscript{547}

\textit{Conclusion}

Hence in this modern era, the use of internet through social media is both a boon and curse. The sellers and buyers unlike yesterday are not like the horses searching for fodder but they have become eagles which directly prey upon their customers, gaining their trust and providing them with quality of their products. But as said, every group of community has black sheep therefore to regulate the affairs of the social media market and to save the interests of the users. There are certain laws that have been enforced. Since happy living is the only motive of the law givers and punishing the evil thinkers is the outcome of enforcing such laws.

To create and live in a secure cyberspace, some strategies must be followed:

- Making a Secure Cyber Ecosystem
- Uplifting Open standard
- Creating Mechanism for IT Security
- Making E-governance services
- Improving Laws related to cyber crime
- Protecting information infrastructure

\textsuperscript{547} Report - Global Cloud Computing Scorecard (2013)
THE LEGAL EXPOSITION OF GAMBLING LAWS IN INDIA- STILL AN UNEXPLORED TERRITORY

VISHAL CHAKRAVARTY

Abstract

Gambling and greed are intertwined and inseparable bring with it a vicious circle of charm that humans find hard to resist. The regulation of gambling in India is done by The Public Gambling Act of 1867. In addition to this, The Constitution of India has made provisions for state governments to enact their own legislation pertaining to gambling. Though there are laws, there are statutes with provisions both at the central level and the state level, yet there is a never ending confusion surrounding the legal complexities of the term gambling in India. People are often entangled between the question as to what is legal and what is not? The purpose of this paper is therefore to explore the term gambling and the legal prospects appended to it thereby making it easier for people to understand. The author in this paper would define the ambit of the term gambling before moving to the provisions of The Public Gambling Act, 1867. The author with the help of statistics would throw some light on the prevailing gambling industry in India. Lastly, the author with the help of certain judicial exposition would explain in detail the ultimate test of game of skill v. game of chance pertaining to gambling in India.
Introduction

Mahatma Gandhi once said- "earth provides enough to satisfy every man's need, but not every man's greed." Humans are more tempted towards games offering additional rewards. The game of chance being one such game, its irresistible charm has engulfed the human race since time immemorial. Gambling ignites the notion of greediness within a man. The high entertainment quotient it offers makes it a game for all age groups across the world. Though gambling is regarded as a sin in a few ancient writings, yet it has firm roots in the Indian culture right from the ancient times. Even the most honored epic, the Mahabharata has depicted numerous incidents pertaining to the practice of gambling. The addiction of gambling has been explained in the part where Yudhistir, the king of dharma lost everything including his wife and brothers to his cousin Duryodhana in a game of dice.\textsuperscript{549} Gambling has also been prohibited by Manu on the ground that it destroys truth, honesty and wealth, but it has been permitted by other law givers when conducted (with the permission of the king) subject to payment of tax to the king.\textsuperscript{550}

The passage of time has changed the traditional game of gambling into its modernized version with the advent of internet and technology. Statistics have shown that there is a paradigm shift from the practice of physical gambling to online gambling in recent years. Games such as poker and rummy have developed significant interest among users. Even though there is a central enactment regarding gambling in India (The Public Gambling Act of 1867), majority are still unaware as to what really constitutes gambling in India. A glance at the regulating legislations and statutes in India lawmakers consider the indulgence in games of luck, chance and probability as immoral and pernicious.\textsuperscript{551}

Gambling in India, the Staggering Statistics

\textsuperscript{549}Jay Satya, ‘Legality of poker and other games of skill: a critical analysis of India’s gaming laws’ 5 NUJS Law Review 93,94 (2012)

\textsuperscript{550}M. RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA (Vol I, Ch. 13, para 1at pp 207-209). The Supreme Court of India made a reference to this paragraph in the case of Haryana State Lotteries v. Govt. of Nct of Delhi & Ors. 1998 (46) DRJ 397

\textsuperscript{551}Hariani and Co., Gambling and Betting Laws in India, available at http://hariani.co.in/newsletters/31207_August_7_2013.pdf
The rise in the number of people involved in the game of chance has shown enormous growth as far as India is concerned. This is evident from the various statistics and surveys conducted from time to time. According to the FICCI-KPMG Indian Media and Entertainment Industry Report 2014, the Indian gaming industry showed growth of 25.5 per cent in 2013, is expected to grow at a CAGR of 16.2 per cent between 2013 and 2018.\textsuperscript{552} In 2012, the value of the Indian gaming industry amounted to 15.3 billion Indian rupees. The compound annual growth rate is 13.9 % for this industry. Gambling (legal and illegal) amounts to around 3.5% of India’s total GDP\textsuperscript{553}. However, it is believed that the total market (including online and land-based gambling) is in excess of $ 70 billion.\textsuperscript{554} India’s gaming industry is blooming with a base of over 100 million internet users and 41% of them regularly accessing gambling websites. Nearly 75% are from just 4 cities (Delhi, Mumbai, Chennai and Bangalore).\textsuperscript{555} Research conducted by playwin (the lottery owned by the Indian state of Sikkim) in 2010 concluded that a fully regulated online gambling market in India would be worth $5 billion.\textsuperscript{556}

\textit{Defining ‘Gambling’}

The notion of gambling has not been defined anywhere in the central enactment of The Public Gambling Act of 1867. However, the same found its place in The Constitution of India which defines gambling as-

“Gambling’ includes any activity or undertaking whose determination is controlled or influenced by chance or accident and any activity or undertaking which is entered into or undertaken with consciousness of the risk of winning or losing (e.g., prize competitions, a wagering contract) where there is no actual transfer of goods but only payment or receipt of the difference according to the market price, which varies from the contract price.”\textsuperscript{557}

\textsuperscript{553} Jay Satya, ‘Legality of poker and other games of skill: a critical analysis of India’s gaming laws’ 5 NUJS Law Review 93,94 (2012)
\textsuperscript{554} ALBERT, Online gambling scenarios in India, available at http://bluesegaming.com/2013/02/india/online-gambling-scenario-in-india/
\textsuperscript{555} Ibid
\textsuperscript{556} Ibid
\textsuperscript{557} List II Entry 34 of the Constitution of India, 1950

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The New Encyclopedia Britannica defines gambling as "the betting or staking of something of value with consciousness of risk and hope of gain on the outcome of a game, a contest, or an uncertain event the result of which may be determined by chance".

According to Black’s Law Dictionary meaning of gambling is given as "the Act of practicing or following game of chance and skill with the expectation and purpose of thereby winning money or other property".

Thus, a close look at the abovementioned definitions reveal the three important requisites for constituting the term gambling i.e., consideration, chance and prize.  

**THE PUBLIC GAMBLING ACT OF 1867- Sole Regulatory Framework in India**

The response to the issue of prohibition to gambling activities can be traced back to the pre-independence enactment of The Public Gambling Act of 1867. The various provisions appended reveals that the Act favours games of skill rather than games of chance. The Act has expressly defined the term "common gaming house" and appended fine and imprisonment for being found or owing it. Besides this, the act also prohibits visiting gambling houses, the violation of which attracts a fine of Rs 100 or imprisonment up to a month.

**IV.1 Horse Racing**

In *K.R. Lakshmanan v. State of Tamil Nadu*, the Court while referring to the definition of gambling in the Encyclopedia Britannica, held that betting on horse racing involves the assessment of a contestant’s physical capacity and the use of other *evaluative skills*. The Court also quoted the American case of *People of Monroe*, stating that the winning horse in a

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559 *Common gaming-house means any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owing, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, enclosure, room or place or otherwise howsoever.*

560 Section 4, THE PUBLIC GAMBLING ACT, 1867

561 AIR 1996 SC 1153
horse race is not determined by chance alone, but other factors such as the condition, speed and endurance of the horse, and the skill and management of the rider.\textsuperscript{562}

**IV.2 Prize Competitions**

The Prize Competition Act, 1955, a central law, regulates prize competitions offering prizes for the solution of any puzzle based upon the building up, arrangement, combination or permutation of letters, words or figures.\textsuperscript{563}

In *State of Bombay v. R. M. D. Chamarbaugwalal*, the Supreme Court of India held that, competitions (games) where success depends on a substantial degree of skill will not fall into category of ’gambling’ (i.e. gaming as defined under state enactments); and despite there being an element of chance, if a game is predominantly a game of skill, it would nevertheless be a game of "mere skill".

**IV.3 Lottery Laws**

Lotteries have been expressly excluded from the purview of the gambling enactments and are governed under the central law- Lotteries (Regulation) Act, 1998- under which Lottery (Regulation) Rules, 2010 have been framed.\textsuperscript{564} Hence, the central enactment stipulates certain conditions, the fulfillment of which allows the state governments to hold a lottery competition. Further pursuant to the central lottery laws, certain states such as Nagaland, Mizoram and Himachal Pradesh enacted rules to regulate/ban certain lotteries in their respective territories.\textsuperscript{565}

**IV.4 Online Gambling**


\textsuperscript{564} *Ibid*

\textsuperscript{565} *Ibid*
The Public Gambling Act of 1867 makes no indication to online gambling. However, this isn't a come as a surprise since when the enactment came into force, the internet regime had not yet started. There is also an additional piece of legislation relating to online betting and gambling- The Information Technology Act of 2000. The Act mentions several provisions regarding online activities and punishments for violation of it. However, no mention whatsoever has been made specifically for the term "online gambling". The government has used its power to instruct the ISPs to prevent Indian residents from accessing certain foreign betting and gaming sites. At the state level, in Maharashtra, it is completely prohibited, while in Sikkim the government now has the authority to issue licenses to operators wishing to provide online gambling services within the state.

In Super Cassettes Industries Ltd. Vs. MySpace Inc. & Anr., High Court of Delhi has held that the word "place" includes an internet or web space for the purposes of the Copyright Act, 1957.

States & Authority to make Gambling Laws

Though there is a central enactment regulating the practice of gambling in India, the Constitution of India has given the states exclusive powers to enact any legislation pertaining to gambling in India. As a consequence of the aforementioned provision, several states have enacted their own gambling legislations. Any individual/entity intending to engage in any gaming activities, would have to comply with the provisions of the enactment/legislation in force across India in various states.

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566 Gambling Laws and Regulation in India, available at http://www.gamblingsites.com/online-gambling-jurisdictions/India
567 Ibid
568 Ibid
569 (2011 (48) PTC 49 (Del)
570 Vinay Vaish, India: Online Gaming And Gambling Laws In India, available at http://www.mondaq.com/india/x/350824/Gaming/ONLINE+GAMING+AND+GAMBLING+LAWS+IN+INDIA

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V.1 Legal Casino Gambling in Goa
With the advent of The Goa, Daman and Diu Gambling Act of 1976, certain forms of gambling has been legalized. The Goa, Daman and Diu Public Gambling Act, 1976, with prior permission of the State Government authorizes any game of electronic amusement/ slot machines in five star hotels and such table games and gaming on board in offshore vessels, as may be notified, subject to such conditions including the payment of recurring and non recurring fees.\(^{571}\)

V.2 Legal Gambling In Sikkim
Sikkim is a second Indian State that has legalized gambling.  
1) The Sikkim Casino Games (Control and Tax Rules), 2002 gives the Sikkim Government the authority to grant licenses to individual and business interested in operating casinos.\(^{572}\)  
2) The Sikkim Regulation of Gambling (Amendment) Act, 2005 gives the Sikkim Government the authority to authorize gambling on certain days and to make specific gambling houses legal at their own discretion by way of a license.\(^{573}\)
Sikkim also became the first Indian State to legalize internet gambling. In the year 2008, the Sikkim State Legislative Assembly has passed the Sikkim Online Gaming (Regulation) Act, 2008 which came into force from 1 July 2009. \(^{574}\) The Act provides for regulating online gaming in Sikkim, which was originally limited to poker and casino games, such as, Black Jack, Pontoon, Bingo, Poker, Baccarat etc. The Act was subsequently amended on 1 August 2009 to make online sports betting in the State of Sikkim legal, subject to the operator holding a license granted by the State Government of Sikkim. Thus, Sikkim is the only State in India that permits online betting in sports through websites whose servers are based in Sikkim.\(^{575}\)

V.3 Delhi Gambling Act of 1955
At present the state legislature of Delhi has enacted the Delhi Public Gambling Act, 1955 which prohibits gaming in the union territory of Delhi, but excludes from its purview the

\(^{571}\) India Gambling Laws, available at http://sportsbetting.net.in/gambling-laws/
\(^{572}\) Ibid
\(^{573}\) Ibid
\(^{574}\) Hariani and Co., Gambling and Betting Laws in India, available at http://hariani.co.in/newsletters/31207_August_7_2013.pdf
\(^{575}\) Ibid
"games of mere skill" wherever played. Thus, the central enactment has no applicability to the union territory of Delhi by virtue of the abovementioned Act.

V.4 West Bengal Gambling Act- exclusion of card games from the ambit of the term gambling
Section 2(c) of The West Bengal Gambling and Prize Competition Act of 1957 exempts card games like poker, rummy, etc from the ambit of the term gambling. It is the sole Indian state which has exempted card games from the ambit of the term gambling.

Game of Chance v. Game of Skill – The Ultimate Test in India
As pointed out above, majority of the population in India are unaware of what actually constitutes gambling. In India, the test of skill vs. chance determines whether a game in concern can be termed as gambling or not. For a game to be considered a game of skill under Indian law, the position of law has been so far that it need not be a 100% skill based game, but predominantly a skill based game.

VI.1 Defining Game of Skill and Game of Chance
Now the question may arise as to what is a game of skill and a game of chance? A game of skill is a game where the outcome is determined mainly by mental or physical skill, rather than by chance. A game of skill generally has an element of chance, but skill plays a greater role in determining the outcome. Games of skill are outside the purview of gambling, and are not prohibited. On the other hand a game of chance is a game whose outcome is strongly influenced by factors such as luck and upon which the contestants may choose to wager.

579 Wikipedia Definition of Game Of Skill
money or anything of monetary value. The apex court in a number of cases has reiterated that in a game of chance, the results are “wholly uncertain and doubtful”.

VI.2 Judicial Elucidation on the Issue

In the case of Manoranjithan Manamyil Mandram v. State of Tamil Nadu, it was held that, Whether a game is of chance or skills is a question of fact to be decided on the facts and circumstances of each case.

The Supreme Court of India, in K.R. Lakshmanan v. State of Tamil Nadu, stated as follows: “Games may be of chance, or of skill or of skill and chance combined. A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, the shuffling of the cards, are all modes of chance. In these games the result is wholly uncertain and doubtful. No human mind knows or can know what it will be until the dice is thrown, the wheel stops its revolution or the dealer has dealt with the cards. A game of skill, on the other hand - although the element of chance necessarily cannot be entirely eliminated - is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player. Golf, chess and even Rummy are considered to be games of skill. The courts have reasoned that there are few games, if any, which consist purely of chance or skill, and as such a game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance. It is the dominant element - "skill" or "chance" - which determines the character of the game.”

In M.J. Shivani & Ors. v. State of Karnataka, the Apex Court observed, "Even a skilled player in a game of mere skill may be lucky or unlucky, so that even in a game of mere skill chance must play its part. But it is not necessary to decide in terms of mathematical precision the relative proportion of chance or skill when deciding whether a game is a game of mere skill. When in a game the element of chance strongly preponderates, it cannot be game of mere skill. Therefore, it is not practicable to decide whether particular video game is a game of skill or of mixed skill and chance. It depends upon the facts, in each case."

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580 Wikipedia Definition of Game Of Chance
581 AIR 2005 Mad 261
582 AIR 1996 SC 1153
583 1995 6 SCC 289

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Whether Rummy is a Game of Skill or a Game of Chance?

In the case of Andhra Pradesh v. Satyanarayana,\textsuperscript{584} it has held that:

Rummy requires certain amount of skill because the fall of the cards has to be memorized and the building up of Rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill. If there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of Rummy or any other game played for stakes, the offence may be brought home. In this case, these elements are missing and therefore we think that the High Court was right in accepting the reference as it did.

Conclusion

The law that regulates gambling in India was formed during the British era. It is however interesting to note that while India follows the same old law, the Britishers have repealed the law. The Act no longer governs the United Kingdom gambling industry. Times have changed, scenarios have changed, what has not changed is the effort to draft a modified version of the old law. Since, when the enactment was formed there wasn't any piece of thing known as internet. With the advent of internet and technology, the concept of online gaming has risen to the occasion. The notion of gambling is not the same as it once used to be. Since, gambling has expanded more and more, it need to be addressed in a more elaborated manner. Time has come when the legislators should address the concept of gambling in a more proficient manner as gambling involves not only legal aspects but various economic, social and moral aspects as well. The judgements of foreign courts and the legislations could definitely provide a helping hand to the lawmakers in doing the same. Changes will come but through great sincerity and effort.

\textsuperscript{584} AIR 1968 SC 825
JUDICIAL ACTIVISM: HOPE OF HIGH-HANDEDNESS OF HIS LORDSHIPS
SUDIPTA BHOWMICK

Abstract

"Be you ever so high, the law is above you". This is the principle of Independence of Judiciary which is vital for the maintenance of the Rule of Law. Sanctity of administration of justice and reposed confidence in the courts make the Judiciary epitome of impartiality, integrity and efficiency with the vested power to punish for its own contempt. But, in 1970's the Golak Nath Judgement and Keshavananda Bharti Decision established its arbitrariness under the veil of independence. Not only that, Judiciary 'has gone so far' to prove itself quite untouchable in relation to appointment of judges. Also, like many other institutions the courts are manned by man and men are subject to fallibility. And this conscious fallibility, reflecting in the catena of cases like A.K. Gopalan's case, Shankari Prasad's case, Sajjan Singh's case, Habeas Corpus Case, Arundhuti Roy's case and many more, kindled the idea of 'Judicial Accountability'. This paper deals with the arbitrariness, lordliness and unreliableness of Judiciary and the rise of the concept of Judicial Accountability which can pave the way for better administration of justice.
Introduction: The Independence of the Ivory Tower

The principle of Independence of Judiciary, has been imported into India from England where it had been asserted by Coke, C.J. in his struggle against an absolute monarch, was later confirmed by Parliament by enacting the Act of Settlement, 1700. In United states of America an attempt for independence was seen in the 1985 in Basic Principles on the Independence of Judiciary which states “the Judiciary shall decide matters before them... without any restrictions, improper influence, inducement, pressures, threats or interference, direct or indirect, from any quarter or for any reason”. The independence of Judiciary is a noble concept which constitutes the foundation upon which rests the edifice of our democratic polity. “Be you ever so high, the law is above you”. This is the principle of Independence of Judiciary which is vital for... the maintenance of the Rule of Law as a dynamic concept and delivery of social justice of the vulnerable sections. Sanctity of administration of justice and reposed confidence in the courts make the Judiciary epitome of impartiality, integrity and efficiency with the vested power to punish for its own contempt. Justice Krishna Iyer has rightly said that "Independence of Judiciary is not genuflexion....to opposition measure nor Government pleasure". It overlaps but goes beyond the separation of powers. Article 50 of the Constitution and Clause VIII of Third Schedule of the Indian Constitution secure and safeguard the independence from the other pillars of democracy. Under Art. 144 of The Indian Constitution, all civil and Judicial authorities in the territory of India have to act in aid of the Supreme Court. Judges are also immune under various laws like Judges (Protection) Act, 1985 from civil or criminal action for their acts, speech etc., in the course of or while acting or purporting to act in the discharge of their official or judicial duties or functions. It is the basic feature of the Constitution and any

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588 S.P. Gupta and oths v. President of India, 1982 2 SCR 365
589 K Veeraswami v. Union of India, 1991 3 SCC 655
590 Under the Contempt of Court Act, 1971.
591 Supra Note 5.
592 JUDICIAL ACCOUNTABILITY AND LIMITATIONS ON JUDICIAL INDEPENDENCE, Chapter III, 195th Law Commission Report
attempt to curtail it directly or indirectly even by an amendment of the Constitution is invalid.⁵⁹³

‘Arbitrariness’ under the veil of Independence

Judicial Review, a basic structure⁵⁹⁴ of the Constitution, in India is based on the assumption that the Constitution is the supreme law of the land, and all governmental organs, which owe their origin to the Constitution and derive their powers from its provisions, must function within the framework of the Constitution, and must not do anything which is inconsistent with the provisions of the Constitution. Unlike US Constitution, in India there is a specific provision in Article 13(2) of the Constitution which mandates that the State shall not make any law which takes away or abridges the fundamental rights enshrined in the Constitution.

Since about the mid-20th century, a version of Judicial Review has acquired the nickname of Judicial Activism, especially in US.⁵⁹⁵ That expression has been quite in vogue in India too since the closing of the years of the last century and is currently a hotly debated subject.

On 27th November, 1967 in Golak Nath and Others v. State of Punjab⁵⁹⁶(Golak Nath) case Supreme Court of India had transgressed the boundary for the first time, from positivist Court to activist Court. Golak Nath reflected the thought that Court can also be a ‘protector and preserver’ of the Constitution and emphasized on the natural law theory by preaching that fundamental rights of people cannot be abridged or taken away by Parliament by

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⁵⁹³ Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299
⁵⁹⁴ Id.
⁵⁹⁶ AIR 1965 SC 845

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passing an amendment. The Kesavananda Bharti Decision has attempted to rewrite the constitution by overruling Golak Nath judgement by creating the basic structure of the Constitution. Not only that, Judiciary 'has gone so far' to prove itself 'Quite Untouchable' in relation to appointment of judges. In First Judges Case the power to appoint Judges was resided with Central Government while in Second Judges Case to 'correct' the previous Judgement and 'eliminate political influence', it is held to prevail its independence by equipping Chief Justice of India(CJI) as best appointer and the grey area regarding collective opinion of the CJI and his senior colleagues was concreted by the Third Judges Case. This tour de force, disregarding Constitution makers altered the provisions of the Indian Constitution for appointment of Judges to 'secure' the Independence of the Judiciary. Robin Cooke, former Chief Justice of Newzland, opined that "rather than underlining the primacy of Chief Justice, the opinion(Third Judges Case) thus appears to have shifted power to a significant extent to a small number of Supreme Court Judges other than the Chief Justice. This may be a far cry from anything envisaged by the framers of the Constitution of 1949...All in all the opinion of the Supreme Court in Third Judges Case must be one of the most remarkable ruling ever issued by a Supreme Appellate National Court in the Common Law world." In Ranganath Misra v. Union of India, Supreme court has transgressed the limit and encroached upon the

597 Golaknath stirred a great controversy regarding the scope of judicial review. For the first time, judges had openly taken up a political position. They held that it was not desirable that parliament’s power to amend the constitution should be unlimited and that the fundamental rights should be at the mercy of special majority of members of parliament required for Constitutional amendment. Golaknath was an open rejection of the view that the Court merely interpreted the Constitution and that it was not concerned with the consequences of its interpretation. The Golaknath decision was an assertion by the court of its roles the protector and preserver of the Constitution. Till then Court has not taken such a bold position on its constitutional role. The judges did not merely interpret the Constitution as it was but interpreted it from the vantage point of what it should be. They brought in the natural law concept in understanding the position of fundamental rights of the constitution. The theory of natural law emphasizes the ideal element of law and has always served as a scale for the evaluation of the positive law. (See S.P. Sathe, Judicial Activism In India,2nd edition, Oxford India Paperbacks, p-67 )
598 (1973) 4 SCC 225
599 AIR 1965 SC 845
600 S. P. Gupta v. Union of India, AIR 1982 SC 149
601 In re Special Reference 1 of 1998, (1998) 7 SCC 739
602 Thinking of making the provision in constituent assembly debates.
603 Art.124, the Constitution of India, 1950
604 "Where Angels Fear to tread", Supreme but not Infallible by Kripal, Oxford University Press p-97.
605 2003 7 SCC 133

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exclusive domain of legislature by advising the government to consider the report of a commission appointed by it and also directed the government to implement the report.

**Judicial Over-Activism**

Apart from Golaknath Judgement and Keshavnanada Bharti Judgement in 1970’s, Judicial Activism was turned into over-activism by another landmark judgement which is *Maneka Gandhi v. Union of India*[^606]. This judgement opened the floodgate of justness, fairness and reasonableness by providing a back-door entry to 'due process of law' in the place of 'procedure established by law' in order to bypass the absolutism of executives and its interference with individual freedom. In 1980’s, the Supreme Court retrieved the lost glory[^607] of Directive Principles of State Policy and enumerated that 'harmony and balance between fundamental right and directive principle is an essential feature of the basic structure of the Constitution'[^608]. Once the Pandora’s Box was opened in *Maneka Gandhi* and *Minerva Mills* Judgements, the Judiciary devised new strategies to accommodate the Directive Principles within the ambit of judicial enforcement. For that, the Court has prescribed norms regarding the running of the prions and mental intuitions[^609], instructed the Government to implement labor laws at construction sites[^610], recognised admissions in medical colleges throughout India laying down examination schedules[^611], prescribed hawking zones in metropolitan cities[^612], laid down the guidelines for the retail outlets for essential commodities such as LPG[^613], resolved disputes between public undertakings of Central Government[^614], directed the noxious factories to restart on the technical reports on safety measures[^615], prescribed the poverty limits for the low income urban housing[^616] or set up an expert panel headed by a retired Supreme Court to study the vehicular pollution.

[^606]: AIR 1978 SC 597
[^607]: The State of Madras v. Champakam Dorairajan, AIR 1951 SC 226
[^608]: Minerva Mills v. Union of India, AIR 1980 SC 1789
[^613]: Center for PIL v. Union of India, 1995 Sppl. (3) SCC 382.
[^614]: ONGC v. Collector of Central Excise, 1995 Sppl. (3) SCC 541. (This decision has since been reversed)
level etc. In these decisions the court did legislate and encroached into the executive and legislature domain. Not only that, from the first Fundamental Rights case to till date, Art. 21 has been used by the higher judiciary to breed so many new rights that it has become a 'mini code of Fundamental Rights'.

The judgment of the Supreme Court in *S R Bommai v Union of India* laying down that the Presidential Proclamation dissolving a State Legislative Assembly is subject to judicial review and that if the court strikes down the proclamation, it has the power to restore the dismissed State Government to office; judicial legislation in Vishakha's case regarding the prevention of sexual harassment of women in the workplace; the creation of a high-powered Committee to monitor parking charges; the wearing of helmets; parking space; one-way traffic; black film or vehicle windows; removal of billboards; interference in the educational policies of the Government in examples such as the *TMA Pai Foundation* case and the *Islamic Academy* case; even the recent Gujarat fake encounter case, in which the Court has decided to monitor the investigation and take over the role of the investigating agency while not entrusting the case to the CBI, is a case of over-stepping the constitutional thin line.

In recent times, the encroachment due to lack of accountability has been very egregious. For instance, last year the Supreme Court directed the centre to release five million tons of food grains immediately for distribution, because millions of tons of food grains were lying in the

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619 Satwant Singh Sawhney v. Asstt. passport officer, AIR 1967 SC 1836; Gobind v. State of M.P., AIR 1975 2 SCC 148: AIR 1975 SC 1378; M.H. Hoskot v. state of Maharashtra, AIR 1978 SC 1548; Moti Ram v. State of M.P., AIR 1978 SC 1594; Charles Sobraj v. Supdt. Central Jail, 1978n4 SCC 104; Sunil Batra v. Delhi Admn., AIR 1978 SC 1675; Hussainara Khatoon(l) v State Of Bihar; AIR 1979 SC 1360; Prem Shankar Shukla v Delhi Admn., AIR 1980 SC 1535; Sheela Barse v State Of Maharashtra, AIR 1983 SC 378; Attorney General of Indian v Lachma Devi, AIR 1986 SC 467; Rural Litigation and Entitlement Kendra v. State of U.P., AIR 1985 SC 652; T.V Vatheeswaran v State Of T.N., AIR 1983 SC 361; where the Supreme Court has created the right to go abroad, right to privacy, the right to legal aid, the right against bar fetters, the right against solitary confinement, the right to speedy trial, the right against handcuffing, the right against custodial violence, the right against public hanging, the right to healthy environment, and the right against the delayed execution of death sentence respectively.
620 AIR 1994 SC 1918.
621 1997 (6) SCC 241.
622 (2002) 8 SCC 481.
open for years because of inadequate storage capacity. Citing another striking example, the notice was issued to the union government by the Supreme Court to take action for the Indian students who were being racially attacked in Australia. In 2006, SC issued guidelines to reform the police administration which is completely a state subject. A more recent case being the judgment given by the Supreme Court in appointing two former justices to superintend the Special Investigating Team (SIT) on black money issue of the government. The SC is right in holding the government accountable, but imposing such a judgment is not justified.

In the case of M. C. Mehta vs. Union of India, where a writ was filed with regard to the vehicular pollution in Delhi, the Supreme Court had passed directions for the phasing out of diesel buses and for the conversion to CNG. When these directions were not complied with due to shortage in supply of CNG, the Court held that orders and directions of the Court could not be nullified or modified by State or Central governments. In the most recent case on judicial outreach of Aruna Ramchandra Shanbaug v. Union of India and Others, the apex Court allowed passive euthanasia i.e. withdrawal of life support to a person in permanently vegetative state, subject to approval by the High Court.

**Supreme but not infallible**

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627 Prakash Singh & Ors v. Union Of India And Ors., Writ Petition Civil No.310 of 1996

628 Ram Jeth Malani and ors v. Union of India, Writ Petition Civil No. 176 of 2009.

629 2002 (2) SCR 963.

630 (2011) 4 SCC 454.
"It is not exaggeration to say that the degree of respect and public confidence enjoyed by the Supreme Court is not matched by many other institutions in the country". 631 And also like many other institutions "the courts are manned by man" and men are subject to fallibility. During the Emergency Period in 1977 Independence of Judiciary was chocked 632, but before and after that some uncertain judgements put a question mark onto the integrity of Judiciary to that extent which kindled the idea of 'Judicial Accountability' to keep the third pillar crystal clear from 'conscious fallibility'. Fallibility reflected from the very first fundamental right case. The first fundamental right case, A.K. Gopalan v. State of Madras 633, heard by Supreme Court was total disillusionment. Under the provisions of Preventive Detention Act, A.K. Gopalan, a communist was held up without trial for maintenance of public order. The Supreme Court held that preventive detention were outside the purview of Article 19 of the constitution and "Art. 22 of Indian Constitution was a self contained code and therefore the law of Preventive Detention did not have to satisfy the requirements of Arts. 19, 14, 21." After the independence of India two Judgements, a) Shankari Prasad v. Union of India 634 and b) Sajjan Singh v. Rajasthan 635 upheld that parliament can amend the fundamental rights though Justice Hidayatullah, in latter case, expressed serious reservations by observing that fundamental rights should not become ‘the plaything of the special majority’. 636 During the emergency period ADM Jabalpur v. Shivkant Shukla 637 struck a mighty blow to the flow of right to life. In this case Supreme Court has descended into the abyss and held that no person had any locus standi to move any writ petition under Art. 226 of the Indian Constitution before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention. 638 Life and liberty of citizens are mere bounties of the state and could be taken away by the State whenever it pleased them to do so. 639

632 At that point of time, supersession of judges was happened.
633 AIR 1950 SC 27
634 AIR 1951 SC 458
635 AIR 1965 SC 845
636 Id., p. 862
637 AIR 1976 SC 1207
638 O. Chinnappa Reddy, The Court and the Constitution, summits and shallows, Oxford University Press, p-69
639 Id., p-37
Supremacy of the Supreme Court is way behind when it comes to balancing freedom of speech and contempt of Court. In Arundhati Roy’s case⁶⁴⁰, she was muzzled and suppressed⁶⁴¹ because of her dissenting voice against the decision of Supreme Court in NBA’s case⁶⁴² which ‘had materially affected the livelihood of the people.’

In cases of labour laws, the reasoning and ratio of the Supreme Court lost it logical touch. A strike may not be a fundamental right but right to strike are inherent rights of every worker and they cannot be abridged except it is mentioned in statutes. The case of T.K. Rangrajan v. State of Tamil Nadu⁶⁴³ mired the labour law by demeaning the rights of labour and working class by declaring all strikes are illegal and ‘conspiracies’(which are punishable). In case of Communist Party of India v. Bharat Kumar⁶⁴⁴ the Supreme Court put a blanket ban on bandhs or strikes irrespective of being justified or unjustified. Strike is an expression of discontentment and protest of labourers against the employer. But imposing a blanket ban on all kinds of bandhs is a work of frail mind.

**Conclusion: The Rise of Concept of Judicial Accountability**

Judicial accountability is, in fact, an aftermath of the independence of the judiciary. The word 'accountable' as defined in Oxford Dictionary means 'responsible for your own decision or action and expected to explain them when you are asked'. It is the sine qua non of democracy. This accountability is very well traced in the Constitution under Article 235 in which the 'control' of the Subordinate Judiciary is clearly vested over the High Court. Thus, entrustment of power over subordinate judiciary indicates an effective mechanism to enforce accountability as it is neither accountable to the executive or the legislature. The inept procedure of impeachment has also supplemented to that accountability. But, The absence of any mechanism holding the higher judiciary accountable gives rise to the concept of Judicial Accountability. ‘Settled norms’ and ‘peer pressure’ cannot keep the Indian

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⁶⁴¹ The court held her guilty of contempt and sentenced her to one day’s imprisonment and a fine of Rs 2,000, failing to pay which she would have to undergo three months’ imprisonment. Arundhati Roy was sent to Tihar jail. She spent a day there and came out after paying Rs 2,000. (See S.p. Sathe, Accountability of The Supreme Court, April 13, 2002 Economic and Political Weekly)
⁶⁴³ Id.
⁶⁴⁴ AIR 1998 SC 184

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Judiciary aloof from *eternal infirmities and self-inflicted mortal wounds*. Along with democratically unaccountable to the people, There are several reasons to make the Judiciary accountable:

1. **Impeachment** is the only impractical mechanism available under Art. 124(4) of the Constitution to remove the Supreme Court and High Court judges on the grounds of proven misbehaviour (which is not defined in the Constitution). This lengthy and cumbersome process is the biggest loophole in the removal of corrupt judges.
2. In the case of *R. Veeraswamy* the Supreme Court has gone further to equip itself with an armour to strengthen its immunity shield. It was declared that investigation in any criminal offence of corruption or an FIR registered against any High Court or Supreme Court Judges cannot be proceeded without the prior approval of CJI.
3. "The people of the country have the right to know about the every public act.... this is derived from the concept of freedom of speech and expression". But Section 8 of Right to Information Act, 2005 has particularly excluded the incidental and ancillary part of Judiciary.
4. Judges Enquiry Act, 1968 was enacted to prescribe the procedure for removal of judges of High Court and Supreme Court in the ground of proved misbehaviour. But, No provision regarding asset disclosure of judges, establishment of permanent committee and complaints filed by any public against the Judges make it a toothless piece of legislation.

"A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system. "

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645 A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.
647 Indira Nehru Gandhi v. Raj Narain, 1975 SCR (3) 333
648 Such information which is not in the domain or does not relate to Judiciary functions and duties of the court and matters incidental and ancillary thereto.
harassment of the common people of the country…. The system remains dysfunctional for the weak and the poor... (and has been) displaying their elitist bias.\textsuperscript{650}

Mona Shukla\textsuperscript{651} has listed down three promotions done by Judicial Accountability:

1. It promotes the rule of law by deterring conduct that might compromise judicial independence, integrity and impartiality.

2. It promotes public confidence in judges and judiciary.

3. It promotes institutional responsibility by rendering the judiciary responsive to the needs of the public it serves as a separate branch of the government.

A long waited transparency in appointment of judges is always demanded from the Judiciary. But, recent striking down\textsuperscript{652} of the National Judicial Appointment Commission Act has added to the public disappointments. The existing system of accountability has failed and the growing corruption is eating away the vitals of this branch of democracy. “Judges of the Supreme Court sit on ivory towers far removed from ordinary men and know nothing about them.” The demigod’s image has to be replaced, after all, judges are also human beings and they are capable of making mistakes and committing vices.

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\textsuperscript{650} Id.
\textsuperscript{651} Id.
\textsuperscript{652} Supreme Court Advocates-on-Record Association and ors. v. Union of India, Writ Petition Civil no. 13 of 2015
PIL & JUDICIAL ACTIVISM: OVERREACHING OR UNDERACHIEVING

PALLAVI VERSHA

Abstract

The instruments like Public Interest Litigation (PIL), the exercise of writ jurisdiction and the expansive interpretation of fundamental rights guaranteed by the Constitution of India helped Supreme Court of India to emerge as the most powerful organ of State and amongst the foremost constitutional courts in the world. The expression `Public Interest Litigation' means "any litigation conducted for the benefit of public or for removal of some public grievance." Whereas, Judicial Activism is that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes.

The essay traces the evolution of judicial activism since Independence through pronouncements of the Supreme Court. The author will summarise the core features of the Public Interest Litigation process and demonstrate how it marks a departure from the common-law understanding of the judicial process and about judges' initiatives to deliver social justice in an effective manner. It also illustrates through judgements of the Supreme Court that the instrument of the PIL and the exercise of writ jurisdiction by the Supreme Court go beyond the traditional postulates of judicial processes and political theory on separation of powers between the organs of State.

This essay is therefore a crisp analysis of the circumstances that led to the introduction of PIL which is clearly correlated to the 'activist' turn of the higher judiciary in India. The difficulty of this form of litigation is also discussed, thereby emphasizing on the difficulties in striking the right balance between judicial overreach and judicial restraint.

The aim of writing this paper is to highlight how the Indian judiciary can guard against over-activism in the urge to provide effective justice. Judicial Activism and judicial restraint are the terms used to describe the assertiveness of judicial power. One way to achieve the balance between allowing legitimate PIL cases and discouraging frivolous ones could be to build in economic incentives in PIL and also confine it primarily to those cases where access to justice is undermined by some kind of disability.

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Keywords

Public Interest Litigation, Judicial Activism, Judicial Restraint, Writ, Judicial Power

Relation between PIL & Judicial Activism: Emergence of PIL in India

Today judicial activism has touched almost each and every aspect of life ranging from human rights issues to maintenance of public roads. The preamble to the Constitution of India expresses a commitment to secure all citizens ‘justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and to promote among them fraternity assuring the dignity of the individual and the unity and integrity of the nation.’ The constitution also guarantees specific enforceable Fundamental Rights\(^{654}\) and non-justiciable Directive Principles of state policy and governance.\(^{655}\)

Painfully aware of the limitations of legalism, the judiciary of India has struggled over the last decade to bring law into the service of the poor and oppressed. Under the banner of Public Interest (or Social Action) Litigation and the enforcement of fundamental rights under the Constitution, the courts have sought to rebalance the distribution of legal resources, increase access to justice for the disadvantaged, and imbue formal legal guarantees with substantive and positive content. Originally aimed at combating inhumane prison conditions\(^{656}\) and the horrors of bonded labour,\(^{657}\) public interest actions have now established the right to a speedy trial,\(^{658}\) the right to legal aid,\(^{659}\) the right to a livelihood,\(^{660}\) a right against pollution,\(^{661}\) a right to be protected from industrial hazards,\(^{662}\) and the right

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\(^{654}\) Part III, Arts. 12-35.

\(^{655}\) Part IV, Arts. 36-51.


\(^{657}\) People’s Union for Democratic Rights v. Union of India, AIR 1982 SC 1473; BandhuaMuktiMorcha v. Union of India, AIR 1984 SC 802.


to human dignity. The significant feature of Indian Constitution is partial separation of powers. The doctrine of separation of powers was propounded by the French Jurist, contesqeu. In India, the three organs of the Government viz. Executive, Legislature and the Judiciary are not independently independent but inter-dependently independent.

Public interest litigation or social interest litigation today has great significance and drew the attention of all concerned. The traditional rule of "Locus Standi" that a person, whose right is infringed alone can file a petition, has been considerably relaxed by the Supreme Court in its recent decisions. Now, the court permits public interest litigation at the instance of the so-called Public-Spirited Citizens for the enforcement of Constitutional and Legal rights. Now, one can approach the court for the public cause by filing a petition in the Supreme Court under Art.32 of the Constitution or in the High Court under Art.226 of the Constitution or before the Court of Magistrate under Sec. 133 of the Code of Criminal Procedure, 1973. The constitutional guarantee of direct access itself ensures that less advantaged individuals and groups might more realistically consider asserting their interests through the courts. And by liberally interpreting these provisions the courts have further sought to rebalance the scales of justice.

A number of distinctive characteristics of PIL can be identified, which include: a) liberalization of the rules of standing; b) procedural flexibility; c) a creative and activist interpretation of legal and fundamental rights; d) remedial flexibility and ongoing judicial participation and supervision. Public interest litigation has been initiated by individuals on behalf of other individuals and groups, by academics, journalists and by many social action organizations. As J. Krishna Iyer explained in Mumbai Kangar Sabhha v. Abdulbhai Test litigations, representative actions, pro bono publico and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man... Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with

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individualization of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker.

Interpretations of fundamental rights may be informed by a commitment to the welfare objectives contained in the Directive Principles. While the court may attempt to improve the administration of various welfare laws it has said consistently that it cannot force the state to enact legislation to enhance fundamental rights or to pursue the Directive Principles. The true measure of judicial activism in India, therefore, is found less in the rhetoric of rights definition than in the remedial strategies deployed and actual outcomes in PIL cases.

The Indian judiciary has shown willingness to alter the rules of the game where necessary. Actions may be commenced not only by way of formal petition, but also by way of letters addressed to the court or a judge who may choose to treat it as a petition. There are reports of actions begun by postcard, and even of one judge converting a letter to the editor in a newspaper into a PIL writ. Judges have been known to invite and encourage public interest actions. For example, in one case concerning massive pollution of the river Ganga, the court published notices in the newspaper drawing the litigation to the attention of all concerned industries and municipal authorities inviting them to enter an appearance. The final order, closing a large number of industries and prohibiting the discharge of untreated effluent, was directed to scores of enterprises ex parte.

Role of Judiciary in strengthening PIL and Judicial Activism

Since the establishment of Courts as means of administering justice, law is made from two sources. The prime source is from the legislature and the second is the judge-made law, i.e. judicial interpretation of already existing legislation. Montesquieu stated that concentration of State’s powers in a single person’s hand or in a group of people results in

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665 BandhuaMuktiMorcha v. Union of India, AIR 1984 SC 802.
tyranny. He suggested that there should be clear cut division of power between the three organs of State i.e. executive, legislative and judiciary.

For a very long time, the Indian judiciary had taken an orthodox approach to the very concept of judicial activism. The history of judicial activism can be traced back to 1893 when Justice Mehmood of the Allahabad High Court delivered a dissenting judgment which sowed the seed of activism in India. It was a case of an under trial who could not afford to engage a lawyer. So the question was whether the court could decide his case by merely looking at his papers. Justice Mehmood held that the pre-condition of the case being heard would be fulfilled only when somebody speaks. So he has the widest possible interpretation of the relevant law and laid the foundation stone of judicial activism in India.

The Supreme Court of India started off as a technocratic Court in the 1950's but slowly started acquiring more power through constitutional interpretation. In A.K.Gopalan v. State of Madras, although the Supreme Court conceived its role in a narrow manner, it asserted that its power of judicial review was inherent in the very nature of the written constitution. The Constitution appears to be a matter of abundant caution. The posture of the Supreme Court as a technocratic Court was slowly changed to be activist Court.

In Sakal Newspapers Private Ltd. v. Union of India, it was held that a price and page schedule that laid down how much a newspaper could charge for a number of pages were being violative of freedom the press. The Court also conceived a doctrine of giving preferred position to freedom of speech and expression, which includes freedom of the press, over the freedom to do business. The Supreme Court held that a newspaper was not only a business; it was a vehicle of thought and information and therefore could not be regulated like any other business. In Balaji v. State of Mysore, the Supreme Court held that while the backward classes were entitled to protective discrimination, such protective discrimination should not negate the right to equality and equal protection of law. It held that backwardness should not be determined by caste alone but by secular criteria though caste

670 Sakal Newspapers Private Ltd. v. Union of India, AIR 1962 SC 305.
could be one of them, and that the reserved seats in an educational institution should not exceed fifty per cent of the total number of seats. In Chitralekha v. State of Mysore\textsuperscript{672}, similar restrictions were imposed on the reservation of jobs in civil services. These are examples of judicial activism of the early 1960s.

In these early years of the Indian Supreme Court, the inconvenient decisions of the Supreme Court were overcome through the device of constitutional amendments. The 1\textsuperscript{st}, 4\textsuperscript{th} and 17\textsuperscript{th} constitutional amendments removed various property legislations from the preview of judicial review. A question was raised before the Court in 1951 in Shankari Prasad v. Union of India\textsuperscript{673}, whether Parliament could use its constituent power under Article 368 so as to take away or abridge a fundamental right. The court unanimously held that the constituent power was not subjected to any restriction. That question was again raised in Sajjan Singh v. State of Rajasthan\textsuperscript{674}, where judges responded favourably, though a minority view. In 1967, L.C.Golaknath v. State of Punjab\textsuperscript{675} that minority view became the majority view. It was held that Parliament could not amend the Constitution so as to abridge the fundamental rights.

Supreme Court of India has exercised even wider powers in the interest of Constitutionalism, apart from exercising the power of judicial review in an expansive manner to render justice.\textsuperscript{676} The court has assumed to itself the power to determine the validity of even a constitutional amendment effected under Article 368, in the aftermath of Keshavanand Bharti v. State of Kerala.\textsuperscript{677} This is cited as the best example of judicial activism in India. The Supreme Court has refused to exercise its advisory jurisdiction under Article 143 of the Constitution in the matter of Ayodhya controversy.\textsuperscript{678} Such a refusal itself is an example of judicial activism, exhibited in that area probably for the first time in India. However in Supreme Court Bar Association v. Union of India,\textsuperscript{679} a Constitution Bench of the Supreme Court, overruled the above decision, and kept the question open.

\begin{footnotesize}
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673Shankri Prasad v. Union of India, AIR 1951 SC 458.
676Art. 142 of the Constitution.
679Vinay Chandra Mishra, AIR SCW 3488.
\end{footnotesize}
The Supreme Court has broadened the scope of Locus standi in the matter of enforcement of fundamental rights of the citizens, by ushering in a new era of public interest litigation. The credit for this welcome development goes to few individual judges of the Supreme Court like Justice P.N. Bhagwati, Justice V.R. Krishna Iyer and Justice Kuldip Singh.

The courts have assumed to themselves the roles of monitors and Supervisors in certain investigations involving the political bigwigs in certain scandals. The Patna High Court has ordered the C.B.I., a crime investigation agency of the Central Government, to report directly to the High Court, in the Scam which became popular as it allegedly involved the then Chief Minister of Bihar, Laloo Prasad Yadav. 2G Spectrum and commonwealth scam cases are glaring recent examples to show that how PIL can be used to check the menace of corruption in Indian Administration. In both the cases matter was initiated at the instance of public spirited person by way of PIL. SC court has taken an unprecedented step and cancelled several 2G licenses of different telecom companies. The bench said, the TRAI in making recommendations cannot overlook the basic constitutional principles, though it was an expert body assigned with important functions under the 1997 TRAI Act. In Noida land acquisition case the Supreme Court cancelled the acquisition of land by U.P government as it was acquired for industrial purpose but it was given to builders for making apartments. The court ordered that land should be reverting back to farmers from whom land was acquired.

It cannot be disputed that judicial activism has done a lot to ameliorate the conditions of the masses in the country. It has set right a number of wrongs committed by the states as well as by individuals. The common people are very often denied the protection of law due to delayed functioning of the courts, also called judicial inertia or judicial tardiness. Judicial activism has started the process to remove these occasional aberrations too. This can be furthered only by honest and forthright judicial activism and not by running down the judiciary in the eyes of the public. Justice J.S. Verma had referred: Judicial activism is a sharp-edged tool which has to be used as a scalpel by a skilful surgeon to cure the malady.

Despite the twin-strategy employed by the judiciary to curb the misuse of PIL, it seems that still many frivolous PIL cases reach before the courts. For example, while hearing a bunch of PILs seeking guidelines on premature release of convicts serving life imprisonment in
various prisons, the Supreme Court recently expressed its frustration on the misuse of the PIL device. Noting that around 95% PILs are frivolous, the Court observed that PIL has become a "nuisance" and that time has come to impose a "penalty" on those who file PIL for frivolous reasons. The very notion of PIL is based on flexibility, so this is one possible explanation why it has proved difficult to curb the misuse of PIL. For instance, the judiciary might not like to roll-back the PIL project so as to lose its power to intervene as guardian of the interests of disadvantaged sections or to make the Government accountable in selected cases. It might prefer a situation in which no single genuine PIL case is excluded, even if that result in some non-serious PIL cases being entertained.681 This approach is arguably reflected in the broad ambit of the above Guidelines, which seem more like facilitating rather than curtailing PIL cases.

**Concluding Remarks: Balancing a double-edged Sword**

Public Interest Litigation is working as an important instrument of social change. PIL affords a ladder to justice to disadvantaged sections of society, some of which might not even be well-informed about their rights. Furthermore, it provides an avenue to enforce diffused rights for which either it is difficult to identify an aggrieved person or where aggrieved persons have no incentives to knock at the doors of the courts. The innovation of this legitimate instrument proved beneficial for the developing country like India. PIL has been used as a strategy to combat the atrocities prevailing in society. It's an institutional initiative towards the welfare of the needy class of the society.682 The Judicial Activism has touched almost every aspect of life in the present times. Be it the case of bonded labour, illegal detentions, torture and maltreatment of women, the implementation of various provisions of the constitution, environmental problems, health, sports etc. the courts took cognizance of each case and laid down various judgments to protect the basic human rights of each and every member of society.

However focus should be on ensuring that reasonable restriction is carried on with the execution of the representative processes to enhance the Fundamental & Legal rights of society’s valid interest. The governance cannot be replaced by the judicial institutions. There is a need to discover a balance between judicial and executive institutions. The important question today is not whether the Supreme Court could activate its judicial role, but to what extent the concepts of Judicial Activism and creativity are exercised. Judicial activism should not be used to erode the Constitutional principles of separation of power rather must respect the boundaries. 

By evolving the doctrine of Basic Structure of the Constitution, the Hon’ble Supreme Court of India has limited the power of Parliament to amend the constitution. The court’s increased activism is good and contributed a lot for India’s democracy. The expensive, technical justice now becomes inexpensive and nontechnical through the growth of PIL.

However, the Indian PIL experience also shows us that it is critical to ensure that PIL does not become a back-door to enter the temple of justice to fulfil private interests, settle political scores or simply to gain easy publicity. Courts should also not use PIL as a device to run the country on a day-to-day basis or enter the legitimate domain of the executive and legislature. The way forward, therefore, for India as well as for other jurisdictions is to strike a balance in allowing legitimate PIL cases and discouraging frivolous ones. PIL should be primarily confined to those cases where access to justice is undermined by some kind of disability. It would be appropriate to conclude by quoting Cunningham, “Indian PIL might rather be a Phoenix: a whole new creative arising out of the ashes of the old order.” PIL represents the first attempt by a developing common law country to break away from legal imperialism perpetuated for centuries.

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THE SPIRIT OF SOCIAL ACTION LITIGATION AND JUDICIAL ACTIVISM

SWETHA S.684

Abstract

The justification of judicial activism in its continuing evolution has led to an increasing disparity in recent times. The legality of this relies on the notion that the virtue of our constitution cannot be construed as merely a corpus of rules. Today, it is to be inferred as constructing ethos for egalitarian and constitutional governance. More often than not, judicial activism is also witnessed as being imperative to prevent an inherent abuse of power by hegemonic administrators. Although, traditionally the idea of judicial vigilance was held to be ludicrous and excessive, currently its vitality cannot be written off. In modern relevance, courts are not just a basic institution in assessing the legality and conformity with Constitution. They have imperceptibly acquired political, social and humanitarian prospects, expanding theirambits by dynamic interpretations. Having broken many well established conventions, our peacemakers have boldly trespassed the neatly aligned division of power and have challenged the status quo. This predominantly implies that the courts of law shall have the last word in all matters concerning constitution of India. A controversial sentiment that springs up is how an unelected court can prevail over the intention of the elected representatives in a democratic country. But it must be noted that ambitions of a temporarily ruling executive can never be allowed to supersede the objects of our constitution. Also maintaining the solemnity of constitution can never be derogatory of vested interests in the general public. Thus, this consciousness of the courts has revealed the necessity for prudent social action litigation by relaxing the parameters of 'locus standi' and securing justice beyond all barriers. It has empowered the voiceless, weaker sections of the society and strengthened the faith between the people and keepers of justice. The tenets of judicial activism have matured from the premise of judicial review and translated into action by way of Public Interest Litigation.

In this article, the author has attempted to trace the progression of Public Interest litigation in the background of Indian society. The author also aims to illuminate the contributions of judiciary by their proactive approach to the needs of the society and thus, its timely achievements. The objective of this


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paper is to fix the concept of Public interest litigation in the condensation of judicial activism, its propriety and enhance a growing awareness towards the same.

**Judicial Activism: A Moot Question**

To concoct the plot of Public Interest Litigation and Judicial Activism, it requires a rudimentary understanding of what the term ‘judicial activism’ could signify. Arthur Schlesinger Jr. introduced the term “judicial activism” to the public in a ‘Fortune’ Magazine article in January 1947. Since then, this label has been endorsed by its practitioners and enthusiasts, resisted by political elitists and used by both as an effective rhetoric.

The conviction of activist judges is to revere the Constitution in letter and spirit but dismiss any proposition that may admit administrative action over constitutional allowance. The behaviour of such judges is to stretch the legitimate grant of discretion to accommodate their own fixed impression of collective good. A factor that moulds their judicial decisions may sometimes be ingrained opinions rather than pure legal acumen. Mostly such perceptions do not overstep the laid principles of law but strictly subject these principles within the wider ambit of constitutional governance. Therefore, judicial activism is ‘truly consistent with and required by the Constitution’. Our constitution is a living document, not merely having written letters but an unhampered soul. A written constitution cannot be subject to a static interpretation because it states not rules for the passing hour but for the expanding future.

It would be appropriate to say that ‘judicial activism contributes towards deepening of the commitment to constitutional values’ in addition to paving a way for a more liberal insight by dynamic interpretation of constitution in this age of ‘new public law jurisprudence’. Consequently, it is implicit that the two aspects are conjoined and uphold each other so

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687 S.P.Sathe, Judicial Activism in India “Transgressing borders and enforcing limits”, Oxford University Press
688 Supra 2
as to keep up with changing times. The cause of today’s dilemma is that the executives wish
judiciary to adhere the long established dictum of maximum judicial restraint as opposed to
judicial vigilance. It is said that the judges must exercise their authority with the existing
textual support and not inclinations. Thus, the idea of activism predominantly perpetrated
is one of suspicion and cynicism because the attitude of courts tampers the will of policy
makers. In spite of polarized views, judicial activism is witnessed to be the contemporary
current of judiciary. The inherent objective of a judicial institution is to be organic, active
and zealous. It cannot afford to be sluggish as the society would then be deprived of a
foundation of trust and the conscience of a democratic polity. As aptly remarked, ‘activism
like beauty is often in the eye of the beholder’. (Sherry 2007, 1065) and ‘charges of activism
often depend upon whose ideological ox is being gorged’ 689. Upon understanding this
pluralistic nature of judicial activism, the enquiry ought not to be whether it is desirable but
preferably why a stark contrast exists.

Offending and Defending Judicial Activism

The theory of separation of powers ‘emphasizes the mutual exclusiveness of the three
organs of the government.’ 690 Although there is no express provision in our Constitution
earmarking this theory, it is deemed as an implicit canon to be followed. It is contemplated
that the makers of our Indian Constitution did not favour an expansive trust of powers in
the judiciary by finely wording the supreme text and leaving slight discretion to the judges.
But it is to be called to mind that the present social order is blaringly dissimilar to what was
at the time of Indian independence. The society is at an accelerated danger from crafty
politicians, a handful of opulent and propertied men steering the policy makers to their
benefit and money loving holders of office who unhesitatingly gag the cry of a commoner.
Hence, it is obvious why the government has latched itself to the hopes of a division of
power. They have indeed thrown strong accusations at the heedfulness of judges. This is
evident in forceful words declared by them. For instance, Alexander Hamilton expressed in
The Federalist, ‘the courts must declare the sense of the law, and if they should be disposed

689 Supra 2
690 MP Jain & SN Jain, Principles of Administrative law, Lexis Nexis, 6th Ed
to exercise will instead of judgement, the consequences would equally be the substitution of their pleasure for that of legislative body’. (Hamilton 1788, 440) They condone the acts of judges by shielding the legitimacy of executive arm in its performance of duties. A display of activism was even titled ‘despotic behaviour of federal judges.’ Abraham Lincoln boldly stated that ‘if political issues were resolved by the judiciary, the people will have ceased to be their own rulers.’ This argument seems persuasive especially as a democracy is the translation of will of the people and this will is transformed into action by the elected representatives. To attack this right is synonymous of transgressing the limits of democratically imposed principles. But judiciary is the saviour of people. It is the duty of judiciary to gently caution its subjects and determine any unwarranted privilege of power by their hands. The drawbacks of inappropriate policy making under the mask of authority is disturbing. To countercheck the incorrectness of political parties, a highly evolved and politicized judiciary is sought for. The judiciary is an organ which emancipates rather than disenfranchises the intellect of public. After all, the aim of the courts can never truly be against the welfare of the people.

More importantly, Independence of judiciary is also a fundamental aspect of the constitution. Any disregard of this is ‘practically an assault on independence of judiciary.’ If activism is to be construed as overstepping constitutional limits and seizing political power, it is curious why there is an indifference to legislative or executive activism as seen in everyday living.

Where there is a slash on unquestioned and enormous presumption of power, there is an increased attention in governance. As eloquently stated, ‘the more powerful other branches of State become more danger that they might transcend the constitutional / legal limitations.’ In spite of a plain dissent, a reservoir of morality is incumbent not only as a resolve but also as an obligation of judges.

Post Emergency & Seed of PIL

691 Haines & Sherwood, The Role of The Supreme Court in American Government and Politics:1789-1835, 1944
692 George P, Robert "Lincoln on judicial despotism", February 2003
694 ibid

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It is observed all through the history that a revolution is reactionary. Every nation at some point is fraught with a blackened era which tears the fabric of unity, reduces to the state of lawlessness and becomes an epoch of anarchy. Initially the people imagine themselves to be helpless at the hands of injustice, then submit or become agents of such injustice and finally rise and retaliate for a change.

The law is the mandate only as long as its squad namely the executive, legislature and judiciary condition its enforceability. The Indian emergency 1975-77 was a sad occurrence where trusted institutions became law unto themselves. The constitution was suspended to give sanction to such acts which were illegal.\textsuperscript{695} Mrs. Indira Gandhi the then prime minister drowned the testimonies of democracy by acting on her pleasure. Before them, there was no ethical consideration or any spirit to save the public.\textsuperscript{696} The practice of the executive and parliament was to viciously trammel upon the agitation of judiciary by vining the words of Article 368 in their favour. They held that the power to amend the constitution was an absolution and cannot be curtailed at any instance.

This sentiment can even be called as the doings of the court as initially in the case of \textit{Shankari Prasad v Union of India},\textsuperscript{697} total amending power was given by the judiciary.\textsuperscript{698} The course was followed by \textit{Sajjan Singh}\textsuperscript{699} whereupon the majority reiterated the view in \textit{Shankari Prasad} but a minority opined that it was incorrect to grant unrestrained power. The case of \textit{Golak Nath}\textsuperscript{700} was seen as a total change where the minority view in \textit{Sajan Singh} became the majority. But this was read into as being wrong and the case of \textit{Keshavananda Bharati}\textsuperscript{701} attained legitimacy where it was held that such power cannot extend to tamper the basic structure of the constitution.\textsuperscript{702}

The Constitution is the character of a country. It is a selfhood chosen with forethought and the prerogative of people. It measures the appetite for freedom and endurance of a society. Being indestructible, it is the privilege of people, responsibility of a government and

\textsuperscript{695} Kuldip Nayyar, “Emergency Retold”, Konark Publishers Pvt Ltd, New Delhi
\textsuperscript{696} ibid
\textsuperscript{697} Shankari Prasad v Union of India AIR 1951 SC 455
\textsuperscript{698} Lawlex.org/lex-bulletin/case-analysis-shankari-prasad-vs-union-of-India-air-1951-sc-455/9758
\textsuperscript{699} AIR 845, 1965 SCR (1) 933
\textsuperscript{700} AIR 1643, 1967 SCR (2) 762
\textsuperscript{701} AIR 1973 SC 1461
\textsuperscript{702} Supra 3
the legitimacy of the courts. As Austin describes, constitution is the ‘most wonderful work ever struck off at a given time by the brain and purpose of man.’\textsuperscript{703} The judiciary being the bastion of rights and justice invents novel ways to embrace the demands of a continuously developing society and inject into the already instilled propriety of our constitution. \textbf{Public interest litigation} means any litigation conducted for the benefit of the public or for the removal of some public grievance.\textsuperscript{704} The formulation of ‘basic structure’ of Indian constitution though a borrowed principle is seen to be the genesis of \textit{social action litigation}, a concept which is the progeny of judicial activism. Activism can be called as an attitude and public interest litigation, an action of courts. This stipulates that there can be no law in violation of the basic structure. The doctrine of basic structure views these three ingredients of public interest litigation as immutable: Preamble, Fundamental rights and judicial review.

The fundamental rights in Part III of Indian Constitution are the synonym of basic human rights essential for life as human being. They are inalienable rights which are inherent in mankind and an instrument to develop dignity and worth of a human. They exist even without legislations and it is seen that judicial activism matures from judicial review which is a percept of fundamental rights through Article 32 of Constitution. As a right without remedy does not have much significance, the right to approach Supreme Court by appropriate proceedings for enforcement of fundamental right is ensured by the constitution under Article 32. Here, the right of remedy is itself a fundamental right. An aggrieved party can also file under Article 226 of the constitution and Section 133 of Criminal Procedure Code 1973. Thus, an action under public interest litigation can lie by instigating any of the above procedure. The question of waiver of fundamental right was considered in \textit{Baheshar Nath v Commissioner of income tax}\textsuperscript{705} and \textit{Muthiah v Commissioner of Income Tax}.\textsuperscript{706} It was held by the Supreme Court that no individual can waive his/her fundamental rights. Our democracy being a nascent faith needs to be sheltered till it is impenetrable.

\textsuperscript{703} www.conservativereview.com/commentary/2016/04/we-must-not-destroy-the-constitution-to-save-it accessed on 27-05-2016
\textsuperscript{705} 1959 AIR 149
\textsuperscript{706} 1956 AIR 269

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The review power is harnessed from Article 13 expressly and availed by the courts particularly in Public interest litigation cases. In *A.K. Gopalan v Madras* the court declared that judicial review is an inextricable right conferred by Constitution- ‘the inclusion of Article 13(1) and (2) in the constitution appears to be a matter of abundant caution. Even in their absence, if any Fundamental right is infringed by any legislative enactment, the court has always the power to declare the enactment to the extent it transgresses the limits invalid.’ An undue encroachment by the government is liable to be abandoned as unconstitutional by the competence of judiciary by the express vesting of review power in many provisions of the constitution.

The goals set in Preamble are the inspiration of Directive Principles of State Policy. Through the tool of PIL, the judiciary has surpassed its own limits by not only assuring civil rights but also socio-economic rights which are the backing of DPSP. In a way, the non-justiciable nature of DPSP has been altered to enforceable and a valid claim under PIL. Although fundamental rights were wrongly considered superior to DPSP, in the case of *Maneka Gandhi*, it was clarified that both Fundamental rights and DPSP are complementary twin goals directed towards a common purpose.

Public interest litigation can easily be worded as access to justice and a wholesome encompassing of right to life and liberty in Article 14 of our constitution. To facilitate a progressive understanding of our Indian constitution, the courts enlarged the rights of people by relaxing the stringent conditions of ‘locus standi’ and creating a new age of participatory role in judicial process by public at large. The conventional rule of adjudication was to resolve dispute amongst private parties and the decision of the courts are binding only upon them.

But, in PIL, the Court facilitates access by:

- Entertaining letters from persons interested in opposing illegal acts

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707 1950 AIR 27
709 1978 AIR 597
Allowing social activist organisation or individuals to take up cudgels on behalf of the poor and disadvantaged sections who possess neither knowledge nor resources for activating legal process.

- Permitting citizens to speak on behalf of large unorganized but silent majority against bad governance, wrong development or environmental degradation.\(^{710}\)

Therefore any person who has requisite interest in the case and acting in good faith can appeal to the courts to set right any infringement of fundamental rights. It is a ‘genuine infraction of statutory provision, but not for personal gain, profits or political motive or any other oblique consideration’.\(^{711}\)

A metamorphosis of traditional paradigm of judicial process obliterated the passive role of courts by adverse evolution. Judicial intervention was accorded more acceptance and limitations were undone to warrant speedy, inexpensive justice by diluting complex litigation rules and qualifying principles. Earlier, the standard exercise of a judge was merely an interpreter and the law making capacity was circumscribed to fill the void in statutory enactments. The law of limitation was uncompromisingly applied and only a person hit by an impugned administrative action was allowed to approach the judiciary.

But, the compliance to these premises would imply a compromise on practical and pragmatic considerations. It would threaten a meaningless vow of fundamental rights if a straightforward approach is forsaken to upkeep superficial postulates. As Dicey says, ‘liberty of an individual has emanated from the remedies provided by the courts.’\(^ {712}\)

Realising this, the courts initially extended relief to the writ of Habeas Corpus (illegal detention) and following this, briskly expanded to include other writs. Especially in a writ of mandamus (directing to do or forbidding the doing of an act), the logic of PIL was lengthened to even decree acts which were given as discretionary authority to the government. A legal validity was bestowed by integrating the theory of ‘sufficient interest’ in Supreme Court Act, 1981.

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\(^{710}\) S.P. Sathe, Judicial Activism in India “Transgressing borders and enforcing limits”, Oxford University Press


Like *locus standi*, the doctrine of prematurity is dispensed with, which requires that all available review or reconsideration processes be exhausted before they will consider the merits of a judicial review case.\(^7\) As S.P. Sathe quotes, our ‘Supreme court has not been too fussy about doctrine of prematurity’\(^8\) or any other doctrines which tends to be an impasse.

**Contributions of Indian Judiciary through PIL**

Although India is the oldest civilization, she is still young in democracy. This saddening paradox tells us of a flagrant digression in the economic background of people. An excessive portion of this developing nation lives in the peril of poverty. The deploring concern is that the indigent section of the society seldom finds escape from this acute grief.

The fallacy in our justice system is a benighted belief that all individuals are conscious of the law of the land. But despondent people are without recourse to aid primarily because they lack comprehension of their legal rights and lack facilities to fight infringement.

This is why PIL has emerged to be a powerful machinery to emancipate the weak and powerless through equitable means. The devotion of Indian judiciary to retrieve and restore justice beyond all barriers is translated into action by PIL. As aimed, they have achieved 'public involvement in judicial processes' by spreading the injury suffered by an individual upon the community and enabling any person with sufficient interest to call upon the protection of law.

This concept was first propounded by Justice Krishna Iyer in *Fertilizer Corporation Kamgar Union*\(^9\) thereupon concretized in *S.P.Gupta v UOI*\(^9\). Justifying the liberalization of PIL in Fertilizer case, Justice Krishna Iyer enumerated its reasons thusly:

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\(^7\) [www.isthatlegal.ca/index.php?name=appeal_judicial_review.administrative_law_ontario_sppa](www.isthatlegal.ca/index.php?name=appeal_judicial_review.administrative_law_ontario_sppa), accessed on 28/05/2016 at 12:10 pm

\(^8\) S.P. Sathe, "Avoidance of premature constitution Questions by the Supreme Court" Yearbook of legal studies, Madras 1975

\(^9\) 1981 AIR 3344

\(^9\) AIR 1982 SC 149
Exercise of State power to eradicate corruption may result in unrelated interference with individual’s rights
Social justice was ants liberal judicial review of administrative action
Restrictive rules of standing are antithesis to a healthy system of administrative action
Activism is essential for participative public justice

Sunil Batra v Delhi Administration was the first pronounced case where the Court promoted public participation and spirit to demand justice. In this case, a prison inmate managed to get scribbled letter about the brutish and inhuman treatment of a fellow prisoner to Justice Krishna Iyer who reacted quickly and justly. This was the first judicial discourse on prisoners’ rights.

Another instance in criminal jurisprudence and PIL was Mathura rape case which set a new trend where actions of the court were subjected to public scrutiny and comment. This was revolutionary and redefined the relationship between the judiciary and the people.

Some of the many landmark achievements through the tool of PIL are liberation inhuman conditions of under trial prisoners, compensation awarded to the victims of gas leak, expansion of workers right in respect to Article 21, freeing of bonded labourers, false encounters, investigate into sexual exploitation of children in flesh trade, regulation and prevention of occupational health hazards and diseases in asbestos industries, dealing with the custodial violence against women in prisons and many

718 1980 AIR 1579
719 Supra 3
720 1979 AIR 185
721 Hussainara Khatoon v state of Bihar 1979 AIR 1369, Anil Yadav v State of Bihar 1982 AIR 1008, Khatri and Others v Bihar 1981 SCR (2) 408
722 M.C.Mehta v Union of India 1987 AIR 965
723 People’s Union for Democratic Rights v. Union of India 1982 AIR 1473
724 Bandu Mukti Morcha v UOI AIR 1992 SC 38
725 Chaitanya Kalbagh v U.P 1989 2 SCC 314
726 Vishal Jeet v India AIR 1990 SC 1412
728 Sheela barse v state of Maharashtra JT 1988 (3) 15
more myriads of cases. Also a number of social action organizations and public spirited individuals were welcomed to employ the new norm of a conscious court.

**Conclusion**

The uniqueness about Judicial Activism is the applicability of mutually antithetic definitions which cannot altogether be refuted. It is a malleable term conflicted by descriptions, at times opposed and at times promoted. But Public Interest Litigation, an offshoot of Judicial Activism, seems to have won a place in the hearts of the people. The multiplicity of its purpose and its actual working has fostered optimism that courts can bring about a change in society. There exists a feeling that Judiciary is the better guard of interests of people. Because of an unopposed allure of PIL and display of judicial statesmanship, an apprehension exists that activism might transcend into adventurism. Also, there have been instances where the all-encompassing nature of Public Interest Litigation has threatened to become *publicity* interest litigation. An inherent menace is the use of this avenue by ingenuine and frivolous petitions to achieve inequitable ends.

But the Indian experience teaches that this original and accommodating form of Public interest litigation cannot be disregarded only because it does not accede to a habitual description of judicial accountability. At the end it emerges that judicial activism and PIL are inextricable elements in the process of dispensation of justice to a common man, a fact which has been proved time and again.

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PIL & JUDICIAL ACTIVISM

NOMITA MISHRA

Abstract

Justice Krishna Iyer has remarked that 'every judge is an activist either on the forward gear or on the reverse'.

The phrase Judicial Activism does not have a universally accepted definition. It is understood by different persons differently. It carries with it a number of different meanings. To some it means assertive role by the judiciary in enforcing the Constitutional Rights, to others it means dressing down the Legislature and the Executive.

In the words of Prof. Upendra Baxi it is an ascriptive term e.g. today according to some politicians the judiciary, by practicing the activist philosophy is overstepping its brief, but for a common man who gets justice because of such acts of the Court, it is the normal function of the Court and he will not find any activism in it. According to Justice Bhagwati it is the active use of judicial power for getting willed results.

P.I.L. is one of the expressions of Judicial Activism. It has added a new color to the Judiciary's involvement in public administration. The concept of locus standi and the procedural complexities have been totally diluted in the cases brought before the Courts through P.I.L. Earlier, a PIL would be filed for the sake of rendering justice and enforcing the fundamental rights of the members of the disadvantaged sections of the society who by reason of their poverty and ignorance would not be in a position to seek redressal from the Courts and, therefore, any member of the public was permitted to maintain an application for appropriate directions.

The Courts through a number of PILs have heard the grievances of the prisoners, bonded laborers, pavement dwellers, etc. It was through P.I.L. the problems of the poor, illiterates and under privileged masses came to the vanguard. Even the letters addressed by the individuals as well as individuals acting probono publico to the Court have been treated as writ petitions under Article 32 or 226, which fall under a new jurisdiction called the epistolary jurisdiction. This has additionally proved to be of great help especially for the weaker sections of the society. The P.I.L. action by various groups

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has given rise to a new era known as the era of general awakening giving a ray of hope in the improvement of their lot through the Court process.

Introduction

The term Judicial Activism is nowhere defined in the Constitution. Black's Law Dictionary defines the term 'judicial activism' in the following words:

"A philosophy of judicial law-making whereby judges allow their personal views about public policy among other factors to guide their decisions; usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."730

India follows the doctrine of Separate of powers wherein separate roles are assigned to separate departments. One of the key roles of the Judiciary is to review the actions of the other two organs of the government, namely-the legislature and the executive in order to make sure that they haven't exceeded their constitutional limits and that they do not encroach on the rights of the citizens through arbitrary acts. This is where the activist role of the judiciary comes into picture.

Donning the ‘Activist’ Garb

The Indian Judiciary owes a considerable fraction to the British Rule. The Courts still rely on the various statutory laws and precedents from the Colonial Era, except for what is abhorrent to our own Constitution. Ours is an eclectic constitution wherein our founding fathers have incorporated various provisions from different countries. One of which is the notion of Judicial Review. This concept is contrary to the British notion of Parliamentary Sovereignty.731 In India, the criteria for the Courts to review governmental action is threefold – the fundamental rights enshrined in Part III of the Constitution, the reasonableness of administrative actions and the demarcation of legislative competence between the Union and the States.732 The Doctrine of Judicial Review is also a part of the Basic Structure Doctrine of the Indian Constitution.

731 Justice K.G. Balakrishnan, Address at Singapore Academy of Law, Fifteenth Annual Lecture (October 8, 2008)
732 ibid
The era of 1950 to 1960 was a period when the Judicial Review was being battled for. By the late 1960's, this tussle between the Courts and the Congress Party controlled Parliament turned into one between the idea of 'judicial review' on one hand and unqualified 'parliamentary sovereignty' on the other hand.\textsuperscript{733}

The scope of parliament's power to amend the constitution was decided by the Supreme Court in Keshavananda Bharati v. State of Kerala.\textsuperscript{734} The Apex Court also evolved the Basic Structure Doctrine in the same case. The Court by a wafer-thin majority held that parliament's amending power was not absolute.

If there is any right which illustrates the change in the Judiciary's comprehension of constitutional rights, it is the Right to Life and Personal Liberty guaranteed under Article 21 of the Constitution of India. When the Court encountered A.K. Gopalan's Case\textsuperscript{735}, it gave a narrow interpretation to the said article holding that personal liberty could be curtailed only by a procedure prescribed by the law. This was the time when the concept of due process had not made its way into the Indian picture. This position was finally changed in Maneka Gandhi's Case\textsuperscript{736} wherein it was held that the deprivation of a person's personal liberty under article 21 should also carry with it reasonableness, non-arbitrariness and fairness. This case was the starting point of liberal interpretation of the conceptions of life and personal liberty.

\textbf{PIL & Judicial Activism}

Public Interest Litigation or PIL is litigation in the interest of the public. It is litigation introduced in a court of law, not by the aggrieved party but by the court itself or by any other private party. It is not necessary, for the exercise of the court's jurisdiction, that the person who is the victim of the violation of his or her right should personally approach the court.

Prior to 1980s, only the aggrieved party could personally seek remedy for its grievance and any other person who was not personally affected could not get justice as a proxy for the

\textsuperscript{733} ibid
\textsuperscript{734} (1973) 4 SCC 225
\textsuperscript{735} A.K. Gopalan v. State of Madras, AIR 1950 SC 27
\textsuperscript{736} Maneka Gandhi v. Union of India, AIR 1978 SC 597
victim or the aggrieved party. In other words, only the affected parties had the locus standi (standing required in law) to file a case and continue the litigation while the ones those were not affected had no locus standi to do the same. Consequent to this, it became difficult for the indigent and illiterate to move the court and get their rights enforced.

This picture gradually changed when the post emergency Supreme Court dealt with the problem of denial of justice to the above category of people by bringing in alterations made in the requirements of locus standi and of party aggrieved. The splendid efforts of Justice P. N. Bhagwati and Justice V. R. Krishna Iyer were instrumental of this juristic revolution of eighties to convert the apex court of India into a Supreme Court for all Indians.

During the Keshvananda Era the judges realized that the courts that the judiciary was commonly perceived as an elitist body which would dispense justice only to those who could afford it. Its pro-landowner decisions had also been portrayed as an impediment to the land reforms programme by the incumbent executive agencies. Recognising the need to engage with the egalitarian Constitutional philosophy, some judges took the lead in raising concerns about improving access to justice for the underprivileged. In a report on legal aid published in 1971, Justice P.N. Bhagwati had observed:

“Even while retaining the adversary system, some changes may be effected whereby the judge is given a greater participatory role in the trial so as to place the poor, as far as possible, on a footing of equality with the rich in administration of justice.”

Further, Public interest litigation acquired a new dimension – namely that of ‘epistolary jurisdiction’ with the decision in the case of Sunil Batra v. Delhi Administration by treating a letter as a PIL. While issuing various directions, opined that:

“...technicalities and legal niceties are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found”.

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738 (1978) 4 SCC 494
This was a beautiful example of the Court taking up an ‘activist role’ to prevent the miscarriage of justice in any way. Justice K.G. Balakrishnan in his address on Public Interest Litigation at The Singapore Academy of Law said:

The advent of Public Interest Litigation (PIL) is one of the key components of the approach of ‘judicial activism’ that is attributed to the higher judiciary in India. The Courts’ interventions have played a pivotal role in advancing the protection of civil liberties, the rights of workers, gender justice, accountability of public institutions, environmental conservation and the guarantee of socioeconomic entitlements such as housing, health and education among others. This has not only strengthened the position of the judiciary vis-à-vis the other wings of government, but has also raised its prestige among the general populace.\(^{739}\)

Is Judicial Activism through PIL paving the right way?

A crucial question which is being debated at present is that whether the judiciary is exceeding its boundaries and encroaching upon the domains of the other two organs of the government in the garb of activism. Although we do not strictly adhere to the doctrine of Separation of Powers, yet there are boundaries which ought not to be exceeded by the each organ. While an adversarial environment may prevail in cases where actions are brought to highlight administrative apathy or the government’s condonation of abusive practices, in most public interest related litigation, the judges take on a far more active role in the literal sense as well by posing questions to the parties as well as exploring solutions.\(^{740}\)

Over the years, the social action dimension of PIL has been diluted and eclipsed by another type of “public cause litigation” in courts. In this type of litigation, the court’s intervention is not sought for enforcing the rights of the disadvantaged or poor sections of the society but simply for correcting the actions or omissions of the executive or public officials or departments of government or public bodies. Examples of this type of intervention by the

\(^{739}\) Justice K.G. Balakrishnan, Address at Singapore Academy of Law, Fifteenth Annual Lecture (October 8, 2008)

\(^{740}\) Justice K.G. Balakrishnan, Address at Trinity College Dublin, Ireland, (October 14, 2009)
Court are innumerable. In the interest of preventing pollution, the Supreme Court ordered control over automobile emissions, air and noise and traffic pollution, gave orders for parking charges, wearing of helmets in cities, cleanliness in housing colonies, disposal of garbage etc.741

There are a number of cases where the Courts have taken up bureaucratic and policy-making exercises under the tag of infringement of fundamental rights where in reality no such rights were involved. In recent orders, the Supreme Court has directed the most complex engineering of interlinking rivers in India. The Court has passed orders banning the pasting of black film on automobile windows. On its own, the Court has taken notice of Baba Ramdev being forcibly evicted from the Ramlila grounds by the Delhi Administration and censured it. The Court has ordered the exclusion of tourists in the core area of tiger reserves.

The Supreme Court has made an order even in a military operation. In 1993, the Court issued orders on the conduct of military operations in Hazratbal, Kashmir where the military had as a matter of strategy restricted the food supplies to hostages. The Court ordered that the provision of food of 1,200 calorific value should be supplied to hostages. Commenting on this, an Army General wrote: "For the first time in history, a Court of Law was asked to pronounce judgment on the conduct of an ongoing military operation. Its verdict materially affected the course of operation."742

Moreover, Public Interest Litigation (PIL) leads to detraction from the constitutional principle of ‘separation of powers’ by allowing the Courts to arbitrarily interfere with policy-changes made by the legislature and pass orders that may be difficult for the executive agencies to implement.743 Not just this, one another criticism that encircles the PIL is that the dilution of ‘locus standi’ has led to the growth in a number of frivolous cases coming up

742 ibid

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before the judiciary which instead of seeking justice for the disadvantaged section, either involve the private interest of the litigants or are tools for gaining publicity. With the judiciary already loaded with cases, the PIL cases impose an additional 'filtering role' and generate impediments in its efficiency.

**Conclusion**

The Doctrine of Separation of Powers has been held to be the basic structure of our constitution. The Courts must keep up to the spirit of this doctrine and make sure that they do not interfere with the functioning of the other departments as has been held by the Hon'ble Supreme Court in Shanmugam v. State as:

*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 other and must not encroach into each other's domains.*

Judges must weed out the motivated PILs filed to attack the executive actions. Emphasizing the need for the courts to exercise restraint in certain cases to ensure that Judicial Activism does not become Judicial Adventurism the Apex Court in *Tata Cellular v. Union of India* has held thus:

*In our opinion adjudication must be done within the system of historically validated restraints and conscious minimisation of the judges' preferences. The Court must not embarrass the administrative authorities and must realise that administrative authorities have expertise in the field of administration while the Court does not.*

In the words of Neely, C.J:

*I have very few illusions about my own limitations as a Judge. I am not an accountant, electrical engineer, financier, banker, stockbroker or systems management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation. It is not the function of a Judge to act as a super*

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744 2013) 12 SCC 765
745 vide AIR para 113: SCC para 94
746 (SCC p. 681, para 82)
board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

There is a fine line between Judicial Activism and Overreach and the judiciary must be cautious and make sure that they don’t exercise the latter branding it as the former.

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JUDICIAL ACTIVISM IN INDIA: TRANSITION FROM ACTIVISM TO OVERREACH
ASHISH GUPTA

Abstract
Indian Constitution, dissimilar to different Constitutions does not give only for the structure of administration but also provides for the realignment of expanded social powers to develop a new born democratic republic on the constitutional values of freedom, equality, brotherhood and justice to all - social, monetary related and political. Separation of Power of three organs of the state depict genuine picture of the majority rule set up in our Constitution. Legislatures, Executives and Judiciary all have derived power from Constitution. The legislature makes the laws as indicated by the testing need of the society. In any case, the legislature can't make the law which is ultra vires to the constitution. In that condition, the power of judicial review (legal audit) i.e. interpretation of constitution more particularly, the doctrine of pith substance, doctrine of colorable legislation and doctrine of severability are set in support of find out whether the legislatures were able to legislate a particular law. In recent, the Supreme Court in several cases has shown new political jurisprudence in the matters of constitutional adjudications. Legal activism has begun developing from a power to right. The Apex Court became free from the obligations of consecrated principles of precedents and procedures. The Theme of my essay which reminds the soul of our constitution that there is division of forces among three organs of the state; with special emphasis to the preamble that citizen has to be provided with justice -social, political and financial. The word judicial activism / legal activism indicate that the duty of the Apex Court is to ensure that different organs of the state are performing their functions as per rule of law without transgressing their breaking points. Now the role of Supreme Court of India has changed from protector or interpreter of the Constitution to law maker, in circumstances when the legislature has failed to enact new law as per the changing need of the society. Judges should, however, be careful about one thing, Judicial activism should not become judicial adventurism. A court is not furnished with the aptitudes and competence to discharge the functions that basically belong to the other organs of the State. If the Judiciary adopts a ‘dynamic’ rather than an ‘activist’ role, it will be able to discharge its functions legitimately tuned in to the soul of the Constitution.

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Introduction

The term 'Judicial Activism' or 'Legal Activism' is regularly comprehended just like a simple augmentation of the power of 'Judicial Review' in some intellectual quarters. This is inferable from the very work of Professor Sathe in his celebrated book Judicial Activism in India where he introduces the work as being—a monograph about judicial review and its role in democracy. He calls such picking up of force as —Searching Legal Cautiousness and further characterizes it as 'Legal Activism'. Judges are assessed as activists by different social gatherings as far as their interests, belief systems and qualities... Regularly, the mark is joined to a judge who himself may not consider him as an extremist.

Role of Judiciary

Our Founding Fathers while drafting the Preamble gave precedence to Justice over Liberty, balance and brotherhood by putting these philosophical terms in that specific request. Unless there is equity, freedom is insignificant. Equity and freedom together secure uniformity. There can be no brotherhood unless there is equity, freedom and fairness. In the chain of philosophical musings underlining the Constitution, the most noteworthy is the idea of Equity. Appropriately regarding equity establishes the framework for the welfare and advancement of society. It holds cultivated creatures and edified countries together. In this plan of things the part of legal turns out to be critical.

Part of legal has dependably been to convey equity to the matters which are acquired front of it. Ordinarily this part was seen as to convey equity by entirely taking after the laws in vogue. Be that as it may, satisfaction of the guarantee given in preface to secure Equity (social, financial and political) to every one of its residents was impractical by the legal while entirely taking after its customary part of translating law as administered. It required a more extensive elucidation by legal innovativeness and legal activism to bring a social change keeping open enthusiasm for perspective. The legal has assumed a vital part in advancing itself from its customary part of deciphering the statute as enacted to the improved part of conveying equity to the masses by inventive understanding of the current law and without

748 S.P.Sathe, Judicial Activism in India 1 (2002)
it making law to address the issues of the general public. In this procedure legal made an Enchanted Wand named Open Interest Case for conveying equity to the retrogressive, poor, denied, discouraged, down and out, denied, debased, impeded impaired, those who lack wealth, half eager, half clad millions, uninformed, uneducated, poverty stricken, unfit, minimal Indian, lost and desolate, ignorant, sad, overlooked, misused, humble and lost, powerless, defenseless and underprivileged class of society.

**Activism Transition Overreach**

It is true beyond doubt that the role of judiciary in the changing times has marked a significant shift from its traditional role to a more participatory one to cater to the changing needs of the society. Apart from its traditional role of dispute resolution, it discharges certain other vital functions within the constitutional scheme such as acting as the final interpreter of the Constitution and other organic laws, the protector of fundamental rights of the citizens, and as a guardian to keep necessary checks upon constitutional transgressions by other organs of the state.\(^{749}\)

Lately, such a gigantic extension of unaccountable legal force has pulled in the consideration of a numerous since the adjustment in its part; there has been a striking movement in the working example of the courts by prudence of which the legal is said to have involved an ascendant position inside the country's legislative issues. What it couldn't do under the conventional example now appears to be apparently conceivable with developing legal intercession in different circles of state organizations.

**Why Judicial Activism?**

Despite the fact that it is most extreme hard to enroll all conceivable reasons offering ascend to 'Judicial Activism' which would be adequate to all at all times, the accompanying can be said to constitute some all around acknowledged ones which urge a judge or a court to be "dynamic" while releasing the legal capacities relegated to it.

**Near Collapse of Responsible Governance**

\(^{749}\) Union of India v. Raghbir Singh (1989) 2 SCC 754 at 766.
At the point when the other political branches of the legislature viz. the assembly and the official neglect to release their individual capacities, it offers ascend to a close crumple of capable government. Since a dependable government is the sign of an effective majority rules system and constitutionalism, its breakdown warrants numerous an exceptional and capricious strides.

At the point when the assembly neglects to make the important enactment to suit the changing times and legislative organizations fizzle hopelessly to perform their managerial capacities earnestly, it prompts a disintegration of the certainty of the subjects in the protected qualities and majority rule government. In such an unprecedented situation, the legal strides into the zones as a rule reserved for the lawmaking body and official and the outcome is the legal enactment and a legislature by legal.

**Pressure on Judiciary to step in**

In case the fundamental rights of the people are trampled by the government or any other third party, the judges may take upon themselves the task of aiding the ameliorating conditions of the citizens. In these circumstances, it becomes natural for the citizens to look up to the judiciary to step in their aid and to protect their fundamental rights and freedoms. This mounts tremendous pressure on the judiciary to do something for the suffering masses, which in turn leads to ‘Judicial Activism’. As persons required in translating and applying a law which is not static but rather powerful, judges do take an interest in the social changes and changes that happen because of the evolving times. Under such circumstances, legal has itself asserted to be a dynamic member in social reformatory changes. It has encouraged and at times initiated Public Interest Litigation (PIL) in India. In such cases, the courts have disposed of the customary limitations on themselves, for example, necessities of standing, readiness’ of the case and ill-disposed types of case and have expected the elements of examiner, guide and screen of organization.

**Filling the Legislative Vacuum**

It is said that regardless of the fact that the Parliament and State Assemblies in India make laws for 24 hours a day and 365 days a year, the quantum of law can’t be adequate to the
changing needs of the cutting edge society. The same holds great in appreciation of numerous enactments went by the capable governing bodies. Regardless of the presence of a vast quantum of pre and post established laws, there still stay certain ranges which might not have been enacted upon. This might be because of incident, absence of presentation to the issues, the nonattendance of enactment or aloofness of the assembly. Subsequently, when a skilled assembly neglects to act authoritatively and make an essential law to meet the societal needs, the courts frequently enjoy legal enactment accordingly infringing in the space of governing body. The greatest asset and the strongest weapon in the armory of the judiciary is the confidence it commands and the faith it inspires in the minds of the people in its capacity to do even handed justice and keep the scales in balance in any dispute.\textsuperscript{750}

\textbf{Resolution of Disputes}

The very first undisputed function is the traditionally regarded primary function of the judiciary, i.e. resolution of disputes. Under this functional category, the model postulates a list of following twelve parameters:

1. Judicial Stability
2. Interpretation
3. Majoritarianism and Autonomy
4. Judicial Reasoning
5. Threshold Activism
6. Judicial Remit
7. Rhetoric
8. Obiter Dicta
9. Reliance on Comparative Sources
10. Judicial Voices
11. Extent of Decision
12. Legal Background

\textsuperscript{750} H.R.Khanna, \textit{Judiciary in India and Judicial Process} 47 (1985)
**Constitutional Dialogue with other organs by Judiciary**

The second category as described role of judiciary as a player that —operates in the public sphere as a participant in a network of actors, comprising other governmental branches, individuals and civic bodies. As the authors note, arguing that the judiciary serves a function as a party in a constitutional dialogue with other branches of government means that they —reject visions of the omnipotence of the third branch. The existence of this vision in the model is driven by the belief that it is necessary to locate decisions in their social context. Evaluating judicial decisions without reference to the reaction they socially receive has, according to this model, two shortcomings. First, it regards the courts as the final word on a particular issue and secondly, it does not account for its role as a direct participant in a constitutional dialogue. Thus, according to the model, if a decision is regarded as a welcome change in the society it would not be regarded as ‘activist’, and if on the other hand, the same decision is opposed by the members of the society and the —other members of the social network, a higher degree of activist, would have to be associated with a decision. Under this category, there are four parameters through which the model suggests the measurement of activism.

1. Reaction of the Legislature
2. Administrative or Executive Response
3. Reaction by the Judiciary
4. Vox Populi – The voice of the people is the voice of God.

**Judiciary as Protector of Constitutional Values**

The third function that the judiciary performs, according to this model, is to protect the core constitutional values and decisions that do so are not to be regarded as activist. The inclusion of this function in the model rests on the assumption that —Purely value free judicial decision making is not only impossible but also untenable. Naturally, the question arises as to how such core values are to be determined. It would seem that in most cases they are likely to turn one’s interpretation, and perhaps even preference. This may be because of the fact that scholars often disagree on the conception of a core value. Even if there is a consensus on which core values underlie legal systems, there may be disagreement.
on what that particular core value means. At any rate, the discussion on the third function of the judiciary makes it clear that this particular aspect of the model requires much greater debate and discussion. The same holds true for the inclusion of the second function of the judiciary in the model, as there is by no means a consensus on the view that the judiciary must play a role as a participant in a constitutional dialogue. In addition to these concerns, there are others that arise with respect to the model. The most apparent of these is the fact that since the parameters do not have relative weights, it is uncertain as to which parameter one ought to prioritize.

Judicial Overreach

The term ‘Judicial Overreach’ can be understood as being closely associated with its predecessor philosophy of ‘Judicial Activism’ in the sense that it begins from the point where legitimate activism ends. In other words, the point at which ‘Judicial Activism’ losses its legitimacy in entirety, any further judicial exercise of power beyond that point would tantamount to ‘Judicial Overreach’. According to Justice Verma, —If the court starts doing a job not supposed to be his, then other than the problem of lack of expertise, it leaves the aggrieved party with no forum to ventilate his grievances. Whenever courts take over the function of other bodies or experts, it amounts to overreach; when they adjudicate a legal issue and the decision has a juristic basis, it is legitimate judicial activism and is justified. He further clarifies that —Judicial Activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial ad hoc nor judicial tyranny. These constitute the broad parameters for testing the propriety and legitimacy of judicial interventions. As the name suggests, the term concerns itself at addressing the high handedness of the exercise of judicial power in the domains not constitutionally earmarked for the judiciary. The idea can very well be conceived as an offshoot of the words of Lord Acton when he says that —all power corrupts and absolute power corrupts absolutely.

Since the term judicial activism' takes on vast meanings in an attempt define it, the ascertainment of its limits become next to impossible since the line between appropriate judicial intervention and judicial overreach is often tricky. However the criterion is one related to justifiable interventions and judicially manageable standards’. In this regard, the United States Supreme Court has laid down a pragmatic test in Baker v. Carr for judicial
intervention in matters with a political hue. It has held that the controversy before the court must have a justifiable cause of action and should not suffer from —a lack of judicially discoverable and manageable standards resolving it. This is a pre-requisite for judicial intervention. The past history of judicial activism in India has interestingly shown myriad instances of ‘overreach’ in a catena of decisions as a result of which the term —overreach which was amalgamated with judicial activism before, has come into existence. In his book, Prof. Sathe has called it as Typical Instances of Judicial Activism. It is these typical instances that form the subject matter of Judicial Overreach since they seem to have assailed unwarranted judicial interventions. Objectively, the term Judicial Overreach aims at acting as a bulwark against the unjustifiable attempt by the judiciary to perform executive or legislative functions and emphasize upon the limit within which the judges are constitutionally mandated to be ‘activists’. It considers the broad and functional separation of powers, though not strict, within the constitutional scheme and argues that no state instrumentality can overstep or usurp the functions earmarked to it by the Constitution. The term presupposes that in a democratic set up, any functional inaction on the part of other state organs, apart from judiciary, is constitutionally to be corrected by the people only since the state is actually a conglomeration of popular will in a democracy and at the same time argues that an unaccountable judiciary, in the name of ‘activism’, cannot run the government.

In *Aravali Golf Club v. Chandra Hass & Hass & Ors.* the High court gave directions to the government for the creation of the post of a tractor driver and further directed to regularize the petitioner on the same created post. At the outset, it can be said that creation or abolition of posts under the services of the government is purely an executive-administrative function and the judiciary has no legitimate business to direct the executive in this regard. However, the Supreme Court, taking note of this and the judicial trend of transgressing its limits, declaimed to give any relief to the respondent-petitioner.

To the same tune, in *Mansukhlal Vittal Das Chauhan v. State of Gujarat* the Gujarat High Court directed the Secretary to the government to grant sanction to prosecute, so that the sanction order may be treated to be an order passed by the Secretary of the Gujarat government and not that of the high court. This was a classic instance where the judiciary
tried to enforce its own sweet will by exercising its power to regulate the statutory
discretion vested with the sanctioning authority in the guise of ‘judicial activism’.
Recently, the courts have apparently, if not clearly strayed into the executive domain or in
the matters of policy. The orders passed by the Delhi High Court in recent times dealt with
subjects ranging from age and other criteria for nursery admissions, unauthorized schools,
supply of drinking water in schools, number of free beds in hospitals on public land, use and
misuse of ambulances, requirements for establishing a world class burns ward in the
hospital, the kind of air Delhi ties breathe, begging in public, the use of subways, the nature
of buses commuters board, the legality of constructions, identification of buildings to be
demolished, size of the speed breakers, overcharging by the TSR. In this process, the
judiciary has not only overreached to direct the designated authorities to perform their
duty, but it has also taken over their implementation through non-statutory committees
formed by it. Had there been a law to these effects, judiciary could have been rightly
understood as being ‘activist’ to enforce them and appreciated in its urge to do justice,
however creating a law and then enforcing it by wrong and unconstitutional exercise of its
power is clearly unwarranted under the constitutional scheme. For running the nation is
something not expected out of the judiciary?

Judicial Adventurism
The origins of PIL were in such unexceptional interventions in 1970, as when the court
ordered the release of bonded laborers and stopped inhuman working conditions in stone
quarries and in mental asylums etc. Correctly, this jurisdiction should have been named SAL
or Social Action Litigation to gather its true import. It is also the court’s legitimate function
to enforce the law, not of each and every infraction, but in those cases where its disregard
has grave consequences to the public. No question of the court overreaching its powers can
arise in such cases. In matters relating to environment, where irreversible damage may be
done unless the actions of the authorities are immediately corrected, the court may take
prompt corrective measures, but not take over the administration itself or supplant the law.
However, over the years, the true objective of PIL as originally conceived has been lost sight
of, and it believed to be general jurisdiction for correcting government action or inaction,
regardless of constraints of established principles of judicial review.
As the court cannot disregard the law in judicial review or disregard the fundamental separation of powers underlying the Constitution to appropriate executive or legislative powers, PIL orders cannot disregard law; take over the administration by government or by public authorities, in the name of improving governance or preventing misuse of power. It is this aspect of misplaced judicial activism, which a bench of two judges of the Supreme Court in *Aravali Golf Club case* recently criticized in rather strong words of reprimand. The judgment was timely and has brought misplaced judicial activism into focus, but in the process it did not advert to the permissible scope of judicial intervention.

**Conclusion**

Judicial activism under the constitutional, it can rightly be argued that a legitimate judicial intervention is the one which clearly falls within the permissible scope of judicial review. A thin line demarcating the appropriate and inappropriate judicial intervention can only be drawn on the basis of functions earmarked to the different branches by the Constitution. In the borderline cases, a legal question at the epic entre of the dispute determines the need for judicial intervention. Purely political questions and policy matters not involving decision of a core legal issue is therefore outside the domain of judiciary.

In case of governmental inactions or institutional failures, the power of superior judiciary to issue a writ of mandamus or other suitable direction to the concerned public authority commanding performance of its legal obligation is the remedy. However, there stands a clear distinction between commanding performance by such public authority and the judiciary taking over such function on its own. The former, and not the latter, is legitimate judicial intervention.

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REVIEWING JUDICIAL GROUNDS: SCENARIO OF CHANGING WAYS OF JUSTICE

PRIYANSHI MEENA, JAI MEENA

Abstract
In this paper the authors argue that (a) judicial activism as a way of delivering justice has sown the seeds of integrity and nationalism in the name of judges constituting the bench, (b) in Public Interest Litigation, the proceedings of courts diverge from the basic common law norm of adversarial litigation and the judges are then bound to get active in the literal terms while processing and exploring solutions.

The essay contains a partial exploration of some key concepts associated with the rise of judicial activism under the supervision of law makers and justice providers. It shows that the new accepted practice of forming ‘fact-finding commissions’ on a case to case basis makes the inquiry of the subject matter of the case subtle and since the commission consists of senior and learned lawyers, it directs law into the hands of judicial activism.

To enrich the matter towards need of judicial activism in any nation for proper and fair justice delivery, it would be appropriate to refer to an observation made by Justice Aharon Barak:

“To maintain real democracy and to ensure a delicate balance between its elements; a formal constitution is preferable. To operate effectively a Constitution should enjoy normative supremacy, should not be as easily amendable as a normal statute, and should give judges power to review the constitutionality of legislation.”

To substantiate on Roscoe Pounds theory of law as a social agent, the interventions through strategies such as expansion of Article 21 and the right to information have expanded the scope of constitutional rights where the zeal and motivation happens to be judicial activism. It would be justified to note that even though the constitution framers have not thought of these innovations then but would now certainly agree and appreciate this policy of judicial interventions. Judicial activism undoubtedly has always paved the righteous path to ensure that the notions of fundamental rights do not fail.
When in 1893, Justice Mahmood Ali of the Allahabad High Court delivered a dissenting judgement, the seeds of judicial activism were sown, to prosecute and diverge the ways of justice, in India. Justice Mahmood Ali, in the case where an under trial could not afford to engage a lawyer, held that the pre-condition of case being heard necessarily needs somebody to speak. The trends in the Supreme Court decisions have significantly shown that (a) the privileges of the Legislature under both- external and internal affairs must lay under the purview of Judicial review, (b) the Supreme Court resorts to Article 141 under the judicial legislation to fill the void created by the famous concept of legislative vacuum, and (c) the concept of ‘locus standi’ has broadened its scope in the Public Interest Litigation matters. A disruptive perusal of the decisions rendered by the Indian judiciary during the period of 1950-80 clears that there has always been an arena of judicial activism in the system. To lay down the examples: growth of ‘locus standi’ in Public Interest Litigation, expanded horizon of Article 21, conversion of directive principles as fundamental rights and many more.

People tend to believe that judicial activism is related to the problems of political development in a country. Upendra Baxi, a known Indian jurist, writes “(Judicial) Activism is that way of exercising judicial powers which seeks fundamental re-codification of power relations among the dominant institutions of state, manned by members of ruling class”. Furthermore, he verifies that judicial activism is directed towards and by the political role played by judiciary like the other two political branches. The justification in this relation comes from the fact that responsible government when near fall requires the judiciary to step in aid which is indicatively the reason which forced it to make political judgements.

Judicial activism thus means different to different people; where some consider it as a social revolution in judiciary while others deem it to be a cultural change. In all scenarios, the

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751 Balkrishna, Ref. to the Article, When seed for Judicial Activism was sowed, ― “The Hindustan Times” (New Delhi) dated 01-04-96, p.9
752 Upendra Baxi, Courage Craft and Contention – The Indian Supreme Court in the Eighties (Bombay: 1985) p.10
753 View advocated by T.R. Adhyaruajina in his book titled “Judicial Activism and Constitutional Democracy in India (Bombay,1992) at p.9
definition of judicial activism rightly varies according to the perspective and notions of people and society respectively.

“Having being armed with the power of review, the judiciary comes to acquire the status of a catalyst on change.”\(^{754}\) The existence of judicial activism can be rewarded to two prime factors of English judiciary which are equity and natural justice. The first known case in such regard is of Marbury v Madison\(^{755}\) where for the first time judiciary took an active step over the legislative actions and it was held that any law in contradiction of or repugnant to the Constitution holds fair to be declared void and that any law constituted by the Congress stands to be dismissed and ignored if found deviated from the Constitution. Bringing in course the public interest, all the laws were ruled out which in any way segregated Negros from the all day to day life fields in America: Brown v. Board of Education\(^{756}\). Thus judicial activism is a dimension where courts can not only abolish the laws not standing with the constitution but also figure and encompass rights not mentioned or declared in the constitution clearly hitherto.

Similar to the varied concepts and guides of judicial activism, the reasons that compel a court to become active while discharging judicial functions assigned to them also vary which are:

1) Responsible Governments failure and near collapse: When the two branches of government: the executive and the legislative fail to discharge the designated and responsible functions, the need of unconventional steps arises and then judiciary has to take extra ordinary steps originally earmarked for the legislative and the executive.

2) The vacancy in legislature: The judiciary is counted upon when legislature fails at service of acting legislatively and enacting necessary laws according to the societal needs. The need of judicial legislation arises after such situation prevails. The


\(^{755}\) Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803)

vacuum created in legislature is identified in the saying: “Even if Parliament and all
the state legislatures made laws for 24 hours a day and 365 days in a year, the
quantum of law cannot be sufficient to the changing needs of modern society.”

3) The prospects of guarantees by Constitution: The provisions in Constitution which
give judiciary enough scope to assert itself are various and as follows:

- Article 13 empowers judiciary implicitly to review the validity of laws in regards of
  the Fundamental Rights and declare them void if in contravention to such rights.
- Article 19 empowers the court to decide whether the restrictions on Fundamental
  Rights are reasonable or not.
- Article 32 directs people whose fundamental rights are violated to the Supreme
  Court as a form of such right itself i.e. the right to constitutional remedies.
- Supreme Court is designated as the highest Appellate Court for civil, criminal and
  constitutional matters and under article 131 the court is vested with jurisdiction
to uphold the federal principle of Constitution.
- The Supreme Court is vested with power to judicially advice the President on any
  matter referred to it.
- The Supreme Court enjoys rule making powers under article 142 and 145.

Article 141 empowers Supreme Court to declare any law and such declaration would remain
binding on all courts of India except the Supreme Court itself. The article ensures that
Supreme Court is authoritative to make final decisions in regards to the validity of law. In
Indira Sawhney v. Union of India, it was held that the ‘creamy layer’ of the Backward
Classes should not avail of the reservation scheme provided by the constitution. In the
instant effect of which the Kerala State Backward Classes (Reservation of
Appointments/Posts in Service) Act, 1995 gave a retrospective effect claiming that there is

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757 I.P. Massey, Administrative law (Eastern Book Company, Calcutta)
758 Under article 132 to 137 of the Constitution
759 Under article 143 of the Constitution
760 AIR 2000 SC 498
no creamy layer in the state of Kerala. The act was found unconstitutional by the court and serious contemplative steps were taken against the state. A consequent development characterized in this issue was of ‘Judicial Activism’.

4) The indispensable faith and confidence of public: 85% of the law students of Delhi University declared that they believed in the court and not the Parliament in a recent study on the role of Supreme Court in India.761 Umpteen of students favoured Public Interest Litigation and judicial activism of the Supreme Court. This is evident of the faith and trust that public restores in the Supreme Court as a guardian of their rights. The Supreme Court, too, has withstood all the tests of justice and duty through the distinct concept of judicial activism.

The growth of judicial activism can be signified because of roles played by and as judicial actors in the scenario of delivering justice. The subject of judicial activism was extended to the protection of rights of bonded labour by Chinnappa Reddy, JJ and D.A. Desai. Justice Kuldip Singh in field of Environmental Jurisprudence, Justice K. Rama Swamy in regards of rights of depressed class and Justice J.S. Verma in area of Corruption in High Places; all constitute the expansion of judicial activism and public interest litigation in India in a significant manner. Justice V.R. Krishna Iyer was given high regards when Upendra Baxi stated that ‘his work off the bench is even more enduring on the life of law in India than years of his explosive presence in the Supreme Court.’ The Supreme Court has significantly broadened the scope of ‘Locus Standi’ in enforcing the fundamental rights by bringing in a new scenario and era of Public Interest Litigation, which should be credited to judges like Justice P.N. Bhagwati, Justice V.R. Krishna Iyer and Justice Kuldip Singh, individually.

The Supreme Court of India began proceedings in the 1950’s and the power vested in it can be seen through two arenas: constitutional interpretations and nature of judicial review. In A.K. Gopalan v. State of Madras\textsuperscript{762}, the posture of Supreme Court was transformed to be that of an activist court where it was held that the courts power of judicial review was inherent in the constitution itself and that it has power to declare any legislative enactment invalid if it infringes any of the fundamental rights. In Sakal Newspapers Private Ltd. v. Union of India\textsuperscript{763}, the freedom of speech and expression, which includes freedom of press, was given position higher than freedom to do business and it was held that newspaper is not only a business but a way to express thought and information and therefore could not be enjoyed as other businesses. In Balaji v. State of Mysore\textsuperscript{764}, it was held that in educational institutions, the number of reserved seats could not exceed fifty percent of the total number of seats and that protective discrimination guaranteed to the backward classes should not negate the right to equality and equal protection by law. Similarly in Chitralekha v. State of Mysore\textsuperscript{765}, restrictions were imposed on such reservations in Civil Services. Such examples of judicial activism fill in the time of early 1960s.

The Parliament’s power to amend the constitution was questioned before the court in 1951 in Shankari Prasad v. Union of India\textsuperscript{766} and it was brought in purview that whether under Article 368 Parliament could use its power to abridge a fundamental right and it was held that constituent power could not be restricted in any sense. In 1965 in L.C. Golaknath v. State of Punjab\textsuperscript{767} it was held that Parliament could not amend the Constitution to take away any fundamental right. The concept of asking the politicians and bureaucrats to compensate the state and pay exemplary damages for abusing the power vested in them is a significant example of judicial activism in India because it is exclusive to India and practiced nowhere else in the world.\textsuperscript{768}

\textsuperscript{762} A.K. Gopalan v. State of Madras AIR 1950 SC 27, 34\textsuperscript{763} Sakal Newspapers Private Ltd. v. Union of India AIR 1962 SC 305\textsuperscript{764} Balaji v. State of Mysore AIR 1963 SC 649\textsuperscript{765} Chitralekha v. State of Mysore AIR 1964 SC 1823\textsuperscript{766} Shankari Prasad v. Union of India AIR 1951 SC 458\textsuperscript{767} L.C. Golaknath v. State of Punjab AIR 1967 SC 1643\textsuperscript{768} As the SC has directed Satish Sharma, a former Union Petroleum Minister to deposit Rs50,00,000/- for the wrongful and biased allotment of Petrol Bunks, out of his discretionary quota
court has interpreted Article 368 in a way to assume to itself the power to review even the constitutional amendments, in the aftermath of Keshavanand Bharti v. State of Kerala. This could be denoted as the best example of judicial activism in the world because of its singular nature in vesting such power to any court. The refusal to exercise advisory jurisdiction in the matter of Ayodhya controversy, under article 143, is another significant example of judicial activism and its growth in India.

Public Interest Litigation has always been associated to its ‘people friendly approach’ and judges have newly derived the concepts of ‘injunction’ and ‘stay orders’ for such litigations and public law-related matters and its intent is to improve access to justice for those who were otherwise unaware of their legal entitlements and courts would allow actions to be brought up on their behalf by social activists and lawyers. The right to speedy trial was deemed to be an integral part of protection of life and personal liberty in Hussainara Khatoon (1) v. State of Bihar where an advocate in continuance of an article published in the Indian Express filed a writ petition concerning the plight of under trial prisoners in the state of Bihar and the Supreme Court accepted the Locus Standi of the advocate to maintain the writ petition. The deprived conditions prevailing in protective homes, human trafficking, importation of children for homosexual purposes, trial pendency in courts, and non-payment of wages of bonded labour; all issues were brought up in Upendra Baxi (Dr) v. State of U.P. and the court issued guidelines to ameliorate the condition of these people. In Sheela Barse v. State of Maharashtra, the plight

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and Smt. Sheila Kaul, the former Union Housing and Urban Development to deposit Rs15,00,000/- for ‘out of turn’ allotment of residential flats in Delhi, towards the exemplary damages

769 AIR 1973 SC 1461

770 In Ismail Forrouqui v. Union of India (1994) 6 SCC 360

771 See: Ashok H. Desai and S. Muralidhar, Public Interest Litigation: Potential and Problems’ in B.N. Kirpal et. al. (eds.), Supreme but not Infallible – Essays in honour of the Supreme Court of India (OUP. 2000) at p. 159-192

772 Refer: Susan D. Susman,'Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation’, 13 Wisconsin International Law Journal 57 ( Fall 1994)

773 (1980) 1 SCC 81; See Upendra Baxi, ’The Supreme Court under trial: Undertrials and the Supreme Court’, (1980) Supreme Court Cases (Journal Section), at p. 35

774 (1983) 2 SCC 308

775 (1983) 2 SCC 96

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of women prisoners in Bombay was brought up and in order to eradicate the custodial violence, the court held that female prisoners could be detained only in designated lockups and the interrogation of accused females could be done only in the presence of female officials. Public Interest Litigation took the role of 'epistolary judgement' in Sunil Batra v. Delhi Administration\(^{776}\) where a prisoner lodged a complaint to the judge of Supreme Court concerning the brutal assault by Head Warden on another prisoner and the court considered it as a writ petition and was of opinion that

"...technicalities and legal niceties are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found".

In Municipal Council, Ratlam v. Vardichand\(^ {777}\), the locus standi of people who wanted solution to the open drains which caused diseases was recognized by the court and it asserted that if the:

"...centre of gravity of justice is to shift as indeed the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, the court must consider the issues as there is a need to focus on ordinary men".

The Supreme Court directed the medical institutions to provide medical aid to injured people without withstanding the formalities as guided under the procedural criminal law.\(^ {778}\) It is hence the broadened dimension of locus standi which led to the growth of public interest litigation and helped Supreme Court in taking proactive steps according to the societal needs which is specified in S.P. Gupta v. Union of India\(^ {779}\) where the court opined that:

"It must now be regarded as a well settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons, such as his

\(^{776}\) (1978) 4 SCC 494
\(^{777}\) (1980) 4 SCC 162
\(^{778}\) Parmanand Katara v. Union of India, (1989) 4 SCC 286
\(^{779}\) (1981) Supp. SCC 87
socially or economically disadvantaged position, some other people can invoke the assistance of the court for the purpose of providing judicial redress to the wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him”.

In the realm of environmental rights, various decisions are given in actions brought up by M.C. Mehta such as placing strict liability for the leak of oleum gas from a factory in Delhi\textsuperscript{780}, the relocation of hazardous industries away from municipal settlement of Delhi\textsuperscript{781}, directions to state agencies to check pollution scale in the vicinity of Taj Mahal\textsuperscript{782} and in and near Ganges river\textsuperscript{783}. In Bandhuamukti Morcha\textsuperscript{784} and Mukesh Advani v. State of Madhya Pradesh\textsuperscript{785} concerning the bonded labour, the Supreme Court held “In India where the constitutional goal is to secure social and economic justice to all its citizens by several cases in the form of public interest litigation, bonded labour problem is worse than slavery”.

Justice J.S. Verma rightly said “Judicial Activism is a sharp edged tool which has to be used as a scalpel by a skilful surgeon to cure the malady and not as a Rampuri knife which can kill”. The concept of judicial activism has raised the profile of judiciary in India and is one main device in gaining public confidence and faith. The theory of social change by Roscoe Pound can be counted upon with the justification that (1) judges are bound to get active in literal terms while processing and exploring solutions to public-interest matters, (2) judiciary is bound to step in aid during near collapse of government due to the failure of either executive or legislative wing, and (3) the public trust on courts is due to its relative assertiveness and 'right role' nature. Hence judicial activism has always paved the right way in India.

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\textsuperscript{780} M.C. Mehta v. Union of India, (1987) 1 SCC 395
\textsuperscript{781} M.C. Mehta v. Union of India, (1996) 4 SCC 750
\textsuperscript{782} M.C. Mehta v. Union of India, (1996) 4 SCC 351; Also see Emily R. Atwood, 'Preserving the Taj Mahal: India's struggle to salvage cultural icons in the wake of industrialization', 11 Penn State Environmental Law Review 101 (Winter 2002)
\textsuperscript{783} M.C. Mehta v. Union of India, (1988) 1 SCC 471
\textsuperscript{784} Bandhuamukti Morcha's case AIR 1984 SC 802
\textsuperscript{785} AIR 1985 SC 1363
Thank you Note!

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