KASHMIR JOURNAL OF LEGAL STUDIES

Statement of ownership and other particulars

KASHMIR JOURNAL OF LEGAL STUDIES

Place of Publication	:	Srinagar
Publisher	:	Kashmir Law College
Address	:	Khawajapora, Nowshera Srinagar – 190011 J&K India
Ownership	:	Kashmir Law College

I, Altaf Ahmad hereby declare that the particulars given above are true to the best of my knowledge and belief.

Cite this volume as V KJLS [2015]
ISSN: 2250-2084
Annual subscription
Inland: Rs 500.00
Overseas: $30

Kashmir Journal of Legal Studies is a refereed Journal and published annually. Contributions to the Journal are invited in the form of articles, notes and case comments which should reach the editor of the journal by ending August of the year. Contributors are required to follow the mode of citation and footnoting of the journal of the Indian Law Institute. The Paper(s) already published elsewhere will not be considered for publication in this *Journal*. Articles with more than two or more authors will not be entertained. The paper should not exceed 10,000 words and must also contain an abstract in not more than 150 words followed by key words. The manuscripts must be typed in double space on one side of the A-4 size paper and sent in compact disc (CD) or as an attachment with e-mail at *kashmirlawcollegesgr@gmail.com.*

The editors, publishers and printers do not own any responsibility for the views expressed by the contributors and for the errors, if any, in the information contained in the *Journal* and author shall be solely responsible for the same.

E-mail:- kashmirlawcollegesgr@gmail.com
Website: - www.kashmirlawcollege.com

Published by: **Kashmir Law College**
Nowshera, Srinagar, Kashmir – 190011(India)
Ph: - 0194-2405901 Mob: - 9419017397

Computer Design By: **Mr. Omer Javeed Zargar**
E-mail:- umerjaveed99@gmail.com

Printed at: Salasar Imaging Systems, Delhi

Editorial

Legal education has assumed multi-dimensional colour in terms of its research output, methodology outreach and technological inter face. A legal institution in the modern era can ill afford to bypass these developments. Kashmir Law College has earned credentials for regularly publishing *Kashmir Journal of Legal Studies* with wide variety of research articles of seminal importance. The present issue includes 4 articles followed by a number of notes and comments covering up diverse themes of immense importance and current relevance.

Iftikhar Hussain Bhat in his paper *"IPR Protection To Traditional Medicinal Knowledge: A Critique Of Indian Law"* has tried to focus on traditional knowledge and its importance in economy of the country, the need to formulate new legal regime and to enact Sui Generis legislation to protect biodiversity and associated knowledge.

Mir Mubashir Altaf in his paper *"National Judicial Appointments Commission in India-Dawn of a New Era!"* has analyzed the desirability of NJAC as an effective substitute to the collegium system as a prelude to make the Indian Judiciary more accountable.

Shayesta Nazir and Rehana Shawl in their joint paper *"Public Interest Litigation: Voice to Voiceless*" have dealt with historical evolution of PIL and the need for filtering "frivolous litigations " to save precious time of the courts in India.

Gazala Sharif in her paper *"Traditional Knowledge And Intellectual Property Rights"* has emphasized that the issues relating to Traditional Knowledge be addressed in a holistic manner, including benefit sharing arrangement with the indigenous people while taking cognizance of ethical, environmental and socio-economic concerns.

Mudasir A. Bhat in his paper *"Frye and Daubert Standards: Utility in Indian Judicial System"* has highlighted the importance of admissibility of scientific evidence in courts of law in India and need for relying on Daubert guidelines. The author emphasized that for the general acceptance of the scientific evidence either Daubert Standards should be adopted or similar guidelines should be framed for expert evidence.

Mohammadi Tarannum in her paper *"Schedule Tribes of India as Indigenous Peoples: A conceptual analysis in International perspective*" has critically examined the legal framework related to the issues of schedule tribes of India as indigenous peoples. The author has focused on the issue that Adivasi are treated as the subjects of colonizers even by the Government of India. The author contends that there is constitutional crisis in the Adivasi areas as millions of Adivasi are displaced

Nusrat Pandit in her paper *"Presidents Pleasure on Governor's Post: An Overview"* has critically evaluated the position of a Governor in a state and the pivotal role played by him in centre-state relations and the procedure for removal/appointment of governor in the light of the recommendations by various committees

Mashooq Ahmad and Rukhsana Bano in their joint paper *"Commercial Advertisements and Approach of Judiciary: A Comparative Study"* have highlighted the impact of commercial advertisement on consumers and focused on whether the fundamental right to freedom of speech and expression include the right to advertise

Imran Ahad in his paper "*Transmission of Copyright Works: An Overview"* has focused on the issue of copyright protection and laws related to it. The author has also highlighted the recent amendments in copyright laws governing the issues of transmission.

Insha Hamid in her write up "*The Environment and Human Rights: Role of The Supreme Court of India in Addressing Environmental Issues From a Human Rights Perspective"* has appreciated and critically evaluated the role of the Supreme Court in shaping the environmental jurisprudence in India by focusing on various decisions of the court.

Unanza Gulzar in her case comment *"Shreya Singhal and Ors. V. Union of India (2015): The Breaking of New Dawn in India's Free Speech History"* has highlighted the role of Supreme Court in upholding the right to freedom of speech by striking down section 66A of Information Technology Act, 2007.

I am thankful to the members of the Editorial Committee and other subject experts for editing the manuscripts and ensuring that the present volume finds its own niche in the academic and other relevant fields.

I will be failing in my duty if I do not place on record the appreciation for the untiring work of Dr. Fareed Ahmad Rafiqi, Associate Editor and Mohammad Rafiq Dar, Assistant Editor, for bringing out this issue.

I am thankful to ***Mr. Omer Javeed Zargar*** for Computer Layout and the design of the journal. I am also grateful to the Salasar Imaging systems, Delhi for printing the Journal with meticulous care.

The editor acknowledges with great appreciation the support and co-operation of all the members of the management of the college in general and Mr. Altaf Ahmad Bazaz in particular whose patronage has enabled the publication of the present issue of the journal.

Prof. A.S.Bhat

Kashmir Journal of Legal Studies

Volume-5 (2015-16)

CONTENTS

NOTES AND COMMENTS

Ipr Protection To Traditional Medicinal Knowledge: A Critique Of Indian Law

Iftikhar Hussain Bhat*

Abstract

Traditional medicine plays an important role in health care in both developed and developing countries. Many products based on traditional knowledge are important sources of income, food and health care for large parts of the population of a number of developing countries. In fact, due to their availability and affordability, the traditional medicines and therapy systems of the developing countries provide health care to the vast majority of these countries' residents. The lack of a means of legal protection for this source of knowledge is an issue that touches both upon economic and moral grounds. The industrial exploitation of Traditional Medicinal Knowledge may not only undermine that country's economy and facilitate misappropriation; it may also have a negative impact on matters of national identity. This is an issue of ongoing importance in the realm of intellectual property regime, which has not yet been adequately met. The available instruments – the patenting system and the arrangements for guarding trade secrets – are inadequate for this task, and new arrangements need to be formulated. This article attempts a critical examination of the existing law for the protection of Traditional Medicinal Knowledge in India. The author suggests the need for more efficient and effective sui generis system of protection for the Traditional Medicinal Knowledge wealth in the country.

Keywords: *Traditional Knowledge, Bioprospecting, Biopiracy, Intellectual Property, Patent, Digital Library.*

I. Introduction

The centrality of knowledge in today's global economic system has given rise to what may be termed as the "knowledge economy" in which the weight of global economic activity is

* Assistant Professor, Department of Law, University of Kashmir, Srinagar, (J&K) India.

shifting towards knowledge-oriented products and services. The prime position of knowledge has made it a centre of diverse economic, social and political claims and conflicts amongst different stakeholders at the local, national and international levels. Human communities have always generated, refined and passed on knowledge from generation to generation. Such "Traditional knowledge"[1] has been used for centuries by indigenous and local communities under local laws, customs and traditions; and it is often an important part of their cultural identities.[2] Traditional knowledge has played, and still plays, an important role in vital areas such as, food security, the development of agriculture and medical treatment. Health related knowledge also known as Traditional Medicinal Knowledge is one area of traditional knowledge which appears to be enjoying a healthy state of retention throughout the world. Traditional knowledge, inclusive of Traditional Medicinal Knowledge, is a reflection of age-old practices of a given society. The process of harnessing and regulating traditional knowledge involves anthropological, economic, environmental and intellectual property interests. The global increase in the use of traditional medicine keeps traditional medicine at the heart of these and other interests a balance of all of which must be maintained in any international or national legal instrument regulating Traditional Medicinal Knowledge. In the process of rapid modernization and advancement of medical sciences, partially documented or undocumented knowledge on traditional medicine began to deplete drastically. Although several ethno-botanists and anthropologists have made attempts at documenting such knowledge in various

---

1 Several terms are used by different legislations, organizations and scholars to refer to Traditional Knowledge. These, *inter alia*, includes indigenous knowledge, (systems and practices), "community knowledge", "intangible cultural heritage" and "indigenous cultural and intellectual property" to name a few.

2 Carlos M Correa, *Traditional Knowledge and Intellectual Property: Issues and options surrounding the protection of traditional knowledge*; a Discussion Paper 3 (2001) available at http://www.quno.org

parts of the world, several remote localities and indigenous communities have remained unnoticed. In addition to this, many multinational corporations have misappropriated this knowledge of indigenous people without or inappropriate consent. In light of the above brief introduction this article attempts a critical examination of the existing law for the protection of Traditional Medicinal Knowledge in India. The author intends to show that the legislations in India for the protection of Traditional Medicinal Knowledge, particularly Indian Patent System, are not adequate enough to protect Traditional Medicinal Knowledge. Accordingly, an alternative sue generis system of protection is suggested for the efficient and effective protection of Traditional Medicinal Knowledge in the country.

II. Traditional Medicinal Knowledge: Need for Protection

The term 'Traditional Knowledge' has become popular in modern international discourse, and acquired a wide usage in many academic disciplines spanning from law to sociology, anthropology and natural sciences. There is no universally agreed and legally precise definition to the term Traditional Knowledge as it can be defined in different ways. According to World Intellectual Property Organisation (WIPO), there is no need for a complete and authoritative definition of Traditional Knowledge in order to develop a legal system for its protection.[3] What an operational definition of Traditional Knowledge requires is the designation of its essential elements, and not a singular definition. Accordingly, WIPO uses the term Traditional Knowledge in broad and inclusive manner to refer:

Tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and

---

[3] WIPO, *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore – An Overview,* Document prepared by the Secretariat to the First Session of the IGC, at Para. 65, WIPO Doc. WIPO/GRTKF/IC/1/3(March 16, 2001).

creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.[4]

This definition gives due emphasis to the "Intellectual Activity" that reflects WIPO's involvement in the protection of Traditional Knowledge in, so far as, it could be considered as Intellectual Property. Hence, this is said to be an objective approach to the scope and meaning of Traditional Knowledge that determines not what Traditional Knowledge is but what is protectable in Traditional Knowledge by Intellectual Property System. According to the WIPO Traditional Knowledge may include:

agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; "expressions of folklore" in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of traditional knowledge would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general and other similar elements of heritage in the broad sense.[5]

Since Traditional Medicinal Knowledge is a subset and important part of Traditional knowledge, there are basic features it shares with other categories of Traditional knowledge. Like any other form of Traditional knowledge, influenced by factors such as history, personal attitudes, philosophy and cultural conditions, Traditional Medicinal Knowledge vary greatly from country to country and from region to region.[6] Traditional Medicinal Knowledge may be codified, regulated, taught openly and practiced widely and systematically; conversely, it may be highly

---

4 WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders:* Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), at Para. 25, (2001).

5 *Ibid.*

6 WHO, WHO Traditional Medicine Strategy 2002-2005, at 7, WHO Doc. WHO/EDM/TRM/2002.1 (2002).

secretive, mystical and extremely localized, with knowledge of its practices passed on orally.[7] Given the diverse and broad range characteristics, elements and viewpoints of Traditional Medicinal Knowledge systems it is difficult to assign precise definition or description of Traditional Medicinal Knowledge. World Health Organisation (WHO), while recognizing this difficulty underlines the need to have a working definition that should be comprehensive and inclusive.[8] It thus concludes that Traditional Medicines:

[Include] diverse health practices, approaches, knowledge and beliefs incorporating plant, animal, and/or mineral based medicines, spiritual therapies manual techniques and exercises applied singularly or in combination to maintain well-being, as well as to treat, diagnose or prevent illness.[9]

The importance of Traditional Medicinal Knowledge to indigenous people and its application to the contemporary world is inevitable. There is a proven link between indigenous communities and their Traditional Medicinal Knowledge because indigenous communities rely on such knowledge for their survival, daily life, healing or medicinal purposes and other nutrition needs. The importance of herbal plants for the treatment of illness has long been recognised. Despite scientific innovations, leading to the development of new drugs and medicines[10], it is estimated that 80% of the world's population relies on traditional medicine in one form or another. 85% of the traditional medicine involves the use of plants extracts. Moreover, there are some 200 chemicals extracted in pure form, from approximately 90% plants species used in medicine throughout the world. About half of the world's

---

7 *Ibid.*

8 *See* WHO, *Supra* note 6.

9 *Ibid.*

10 Xiaorui Zhang "Traditional Medicine and its Knowledge" World Health Organisation (2000). Online:http://fepi.ipaam.br/biodiversidade/Organismos%20Internacionais/UNCTAD/Documentos/Ingl%C3%AAs/Who%20by%20Xiaorui%20Zhang.pdf.

medicinal compounds are still derived or obtained from plant sources.[11] In addition to this, traditional medicine is widely available and affordable, even in remote areas, and generally accessible to most people. In India for example, 70% of the population uses Indian traditional medicine as reported by Indian government.[12] Further the study claims that there has been a global upsurge in the use of traditional medicine and complementary and alternative medicine.[13] For example, the percentage of the population which has used traditional medicine are as follows: Australia – 48%, Canada – 50%, USA – 42%, Belgium – 40%, India – 70%, France – 75% and the United Kingdom – 90% as stated in governmental and nongovernmental reports.[14]

Such an increased awareness of the value of Traditional Medicinal Knowledge along with the explosion of research, writing and international focus has induced many organisations, scientific bodies and corporations to profit from the same. Wretchedly, such modern applications of Traditional Medicinal Knowledge rarely value it for its holistic worth, as they do for its commercial value.[15] Hence, such use of Traditional Medicinal Knowledge has increased the misappropriation and exploitation of traditional holder's knowledge. The main motive behind the protection of Traditional Medicinal Knowledge is to prevent unauthorised appropriation of herbal knowledge. Much has been done until now to shun away with such a critical problem, however, in vain. Therefore, it is really important to understand,

---

11 Panumas Kudngaongarm, "Human Rights Standards for the Protection of Intellectual Property: Traditional Knowledge and Indigenous Resources (Part II)" (2010) 13 Thailand Law Journal. Online: http://www.thailawforum.com/articles/traditional-knowledge-part2.html

12 *See* Xiaorui, *Supra* note 10.

13 *Ibid.*

14 *Ibid.*

15 Johan Ragnar, "Biopiracy, the CBD and TRIPS – The Prevention of Biopiracy", Faculty of Law, University of Lund (2004) Online: http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1561387&fileOId=1565619

why we need such a protection, and against what. Traditional Medicinal Knowledge has always been an easily accessible treasure, thus has been susceptible to misappropriation. Technologically rich countries have been using this treasure for the development of various advanced medicines which today has gained the shape of 'bio-prospecting'[16] or 'biopiracy'[17]. Also Traditional Medicinal Knowledge is often misappropriated because it is conveniently assumed that since it is in public domain, communities have given up all their claims over it. This has triggered widespread protest by farmers and indigenous communities. They argue that, knowledge being in public domain; granting of patents to big companies on biological materials will earn them large profits. The transnational corporations generate large revenues, while leaving the local communities unrewarded, and with a threat in the future, of having to buy products from those companies at high prices.[18]

III. Intellectual Property and Traditional Medicinal Knowledge in India

---

16 "Bioprospecting is an umbrella term describing the process of discovery and commercialization of new products based in biological resources, typically in less-developed countries. Bioprospecting often draws on indigenous knowledge about uses and characteristics of plants and animals. In this way bio-prospecting includes biopiracy, the exploitative appropriation of indigenous forms of knowledge by commercial actors, as well as search for previously unknown compounds in organisms that have never been used in traditional medicine."
Online: < http://en.wikipedia.org/wiki/Bioprospecting>

17 Biopiracy means, large corporations adopting legal practices by using tools of Intellectual Property Rights to legitimize the exclusive ownership and free ride over biological resources and traditional medicinal knowledge without giving recognition and share in profits. *See* International Expert Workshop on Access to Genetic Resources and Benefit Sharing, "Identification of Outstanding ABS Issues: Access to GR and IPR; What is Biopiracy?" Moderncms. Ecosystem Market Place Online:<http://moderncms.ecosystemmarketplace.com/repository/moderncms_documents/I.3.pdf

18 A.K.Ventura, "Biodiversity and Intellectual Property Rights: Impact on Underdeveloped Countries" Panmedia (3 January 1997).

Intellectual Property is a generic term used to refer to a group of legal regimes, each of which, to different degrees, confers rights of ownership in a particular subject matter and devised to protect knowledge literally by granting rights to exclusion of third parties from unauthorized exploitation.[19] IPRs are seen as one possible means to protect Traditional Knowledge including Traditional Medicinal Knowledge both internationally and nationally. Most countries use IPR as a legal mechanism to allocate rights over knowledge, which has a significant role in the relationship between indigenous and local communities, their knowledge, and other societies with which they interact".[20] There are many approaches in IPR regime to protect Traditional Knowledge of indigenous communities, such as, copyright, trademarks, industrial designs, trade names, geographical indications and patents briefly discussed as follows:

a) Patent Protection

Patents are designed to stimulate innovation by granting exclusive property rights to the inventor of a novel product.[21] The patent system is used for the protection of technical solutions that are industrially applicable[22], universally novel[23] and involve an inventive step[24]. Indian Patent system grants rights to the person who invents any new machine, process, article of manufacture or composition of matter, biological discoveries etc., and that fits to the criteria of above protection. The patent holder has an exclusive right to restrict others from making, using, selling, or distributing

---

19 WIPO, WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 3 (2nd ed., 2004)

20 David Downes, "Using Intellectual property as a Tool to Protect TK: Recommendations for Next Step" Center for International Environment Law (2i November 1997) Online: < http://www.ciel.org/Publications/UsingIPtoProtectTraditionalKnowledge.pdf>

21 Lorna Dwyer, *Biopiracy, Trade, and Sustainable Development*, 19 COLO. J. INT'L ENVT"L. L. & POL'Y 219, 232 (2008) at 231.

22 The Patent Act, 1970 at Section 2(ac).

23 *Ibid* at Section 2(I).

24 *Ibid* at Section 2(ja).

the patented invention without permission.[25] Generally the term of protection offered by the Indian Patent Act, for a patented invention is 20 years from the date of filing of an application.[26] India amended its Patent Act, 1970 in 2002 and 2005 to meet its Trade Related Aspects of Intellectual Property Rights (TRIPS) obligations. In the context of patenting biotechnological inventions, 2002 Amendment added section 3 (j)[27] to the Indian Patent Act 1970. This section specified that plants and animals, and any part of a plant or animal (excluding micro-organisms, but including seeds) are not patentable. Likewise, plant varieties, species and essentially biological processes used for the production or propagation of plants and animals were also considered un- patentable.[28]

For many years, the patent system in India has been criticised for its failure to prevent misappropriation of Traditional Medicinal Knowledge. It is believed that, the positive protection of Traditional Medicinal Knowledge cannot be successively accomplished through the patent system and thus, this system is regarded as a defensive measure against misappropriation of Traditional Medicinal Knowledge.[29] The major problem with the protection of Traditional Medicinal Knowledge lies in the fact that it is not documented and is orally transferred over generations. Due to the improper and un-standardized documentation of

---

25 *Ibid* at Section 48.

26 *Ibid* at Section 53.

27 *Ibid* at Section 3 (j) of Patents Act substituted by Act no.of 2002 it provides - What are not inventions: plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals.

28 Swarup Kumar, "Patentability of Biological Material(s) – Essentially Therapeutic Antibodies – In India" (2008) 5 Journal of Law, Technology & Society 583 at 584. Online: http://www.law.ed.ac.uk/ahrc/script-ed/vol5-3/kumar.asp. Also *See* R Ott, "Patentability of Plants, Animals and Microorganisms in India" (2004) 16 OKLA. J.L. & TECH. Online: http://www.okjolt.org/articles/2004okjoltrev16.cfm

29 Dinesh Dayma, "Protection of TK in Indian Patent Act" Go For the Law Online: < http://www.goforthelaw.com/articles/fromlawstu/article76.htm>

Traditional Medicinal Knowledge, patents are often granted to parties who are traditionally not the owners of the knowledge. Furthermore, a part of the profits made by the patent holders also does not flow back to Traditional Medicinal Knowledge holders, thus leading to discontent amongst the latter.[30] The main objective of the current patent system is to develop new knowledge for prosperity of humanity which is getting diluted day by day. However, it bolsters monopolization of new knowledge for exploiting mankind. Need of the hour is to grant patents in a way that serves the public interest. Traditional Medicinal Knowledge is the result of the hard work of indigenous ancestors and must be used for the benefit of humanity. Thus, in this competitive world of patents, it needs to be protected.

Tools of IPR were developed to protect innovations and creativity against piracy. The Indian patent system grants monopoly on an invention if it suffices three major grounds, i.e. Newness (Novelty requirement), Usefulness (the Utility requirement) and Non Obviousness (the non-obviousness requirement). Proponents of patent argue that they are designed to stimulate innovation, and credit the hard labor.[31] However, irony of the situation is that, they are now being used to harbor a new form of piracy, i.e. biological piracy or Biopiracy. It is argued that, the patent system is designed to stimulate and protect the commercialization and monopoly of knowledge by granting exclusive commercial rights for 17-20 years to the one who invents something novel and non-obvious.[32] Further, if indigenous peoples and communities had the ability to use these forms of protection, they could have possessed patents for their innovative

---

30 Ashmita Saha, "Role of Patent Act in Protecting & Preserving TK". Online: < http://www.authorstream.com/Presentation/athor-486578-role-of-patent-act-in-protecting/>

31 Malini S. Goel, "Keeping Biopirates at Bay: Creating a new Legal and Institutional Protection Regime for Traditional Knowledge" The Fletcher School:TuftUniversity(2003)Online:<http://repository01.lib.tufts.edu:8080/fedora/get/tufts:UA015.012.DO.00021/bdef:TuftsPDF/getPDF

32 *Ibid.*

use and practices of Traditional Medicinal Knowledge. Further, any attempts at using their information without payment or permission would constitute an act of legal piracy.

Another important feature of Indian patent law is the concept of prior art. Prior art can negate the novelty requirement because novelty dictates that an invention in question cannot have been made public in any way through any published literature, display or other formal description, nor cited in a previous patent prior to the granting of the patent.[33] If evidence of a similar invention is found in a printed manner or already in public knowledge, this will constitute prior art. Practically speaking this is not always true for evidence found in the general public domain, particularly when it is an international issue. The flawed machinery of the patent system is further compounded by the fact that developed nations are attempting to expand these IP standards worldwide. As a result, the international law, United Nations and other international institutions that promote these laws, international treaties, distinct national laws, regional declarations and developing countries, and NGO positions that differ from the established Intellectual Property regimes.[34]

b) Trade Secret Protection

Trade secret protection is potentially another mechanism for the protection of Traditional Medicinal Knowledge through IPR. Broadly speaking, trade secrets are any business information that is kept confidential to maintain an advantage over competitors and its disclosure would harm the interest of the business.[35] This valuable information is protected through the laws of trade secret or undisclosed information, if it complied with the conditions required by law. How trade secret laws can protect Traditional Medicinal Knowledge? Much of Traditional Medicinal Knowledge is disclosed to the public either through publications or use. There is, however, cases where traditional healers

---

33 *See* Malini supra note 31.

34 *Ibid.*

35 BRYAN A. GARNER (ED.), BLACKS LAW DICTIONARY, 1501 (7th ed. 1999)

deliberately kept their knowledge secret and known among only a small, closed circle of traditional healers or is passed down generation-to-generation within a family. The knowledge may not be generally known and may, therefore, be protectable as a trade secret so that they can take legal action on those who misappropriate it.

Trade secret protection has many advantages to the right holders, especially for Traditional Medicinal Knowledge, if possible. First, registration is not needed in order to acquire the rights conferred under trade secrets law,[36] only a reasonable effort to keep the secret and/or declaring that the details are secret is enough.[37] Second, a trade secret need not meet the more formal, rigorous standards for patent protection of "novelty" and "inventive step"; that would exclude it from patentability. Fourth, unlike other forms of IPRs in which protection is limited by time, a trade secret can, if kept secret, its protection last in perpetuity.[38] This feature is especially appropriate to Traditional Medicinal Knowledge that has remained secret and must remain so due to cultural or religious factors.

There are, however, some concrete disadvantages of protecting secret Traditional Medicinal Knowledge as a trade secret. In trade secret law, protection is available only against a wrongful acquisition, use, or disclosure of the trade secret. It does not provide the exclusive right to possession or use and exclude third parties from making commercial use of it.[39] Once the product is commercialized, anyone may have access to it and use it at will. In doing so, they may be able to inspect it, dissect it and analyze it to determine how it works or how it was made or manufactured and finally discover the secret. This is what we call

---

36 WIPO, *Trade Secrets: Policy Framework And Best Practices*, WIPO MAGAZINE, May 2002, at 17 (There is no government registration process in any country of the world that forces enterprises to reveal their confidential business in formation to the authorities in order to obtain trade secret rights.)

37 N. Stephan Kinsella, *Against Intellectual Property*, 15(2) J. LIBERTARIAN STUDIES 1, 6 (2001)

38 For instance patent protection is granted for only 20 years after the filing date of the patent application.

39 P. Samuelson & S. Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L. J. 1575, 1583 (2002)

reverse engineering.[40] As long as acquisition of the product is by fair and honest means, a person may legally obtain information underlying a trade secret by reverse engineering.[41] This is a precarious issue especially to Traditional Medicinal Knowledge. Traditional Medicines are mostly a simple composition of herbs or other substance that can be easily detected by modern science. Thus, they are more likely to be discovered by reverse engineering so that it can be legally produced by third parties. If that is the case, it will defeat the very essence of protection. Moreover, though acquiring the right incur no payment at all, financial and technical capacity is necessary to keep the information secret and to enforce the right.[42]

While there is no precise legislation on trade secret in India, but excessive attention is being placed on the use of trade secret against the exploitation of Traditional Knowledge by public institutions, private corporations and local communities for which patents offer a limited scope.[43] Commonly, Trade secrets are protected under the doctrine of unfair competition.[44] This helps in protecting dishonest commercial practices, provided that the knowledge holder takes reasonable steps, under the circumstances, to keep the knowledge secret.[45] Trade Secret protection is considered suitable for setting a high threshold for herbal

---

40 Thomas Dougherty, *Common Defenses in Theft of Trade Secret Cases*, 57(2) US Attorneys' Bulletin 27, 31(2009)

41 Samuelson & Scotchmer, *supra* note 137, at1577

42 WIPO summarizes the cost of protecting trade secrets to include the cost of putting in place an information security and protection policy and program in the company and the cost of monitoring, surveillance, audit and legal measures in the costly and lengthy court procedures against insiders or outsiders who breach or try to breach the security system. *See*: WIPO, *Trade Secrets: Policy Framework And Best Practices*, WIPO MAGAZINE, May 2002, at 17

43 Murray Lee Eiland, "Patenting Traditional Medicine" (2007) 89 J. Pat &Trademark Off. Soc'y 45 at 74-76 Online: http://heinonline.org/HOL/Page?handle=hein.journals/jpatos89&div=5&g_sent=1&collection=journals

44 Carlos M Correa, Protection and Promotion of Traditional Medicine Implications For Public Health in Developing Countries (Switzerland: SouthCenter,2002).Online:< http://apps.who.int/medicinedocs/en/d/Js4917e/3.html#Js4917e.3>

45 Ibid. Also *See* Article 39.2 of the TRIPS Agreement.

medicines and plant based knowledge due to a number of characteristics: (1) Information must be a secret, (2) Should have commercial value on account of its secretive character, (3) There should be some evidence to show that reasonable efforts were made to maintain the secrecy of such information.[46]

The main feature is that, this kind of protection does not require any government involvement or registration. Particularly in the case of Traditional Knowledge, which is known to a small group of people, the definition of secrecy is of critical importance. Secrecy does not have to be absolute. It is possible to disclose the information on a 'need to know' basis as well as under the exceptions provided for under confidentiality agreements.[47]

c) The Biodiversity Act, 2002

In order to recognise Traditional Medicinal Knowledge, India enacted the Biological Diversity Act, 2002. The Act covers issues like: protection for biological diversity and associated knowledge, sustainable use of its components, equitable benefit sharing arising out of the biological resources; foreigners, non-resident Indians, body corporate, association and organisation either incorporated or not incorporated in India for accessing Indian Biodiversity. However, this is not an exclusive and precise law to protect misappropriation of Traditional Medicinal Knowledge, though some initiatives can be observed in this regard through the lens of this Act. This Act addresses the basic concerns of access to genetic resources, collection and utilization of biological resources and associated knowledge by foreign individuals, institutions, and companies to ensure equitable sharing of benefits arising out of these resources and knowledge to the country and the people.

The legislation provides for the establishment of federal management structure including: National Biodiversity Authority (NBA) at the apex level, State Biodiversity Board (SBA) at state

---

46 Murray Lee Eiland, "Patenting Traditional Medicine" (2007) 89 J. Pat &Trademark Off. Soc'y 45 at 74-76 Online: http://heinonline.org/HOL/Page?handle=hein.journals/jpatos89&div=5&g_sent=1&collection=journals

47 *Ibid.*

level, and Biodiversity Management Committees (BMCs) at local community level. NBA grants approval for access to genetic resources by foreigners, or non-residents Indians, subject to conditions like ensuring equitable sharing of benefits. By virtue of section 6 of the Indian Biodiversity Act, 2002, anybody seeking any kind of IPRs on research based upon a biological resource or knowledge obtained from India, needs to obtain prior approval from NBA.[48] Section 18 (iv) of the Act, stipulates that one of the functions of the NBA is to take measures to oppose the grant of IPRs in any country outside India on any biological resource obtained from India or knowledge associated with such a biological resource.[49] Indians and Indian institutions are required to inform SBA before performing any research activity on biodiversity. Lastly, The NBA and the SBA are required to consult BMC in decisions relating to the use of biological resources/ related knowledge within their jurisdiction. The legislation also provides for the promotion, conservation, sustainable use and documentation of biodiversity.

d) Geographical Indications

In order to give recognition and protection to Traditional Knowledge, India developed a multi-pronged approach to tackle misappropriation of Traditional Knowledge issue. Under this, a product will be defined by a geographical area to which it traditionally belongs. India established Geographical Indications of Goods (Registration and Protection) Act, 1999 with one of its objectives to analyze the scope of Geographical Indication protection for Traditional Knowledge and policy requirements in Indian Context. Geographical Indication refers to indication that identifies agricultural, natural or manufactured goods originating

---

[48] National Biodiversity Authority of India is one of the three tiered structure of Biodiversity Act of 2002. It states that, all matters relating to requests for access by foreign individuals, institutions or companies, and all matters relating to transfer of results of research to any foreigner will be dealt with by the National Biodiversity Authority. Online< http://www.nbaindia.org/faq.htm>

[49] *Ibid*.

in a territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin.[50] Geographical Indications can be applied to tangible manifestations of Traditional Knowledge that can be identified with a geographical area. Geographical Indication laws have been used to make a policy that facilitates inclusive growth based on Traditional Knowledge across geographical regions of the country.

e) Traditional Knowledge Digital Library (TKDL)

The notion of documentation of Traditional Medicinal Knowledge was acknowledged as a means of giving due recognition to Traditional Medicinal Knowledge holders. Traditional Knowledge Digital Library (TKDL) is an Indian digital knowledge repository, especially about medicinal plants and formulations used in Indian systems of medicine. It was started in 2001, as collaboration between the Council of Scientific and Industrial Research (CSIR) and Department of Ayurveda, Yoga, Naturopathy, Unani, Siddha and Homoeopathy (AYUSH), Ministry of Health & Family Welfare, Government of India. The main objective of the library is to protect the ancient Traditional Medicinal Knowledge of the country from exploitation through biopiracy and unethical patents, by documenting it electronically and classifying it as per international patent classification systems.[51] Apart from that, the non-patent database also serves to foster modern research based on Traditional Medicinal Knowledge, as it simplifies access to this vast knowledge, be it of traditional remedies, or practices.[52]

---

50 Prietika Singh and Dheeraj Seth, "TK and Geographical Indications: Fighting Back" Managing IP (2011). Online:http://www.managingip.com/Article/2897199/Traditional-knowledge-and-geographical-indications-Fighting-back.html

51 Surya Mani Tripathi & Anshu Pratap Singh, "Protection of TK Medicinal Plants" (2011) International Crops Research Insittutie for Semi Arid Tropic,at7.Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792541

52 *Ibid.*

It is an initiative by India to digitize and document the knowledge available in the public domain. The Patent authorities while granting patents will check the invention to prior art in the public domain. Such kind of documentation of knowledge will help trace the inventions in the public domain and to know whether they are eligible for patents, preventing misappropriation of Traditional Knowledge. This also helps in tracing indigenous community with whom commercialization benefits are to be shared.[53] However, many indigenous communities have stressed that, "registries, databases and intellectual property systems are not adequate systems for protecting and transmitting Traditional Medicinal Knowledge, innovations and practices. For millennia, indigenous people have had their own system of protection and transmission with help of their customary laws, which should be respected".[54] They have committed themselves to protect their knowledge and reaffirmed its use in respecting its spiritual values and dimensions of such knowledge. Indigenous people have been critical about the documentation of knowledge, considering that it may lead to the misappropriation of their knowledge by third parties.

The critics of Traditional Medicinal Knowledge have argued that Traditional Knowledge Digital Library may be playing into the hands of foreign companies by providing easy access to India's Traditional Medicinal Knowledge. They also complain that the companies also use the information to develop new products, such drugs, will be under no obligation to share any profits with local communities.[55] It is argued that the Traditional Knowledge Digital

---

53 Gunmala Suri & Puja Chhabra Sharma, "Intellectual Property Rights for Traditional Healers: Indian Perception" (2008) 55 Journal of Economic and Business Administration, 210 at 212.
Online: http://ideas.repec.org/a/aic/journl/y2008v55p210-219.html#cites

54 International Indigenous Forum on Biodiversity: Closing Declaration Sixth Conference of the Parties of the Convention on Biological Diversity Klimabuendnis (2002)
Online: http://www.klimabuendnis.org/closing-declaration0.html

55 K.S Jayaraman, "Biopiracy Fears Cloud Indian Database" Scidev Net (December 5, 2002)

Library cannot prevent 'Utility' patents being taken on new uses that are not mentioned in the Traditional Knowledge Digital Library. It will not stop biopiracy unless the sovereignty granted for bio-resources under Convention on Biological Diversity is extended to products which are derived from such resources.[56] In practice that means, there should be more utilization of prior informed consent and benefit sharing schemes. It is also contended that, whatever is being digitized cannot be treated as the solid evidence. It does not become evidence because it is in digital form. So it is a misconception to imagine that just putting it into a digital form now adds additional weight because absolutely the same material in black and white is available, which is how it would have been taken into the court. Furthermore Traditional Knowledge Digital Library, which is only accessible to foreign patent offices under access agreement, is not available to Indian public. Why is it that we have a secret of our own national heritage? It should be our public knowledge first. The best defense against biopiracy is in fact to use it and make it more available to the public of India, so more people continue to use it. The more it stays in the public domain as a living tradition the more stupid a piracy becomes.[57]

IV. Need for Sui Generis System for the Protection of Traditional Medicinal Knowledge

The application of IPR to biological resources and associated Traditional Medicinal Knowledge has been widely criticized. "The derivation of the conflict over Intellectual Property lies in the dichotomy between the Western tenet of individual private property and the non – western ideology of combined property ownership. A coerced harmonization of property doctrines results in a strong clash of cultures.[58] In indigenous societies natural resources are considered sacred in number. They believe that

---

56 *Ibid.*

57 *Ibid.*

58 Swaireeta Dutta, "The Turmeric Patent is the Just the First Step in Stopping Biopiracy" Nabard. Online:< http://www.nabard.org/nrmc/pdf/nabard%20turmeric%20survey.pdf>

knowledge, ideas and creativity are meant to be shared, exchanges and cultivated in order for society to progress. Due to the difficulties identified above in the application of IPR, particularly patent system to the protection of Traditional Medicinal Knowledge, it is needful to establish Sui Generis system of protection for Traditional Medicinal Knowledge. Sui Generis literally means, 'of its own kind' and consists of a set of nationally recognized laws and ways of extending plant variety protection other than through patents. They are considered an alternative model created outside the prevailing IPR regime. It is specially designed to address the needs and concerns of a particular issue. Such system will create a relationship between the interest in biodiversity and the traditional control of resources necessary to the protection of cultural diversity.[59] The genetic resources and associated Traditional Medicinal Knowledge, being public goods exist outside the pail of markets. They are not amenable to pricing. Where both genetic resources and associated Traditional Knowledge are sought to be accessed through bioprospecting activities matter gets complicated. One of the most ticklish issues is to segregate value of genetic resources from its associated Traditional Knowledge. Since biodiversity legislation largely view Traditional Knowledge as an associated feature of genetic resources, the former is likely to be devalued in comparison to the latter.[60] Sui Generis legislation on Traditional Medicinal Knowledge will recognize economic, cultural, social development in order to ensure a more objective valuation of Traditional Medicinal Knowledge along with a benefit sharing prospective. A Sui Generis law for protecting Traditional Knowledge is also

---

59 Johanna Gibson, "TK and International Context for Protection" Script-ed 1:1 (March 2004) 58 at 59
Online: http://www.law.ed.ac.uk/ahrc/script-ed/docs/TK.pdf

60 A. Damodaran, "Traditional Knowledge, Intellectual Property Rights and Biodiversity Conservation: Critical Issues and key Challenges" (2008) 13 Journal of Intellectual Property Rights 509 at 512. Online: http://nopr.niscair.res.in/bitstream/123456789/2039/1/JIPR%2013(5)%20509-513.pdf

necessitated by the fact that, discussions that narrowly focus on Traditional Knowledge related to biological and non-biological resources do not cover the knowledge that is non-functional. A Sui Generis regulation that covers all facets of Traditional Knowledge will be wider in scope and comprehensive in approaching Traditional Knowledge in its totality. To this extent it will encourage a more objective system of valuation of Traditional Knowledge that respects its aggregate value, than the value of a small component. While national Sui Generis legislation would facilitate a robust system of Traditional Knowledge protection, international action to frame guidelines and compacts is desirable, given the global character of knowledge and resource flows. International guidelines and compacts not only guarantee reciprocity but also ensure that norms of Traditional Knowledge protection and benefit sharing are harmonized within the framework of a multilateral regime.[61]

V. Conclusion and Suggestions

Traditional Medicinal Knowledge has played and still plays, vital role in the daily lives of vast majority of people. The concepts, knowledge and utilization of Ayurveda, Unani, and herbal plants have been practiced since the ages, by generating, refining and passing them from generation to generation. The ideal intentions of our ancestors were to safeguard the knowledge to make it sustainable for future generations for their health benefits. Nevertheless, today, this knowledge is usually practiced and shared by and among different nations respectively. Such practices and sharing is not the result of peaceful exchange of Traditional Medicinal Knowledge, rather plundering of the knowledge without recognizing and intimating the knowledge holders. This has provided a window to pharmaceutical industries to assume that herbal sector in developing countries operate on an assumption that traditional medicinal knowledge is available for all to commercialize without the consideration, such as, benefit sharing or customary ownership and without recognition to indigenous

---

61 *Ibid.*

communities. Thus, today the sharing of knowledge is observed as trade concerns, and for that; having a legal fencing is really important. Absence of any legal protection has to lead to severe exploitation of traditional medicinal knowledge. It has also affected the fundamental justice and the ability to protect, preserve and control one's natural heritage. Further, it has deprived indigenous communities from their right to receive a fair return on what these communities have developed and preserved. Thus, indigenous communities are losing their identity and due to this the nation's identity as being rich in culture, biodiversity and traditional knowledge related to bio resources is in danger.

The discussion in this paper makes it clear that IPR legislation in India does not: solely recognize Traditional Medicinal Knowledge, define Traditional Medicinal Knowledge, and define the scope of Traditional Medicinal Knowledge, enlist the rights of indigenous communities, foreign researchers' rights and massive pharmaceuticals companies' rights in order to patent Traditional Medicinal Knowledge. In addition to this, it does not provide: what can be or cannot be patented under Traditional Medicinal Knowledge, the way of legal approach that should be taken by indigenous communities whose knowledge has been exploited and misappropriated, and benefit sharing schemes for indigenous communities whose knowledge has been shared. Though much concern about such issues can be found in different literature, by many writers but this is worthless until Traditional Medicinal Knowledge has a legal stamp on it. The above situation can be compared to the one where Traditional Medicinal Knowledge exists in public domain but its documentation is not enough for its protection. Similarly such concerns are of no use, no matter where they are made, if they are not stamped as an Act. Furthermore, enshrining small provisions in different legislation for protection of Traditional Medicinal Knowledge and making amendments to it, creates more confusion among the users. Problem aggravates when the issue is not properly defined in any of the Act, but minor recognitions are made in order to protect the same. Thus, makes it

vague and difficult to understand in order to solve the problem. Despite so many legislations working as protective layers within the IPR regime, the problem still persists. Particularly, the Indian Patent system is not adequate enough to recognize, preserve and protect Traditional Medicinal Knowledge. Indian patent law as a protection mechanism protects, novelty, non-obviousness, and utility. However, Traditional Medicinal Knowledge being in public domain does not carry such attributes, still requires protection because, it contains distinct cultural identities of indigenous community along with that of nation. It is the knowledge that has been preserved, conserved and practiced for millennia by our ancestors over generations. It is the blend of our socio-political, cultural, economic system and institutions, ethics, moral values and our customary laws and norms. The need to enact Sui Generis legislation is necessary to protect biodiversity and associated knowledge as they are being collected and patented, valuable gens are isolated from bio-resources and patented and these genes are then used to generate commercial products. Therefore, only a comprehensive legislation specially designed to meet the standards of protection for Traditional Medicinal Knowledge can ensure the end of such exploitation or Biopiracy.

National Judicial Appointments Commission In India: Dawn Of A New Era!

Mir Mubashir Altaf*

Abstract

Since independence the process of appointing judges in the higher judiciary has been a hotly debated issue in India. Originally the power of appointing the judges was vested in the executive which was later on wrested by the judiciary by providing for the system of collegium, a body composed exclusively of judges. However, the system of Collegium has been a subject of vehement criticism for being largely in-effective and non-transparent. As a consequence there was a growing clamor within the socio-legal circles for replacing the extant collegium system. The government of the day responded by enacting the National Judicial Appointments Commission Act 2014 and amending the Constitution by virtue of the Ninety Ninth Amendment thereby effectively replacing the Collegium system with a National Judicial Appointments Commission. This paper is an attempt at analyzing whether the NJAC is an effective substitute to the collegium system and whether it would in any way contribute towards making the Indian judiciary more accountable.

Keywords: *NJAC, Collegium, Judicial Independence, 99th amendment, Judicial appointments.*

I.INTRODUCTION

An impartial and independent selection mechanism is a sure safeguard for enduring that people with doubtful integrity do not occupy high judicial offices. According to Article 124(4), the judges of the Supreme Court are to be appointed by the President in consultation with the judges of the Supreme Court and the High Courts. [62]. In appointing judges to the Supreme Court and the High

---

* Mir Mubashir Altaf , Bsc.LL.M.NET-JRF, Assistant Professor (Contractual),School of Legal Studies, Central University, Srinagar Kashmir.

62 See Shyamtha Pappu, ***Appointment, Transfer and Removal of Judges,*** P. 154.

Courts' the Constitution provided for consultation with the Chief Justice of the Supreme Court. However, the Constitution did not provide any guidance for resolving cases where there was a conflict between the views of the President and the Chief Justice of India. During the first two decades, after the Indian independence, a convention had developed that the opinion of the Chief Justice of India, formed in consultation with the Executive was to be given primacy. In the matter of appointment of the Chief Justice of India, the Constitution does not provide any specific procedure however after the Constitution came into force, the practice to appoint the senior most judge of the Supreme Court as the Chief Justice of India was established. This practice came to be uniformly followed, despite the fact that the Law Commission of India in its 14th Report titled *Reform in Judicial Administration* had vehemently criticized it. The government of the day did not take any notice of the recommendation and the practice of appointing the senior most judges to the office of the Chief Justice continued. This long-standing convention was broken on a number of occasions, most notably during the premiership of Indira Gandhi, when Justice A.N. Ray was appointed as the Chief Justice despite three judges being more senior to him. The government justified the departure from the long established convention on two basis, one that the Constitution did not lay down any rule of seniority and secondly citing the recommendation of the Law Commission of India. A literal interpretation of the Article 124 of the Constitution would have meant that primacy had to be given to the views of the President. This is exactly what the Supreme Court held in the *First Judges Case* .The Apex Court held that the ultimate power of appointment rests with the Central government and that it is in accord with constitutional practice in all democratic countries[63]. The judgment of the Supreme Court in this case came in for sharp criticism, as the solution offered by the Apex court was not found satisfactory.

---

63 S.P.Gupta v Union of India AIR 1982 SC 149 at P. 202.

Ultimately, the Supreme Court in *Second Judges Case*[64], re-visited its judgment in First Judges Case, emphasizing the fact that the question of primacy has to be considered in the context of achieving the constitutional purpose of selecting the best suitable for the composition of the Supreme Court so essential to the independence of the judiciary and thereby to preserve democracy[65]. The Supreme Court, while explaining the rationale of consultation with the Chief Justice, pointed out that the provision for consultation with the Chief Justice was introduced because of the realization that the Chief Justice is best equipped to know and assess the worth of the candidate and his suitability for appointment as a Supreme Court judge and it was necessary to eliminate political influence[66]. The Supreme Court made it clear that the opinion of the judiciary symbolized by the view of the Chief Justice of India has primacy. After the Supreme Court of India laid down the requirement of making appointments to the higher judiciary through the collegiums, many cases arose where the Chief Justice of India recommended candidates to the President without taking into consideration the views of other judges of the collegium. In the *Presidential Reference case* also known as the *Third Judges Case*, the Apex Court clarified the law laid down by the Supreme Court in the *Second Judges Case*. The Supreme Court laid down that the meaning of the phrase 'the opinion of the Chief Justice' is 'reflective of the opinion of the judiciary' and which means that it must necessarily have an element of plurality in its formation. According to the Apex Court, the expression 'consultation' with the Chief Justice requires consultation with the plurality of judges in the formation of the opinion of the Chief Justice of India[67]. As a measure of an additional safeguard the court stated the views of other judges

---

64 Supreme Court Advocate on Record Examination v Union of India AIR 1994 SC 268

65 Ibid., P. 425.

66 See. M.P Jain, ***Indian Constitutional Law*** **(**Sixth ed., 2011). P. 204.

67 In re, Presidential Reference AIR 1999 SC 1 at P. 22.

constituting the collegium should be conveyed in writing by the Chief Justice of India to the government of India along with his own views[68]. The main purpose underlying the law laid down by the Supreme Court in the matter of appointing Supreme Court judges was to minimize political influence in judicial appointment, as well as, to minimize individual discretion of the constitutional functionaries involved in the matter of appointment of the Supreme Court judges.

This system of appointing the judges through the collegium has its detractors who feel that the judiciary has usurped the power of appointing the judges, which constitutionally belonged to the executive. Krishna Iyer.J has thus remarked that

"The process is innocent but in my view constitutionally unwarranted. I refer to the collegium phenomenon based on the pronouncement of a nine-Judge Bench (1998 7 SCC 739) which held, by a majority of one, that the independence of the judiciary demands that the selection of judges of the higher courts be made the monopoly of a batch of three senior-most judges. The executive power to appoint judges is wrested from the Cabinet and exercised by the collegium. This is a novel conquest, unique in any democracy. The selection of judges is an expert job, but judges, senior or junior, are untrained and without investigative tools and unfit for this non-judicial technical operation"[69].

There is a view that the decision in the First judges case was constitutionally correct but it was definitely not in accordance with the constitutional convention[70]. One of the leading Indian lawyers Fali Nariman, who pleaded and ultimately won the case for the petitioner in the Second Judges cases has queerly become one of the critics of the collegium system. Nariman is of the view that even after re-constructing Article 124(2) in the guise of judicial

---

68 Ibid, P. 17.

69 V.R. Krishna Iyer, *Needed, transparency and accountability* available at http://www.thehindu.com/2009/02/19/stories/2009021954661000.

70 Fali S. Nariman, ***Before Memory Fades-An Autobiography*** (2012). P. 392.

interpretation the selections to the highest judicial office of the country could not be implemented in the spirit in which the doctrine was propounded. According to Nariman, the basic reason for this failure was the fact that senior most judges of the Supreme Court to put in his words "*could not always see eye to eye in matters of appointing judges"*[71]. Nariman observes:

The truth is that, although good, competent, honest men and women have been appointed to the superior judiciary under this judge evolved doctrine, many able, competent persons have been passed over for wholly unknown reasons simply because there is no institutionalized system for making recommendations; no database or referral record of high court judges who are considered suitable for appointment as judges of the Supreme Court[72].

One of the vehement critics of the collegiums system, Prashant Bushan, has remarked that

This (power of appointment of judges) has been appropriated by the judiciary who has been making the appointments in an arbitrary, non-transparent and nepotistic manner. The higher judiciary has thus become a self-perpetuating oligarchy[73].

It is submitted that the judiciary has not been able to do justice with the power of appointment, which it has appropriated to itself through judicial interpretation. If the object of appropriating this power was to make it more transparent and impartial it has failed to achieve that purpose. The process of consultation within the collegium in not transparent at all, there are no specific guidelines which would help in the decision making process. Besides it, confining this whole exercise to a small group of judges does not seem to be the correct approach. The consultation process has to be broad based taking into consideration the views of all stakeholders including the Bar. The Collegium system lacks an

---

71 Ibid, P. 397.

72 Ibid, P. 398.

73 Prashant Bhushan, ***The Judiciary: hopes and fear*s**. Retrieved April 12, 2013 from www.cjar.org.

effective mechanism to check the antecedents of judges before elevating him to the Supreme Court or High Court.

The Law Commission in its 214th Report titled *Proposal for Reconsideration of Judges Cases I, II and III* stated that the Supreme Court has virtually re-written Article 124(2) and Article 217 by these three judgments. The Commission criticized the system of collegiums, it expressed the view that the Constitution does not provide for any system of collegiums. The Commission expressed the view that the original framework for making appointments under the Constitution should be restored[74].

II. NATIONAL JUDICIAL APPOINTMENTS COMMISSION IN INDIA

The establishment of the National Judicial Appointments Commission (NJAC) is going to be a development of seminal importance in the constitutional history of India. The National Judicial Appointments Commission Bill passed by both the houses of the Parliament seeks to establish a Judicial Appointments Commission.

COMPOSITION OF THE NATIONAL JUDICIAL COMMISSION

The commission shall compose of the following members[75]:

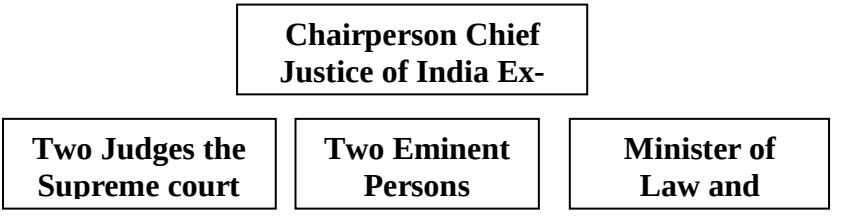
---

74 Harikrishna Pramod and Arunima***, Judicial Accountabilty: An Overview of the Legislative and Judicial Trends in India.*** **(2011) 2NLIU Law Rev. P. 14.**

75 Article 124-A of the Constitution of India provides that "124A. (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:—(a) the Chief Justice of India, Chairperson, ex officio;(b) two other senior Judges of the Supreme Court next to the Chief Justice of India —Members, ex officio;(c) the Union Minister in charge of Law and Justice—Member, ex officio;
(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People — Members: Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:

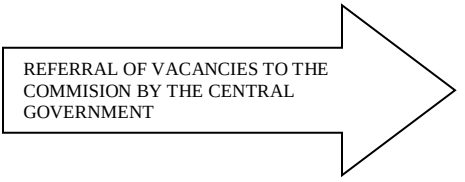
a) Chief Justice of India
b) Two Supreme Court Judges
c) Union Minister of Law and Justice
d) Two Eminent Persons

The commission would be headed by the Chief Justice of India (CJI) who shall be the Chairperson of the Commission. In addition to the CJI there would be two more judges from the Supreme Court in the Commission as its members. The commission therefore gives adequate representation to the judiciary while at the same time providing representation to the members of the executive and the civil society by including the minister in charge of the Law and Justice and two eminent persons as it members respectively.



Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

PROCESS OF SELECTION UNDER THE NEW SYSTEM



NATIONAL JUDICIAL APPOINTMENTS COMMISSION

VACANCY TO BE FILLED	CRITERIA*
A) CHIEF JUSTICE OF INDIA	1.Sr.Most Judge of Supreme Court
B) CHIEF JUSTICE OF HIGH COURT	1.Interse Seniority 2. Merit, Ability & any other criteria of suitability**.
C) JUDGE OF A HIGH COURT	1.Merit, Ability & any other criteria of suitability**.

* This criteria is in addition to the basic eligibility criteria provided under the Constitution
** To be specified through regulations.

NOMINATION PROCESS OF HIGH COURT JUDGES

- Nomination of persons by the Chief Justice of the concerned High Court in consultation with the two Sr.most Judges of the High Court.
- Nomination of persons by the Commission itself but not before seeking the view of the Chief Justice of the concerned High Court who shall consult with the two Sr. most judges of the High Court before expressing his views.
- Consensus: The process of nomination has to be on the basis of near unanimity among the members, if two members do not agree upon suitability of a person such person cannot be recommended.
- Political Element: The process of nomination involves eliciting views from the Governor and the Chief Minister of the concerned state.

RECOMMENDATION TO THE PRESIDENT

Once the nomination process has been completed the commission would send its recommendations to the President. The President may accept the recommendation and make the appointment or in the alternative send the recommendation back to the Commission for reconsideration.

FUNCTIONS OF THE COMMISSIOM

The NJAC has been not only given the power of recommending persons for appointment as High Court and Supreme Court judges but additionally the Commission has been empowered to recommend transfer of high court judges. Previously this power was being exercised by the President of India in consultation with the Chief Justice of India[76].

III.MERITS OF THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION

- Broad Based Body:

The NJAC marks a departure from the Collegium system in a significant way so far as the composition of both the bodies is concerned. The system of the collegiums is purely a body composed of the judges without any representation of the other organs of the state. However, the NJAC provides for representation not only to the executive organ of the state but also to the members of the civil society by providing for inclusion of minister in charge of law and justice and two eminent jurists respectively.

- Time Bound

One of the major reasons for the huge pendency of cases all over the country is the delay in filing up of vacancies in the various high courts. Under the new system the government is under an obligation to refer the vacancies, available or anticipated

---

[76] Clause 1 of Article 222 of the Indian Constitution provided that the (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court. However, by virtue of the 99th Constitution amendment Act of 2014 this position has been altered by assigning the role to the NJAC.

to the Commission in a time bound manner. This step would surely help in filling up the vacancies thereby addressing to a large extent the mounting pendency of cases in the country.

- Emphasis on Merit

The National Judicial Commission is under an obligation to give due consideration to the merit while also taking into account other relevant considerations like seniority. Under the Collegium system the requirement as to consideration of the merit was not expressly spelled out. Laying down stress on merit would surely lead to better talent manning the higher judicial offices of the Country.

- Transparent and Systematic Process

The extant collegium system followed a process which was excessively secretive, one did not know about anything about the deliberations taking place within the collegium. The whole process right from the nomination, short listing and final recommendations were totally kept secret. This secretive nature of deliberations within the Collegium would not always augur well in every case and there have been instances wherein it has proved to be counterproductive. The process to be followed by the Judicial Appointments Commission is bound to be somewhat open and systematic given the fact the Act deals in detail with the processes to be followed by the Commission.

- Transfer of Judges

Under Article 217 of the Constitution the President is empowered to transfer a High Court judge from one High Court to another in consultation with the Chief Justice of India. This responsibility has been now assigned to the Commission. The commission is authorized to recommend transfer of high court judges to the President. This measure is significant in the sense it would reduce possibilities of bias in the matter of transfer of the judges.

IV DE-MERITS OF THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION

- No Applications:

One of the drawbacks of the collegium system is that it adopts the nomination process wherein the Central government, nominates persons for filling up the vacancies in the higher judiciary. Instead of relying on the nomination process, the new system should have adopted the process of seeking applications from eligible persons for filling up the posts in the higher judiciary. Opting for the application mode of filling up of the vacancies would have ensured that the Commission would have a larger pool of talent before it while making recommendations to the President. At the same time it would have ensured the meritorious candidates are not left out of the fray as is likely to happen in the nomination process.

- No Grievance Redressal

The short listing mode adopted by the Commission does not provide for the grievance redressal mechanism in cases of those candidates who get shortlisted but do not get recommended. It would have been a novel introduction if the Act would have provided for grievance redressal as is the case under the Constitution Reform Act 2005 in the United Kingdom. In the United Kingdom there is an office of the Judicial Appointments and Conduct Ombudsman which entertains the complaints in matters pertaining to judicial appointments. [77]. The replication of this process in India would have been a welcome step as it would have ensured that selection process is fair by allaying allegations of bias.

- Political Element

In the matter of filing up of the vacancies of judges in the High Courts, there is an additional requirement of eliciting the views from the Governor and the Chief Minister of the concerned state. The motive behind this provision seems to make the process

---

[77] Section 62(1) of the Constitution Reform Act 2005 provides that - There is to be a Judicial Appointments and Conduct Ombudsman

of judicial selections more participatory however, this step could prove to be counterproductive as it would not only introduce an element of political bias but may raise fears of political interference which may not augur well for the independence of the judiciary. This incorporation of the political element is incompatible with the contemporary notion of keeping out the political interference in the matter of appointment of judges[78].

- Seniority Rule

In the case of appointing the Chief Justice of India, the National Judicial Appointments Commission has nothing new to offer rather it continues with the earlier practice of appointing the senior most judge of the Supreme Court as the Chief Justice however, continuing with this system would mean ignoring the merit altogether. In my humble submission application of the seniority rule in the matter of appointment of the Chief Justice is in contradistinction to the modern practice of appointing judges solely on the basis of merit[79]. Moreover, the seniority rule disregards the report of the Law Commission of India which in its 14th Report had strongly recommended for making merit based judicial appointments[80].

- Eminent Jurists

The term eminent jurist used in the N.J.A.C. Act has not been defined. The Act nowhere stipulates the qualities or criteria for choosing such eminent persons thereby conferring a wide degree of discretion. However, the Act has provided a safeguard by providing for a collegium for nominating such eminent persons.

---

78 See, Anthony King, ***The British Constitution*** (2009) P.149. See also Mir Mubashir Altaf, ***Revisiting the Mechanisms of Judicial Accountability in India*** (2014). P.142.

79 See Latimer House Principes on the Accountability of and the relationship between the three branches of the government. See also the Beijing Statement of the Principle of the Independence of Judiciary in the Lawasia region.

80 See, the 14th Report of the Law Commission of India. Universal Compendium Reports of the Law Commission of India (Vol.2,2007) P.14.39.

The collegium would consist of the Prime Minister, Leader of Opposition in the Lok Sabha and the Chief Justice of India. Since this collegium would consist of senior constitutional functionaries, it inspires confidence that those nominated in this category would ideally be meritorious and free from bias[81]. It would have been ideal if Act would have laid down the qualities or attributes for a person to be considered as an eminent jurist[82].

- No Impartial Investigating Wing:

The National Judicial Appointments Commission to be established has not been provided with an internal impartial investigative wing which would inquire into the antecedents of the prospective candidates. The reliance placed by the Commission on the state apparatus for verifying the credentials of the candidates could be a severe handicap as the existing state apparatus is known to be vulnerable to executive interference and inefficiency.

V. CONCLUSION

The establishment of National Judicial Appointments Commission is a step in the right direction and a better alternative to the collegium system. However, there are many jurists who have vehemently opposed the establishment of the NJAC. Ram Jethmalani has termed the establishment of the NJAC as a fraud on the Constitution[83]. In fact one of the leading constitutional jurists of India, Fali S. Nariman has approached the Supreme Court

---

81 See, Kihota Hollohan v Zachillu AIR 1993 SC 412 wherein the Supreme Court of India upheld the powers of the Speaker of Parliament under Schedule X to the Constitution on the ground of being a high constitutional functionary negativing the fears of political bias.

82 The criteria could be broadly based on the attributes like contributions in the discipline of law, impartiality, independence, rectitude . These attributes have been outlined by the Honorable Supreme Court of India in S.P.Gupta v Union of India AIR 1982 SC149; SCARA v Union of India AIR 1994 SC 1918.

83 NJAC is a fraud on Constitution, Ram Jethmalani says, http://timesofindia.indiatimes.com/india/NJAC-is-a-fraud-on-Constitution-Ram-Jethmalani-says/articleshow/46893672.cms Last Visited April, 13, 2015.

challenging the constitutionality of the National Judicial Appointments Commission Act 2014 and the Constitution (Ninety Ninth Amendment) Act 2014. The challenge to the validity of the impugned laws has been on the basic premise that the creation of NJAC is a threat to the independence of the judiciary. It is argued that the presence of two eminent persons and the Minster of Law and Justice would allow the executive to interfere in the working of the Commission. Moreover, it is stressed that the executive could stall the process of appointments by vetoing any proposal through the intervention of the non-judicial members of the commission[84]. Additionally the vires of the NJAC Act have been challenged on the technical ground that it had been enacted before the Constitution was amended by the Ninty Ninth Amendment. It is reasoned that at the time of Parliament granting its nod, the constitution had not been suitably amended and that the 99th amendment can't be applied retrospectively. Therefore, absence of the amendment renders the passing of the bill unconstitutional and ultra-vires[85]. Notwithstanding the challenge on technical grounds it is submitted that the NJAC offers a better alternative to the collegium system despite its aforementioned drawbacks. The assertion that the involvement of the non-judicial members would result in the executive interference is not well founded. The two non-judicial members apart from the Minister of Law and Justice are not nominated by the executive rather a collegium consisting of the Chief Justice of India, the Leader of Opposition of Lok Sabha and the Prime Minister. As such the Act has adopted a transparent and fair mechanism in the selection of the two eminent persons within the Commission. Moreover, the composition of the Commission tilts the balance in favour of the judiciary and

---

84 The 6 member Commission, as envisioned under the Act, would allow any two members to veto a name under consideration

85 The NJAC Challenge: SC Day 1, http://thefirm.moneycontrol.com/story_page.php?autono=1325640 Last visited March 11, 2015.

therefore any assertion that the Commission would toe the executive line is largely exaggerated. However, the establishment of the NJAC has hit a stumbling block with the refusal of the C.J.I to join the collegium tasked with choosing the two eminent persons. This action of the C.J.I has resulted in a constitutional stalemate which has virtually halted the efforts at establishing the National Judicial Appointments Commission. Notwithstanding this temporary stalemate, the experiment of establishing NJAC is certainly a right step in the direction of making the judiciary in India accountable.

Public Interest Litigation: Voice to Voiceless

Shayesta Nazir[*]
Dr.Rehana Shawl[**]

Abstract

Till 1960s and seventies, the concept of litigation in India was still in its rudimentary form and was seen as a private pursuit for the vindication of private vested interests. Litigation in those days consisted mainly of some action initiated and continued by certain individuals, usually, addressing their own grievances/problems. Thus, the initiation and continuance of litigation was the prerogative of the injured person or the aggrieved party. Even this was greatly limited by the resources available with those individuals. There were very little organised efforts or attempts to take up wider issue. However, this entire scenario changed during Eighties when the Supreme Court of India introduced the concept of public interest litigation (PIL). The Supreme Court of India gave all individuals in the country and the newly formed consumer groups or social action groups, an easier access to the law and introduced in their work a broad public interest perspective. Seeds of PIL were sown post emergency period by giants in legal field; evolutionary judges to say the least like J. Krishna Iyer and then later J. Bhagwati who converted "Apex Court of India into its Supreme Court" – open to one and all irrespective of class, caste, religion and gender considerations. PIL marked a new phase in the constitutional and legal history of India setting a trend setting mark ushering new realms of justice accessible to all and sundry. This paper will be dealing with historical evolution of PIL in India and critical appreciation of how far it has achieved the very purpose it was set for and suggestions and conclusion will be given with respect to same.

---

[*] LLM 3rd Semester student, School of Legal Studies, Central University, (J&K) Srinagar, Kashmir.

[**] Astt.Prof (contractual)School of legal Studies, Central University, (J&K) Srinagar, Kashmir.

Keywords: *PIL, Public interest, Justice, Apex Court, Litigation, Vindication*

Introduction

*"**Injustice** anywhere is a threat to **justice** everywhere." (Emphasis supplied)*

~Martin Luther King Jr. ~

Public Interest Litigation (PIL) ushered altogether a new era of justice dispensation in India converting Apex Court of India into its Supreme Court – open and accessible to all. Earlier concept of justice was both literally and metaphorically "lofty" for poor and underprivileged, who because of their economic backwardness couldn't dream of vindication of their rights. But situation is no longer the same as "judicial activism", especially the introduction of Public Interest Litigation brought justice to their doorsteps. Now justice is no longer a dream but a low hanging fruit, accessible to all and sundry equally irrespective of caste, colour, race and economic considerations.

Public interest litigation now serves a much broader function than merely espousal of the grievances of the weak and the disadvantaged persons. It is now being used to ventilate public grievances where the society as a whole, rather than a specific individual, feels aggrieved. If the traditional rule of *locus standi* is adhered to, such public grievances could not be brought before the Court by any individual.[86] As BHAGWATI, J. has explained in *Asiad workers case*[87], public interest litigation is brought before the Court not for the purpose of enforcing the rights of one individual against another as happens in the case of ordinary litigation. Under this category, a large number of cases raising all kinds of socio-economic and administrative problems affecting the public generally, such as protection of the environment, misuse of powers by Ministers, etc., have been brought before the Supreme Court and the High Courts.[88]

---

86 M.P.Jain, *Indian Constitutional Law*. (7th edition,2014) at p.1328

87 Peoples' Union for Democratic Rights v. Union of India (AIR 1982 SC 1473).

88 *Ibid.*

The principle was enunciated by the Court as early as 1982 in *S.P.Gupta v. Union of India*[89], where BHAGWATI, J., stated:

"Any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision."[90]

Historical Perspective

Till 1960s and seventies, the concept of litigation in India was still in its rudimentary form and was seen as a private pursuit for the vindication of private vested interests. Litigation in those days consisted mainly of some action initiated and continued by certain individuals, usually, addressing their own grievances/problems. Thus, the initiation and continuance of litigation was the prerogative of the injured person or the aggrieved party. Even this was greatly limited by the resources available with those individuals.[91]

However, all these scenario changed during Eighties with the Supreme Court of India led the concept of public interest litigation (PIL). The Supreme Court of India gave all individuals in the country and the newly formed consumer groups or social action groups, an easier access to the law and introduced in their work a broad public interest perspective. Prior to 1980s, only the aggrieved party could personally knock the doors of justice and seek remedy for his grievance and any other person who was not personally affected could not knock the doors of justice as a proxy for the 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 and the non affected persons had no locus standi to do so. And as a result, there was hardly any link between the rights guaranteed by the Constitution of Indian

---

89 AIR 1982 SC. 149

90 Supra 1 at 1328

91 Available at:*http://www.legalserviceindia.com,* accessed on 30/6/2015.

Union and the laws made by the legislature on the one hand and the vast majority of illiterate citizens on the other. However, all these scenario gradually changed when the post emergency Supreme Court tackled the problem of access to justice by people through radical changes and 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. And as a result any citizen of India or any consumer groups or social action groups can approach the apex court of the country seeking legal remedies in all cases where the interests of general public or a section of public are at stake. Further, public interest cases could be filed without investment of heavy court fees as required in private civil litigation[92].

PIL against Whom?

Now this is a curious part of PIL that if any public spirited person wants to file PIL in court of law but the question is where and against whom? So the answer is this that any public spirited person can file any PIL but only against the state govt./ central govt. or any municipality authority but not any private party but it doesn't mean that private party does not come under the sphere of PIL. A private party also can be tried by the PIL by taking a role of respondent after making concerned state authorities the parties.[93]

For example- If there is a Private factory in Delhi, which is causing pollution, then people living nearly or any other person can file a PUBLIC INTEREST LITIGATION against:

1. Government of Delhi
2. State Pollution Control Board, and
3. Also against the private factory

But public interest litigation can not be filed against only private party without concerning state govt. or central govt. as in the above case

---

92 Available at:*http://www.legalserviceindia.com*, accessed on 30/6/2015.

93 Available at: *http://www.lawteacher.net.*, accessed on 30/6/2015.

this case was against the union of India not to that corporation whose fault was there.[94]

Procedure and Mechanism

Public interest litigation is not defined in any statute or any act. It has been interpreted by judge to consider the intent of public at large. This is just like a writ petition which is filed in High court or Supreme Court under article 226 for High court and article 32 for Supreme Court. When public interest is affecting at large then this can be filed but affection on only one person is not a ground for filing this petition. There are some various areas where public interest litigation can be filed.[95]

(a) Violation of basic human rights of the poor.

(b) Content or conduct of government policy.

(c) Compel municipal authorities to perform a public duty.

(d) Violation of religious rights or other basic fundamental rights.

These are the main areas where any public interest litigation can be filed against State,/Central Govt., Municipal Authorities, and not any private party. However private party can be included in this as a respondent after including state authority. This petition is filed in High court or Supreme Court just in a same manner as other writ petition is filed. There is some fee for this purpose and its hearing proceeds just like other cases. In early 90's a judge had treated a complaining post card as public interest litigation so we can say that a letter also may be treated as writ of public interest litigation. There are various kinds of remedies also there to secure the public interest as INTERIM MEASURES, APPOINTING A COMMITTEE, and FINAL ORDERS.[96]

In India the first case of PIL was filed in 1976 named *Majdur kaamgar Sabha v Abdul bhai Faizulla bhai case,*. Where Krishna Iyer allowed a group of people to file petition on behalf of others. The rights of the members were violated. Krishna Iyer held either one individual or

---

94 *Ibid.,*

95 Available at: *http://www.lawteacher.net.,* accessed on 30/6/2015.

96 *Ibid.,*

group of individuals together can come to the court. But some time misuse of this petition also comes into picture. This is the problem in PIL that many times this is misused by some people. There are various cases in which PIL is misused as *S.P. Gupta v union of India*[97], in this case misuse of PIL came into picture and secondly in the case of *Shushes Kumar v Union of India,* in this case there was a manager in a company and his boss fired him and he gave a PIL in spite of there not being any ground of PIL.[98]

Procedure to file public interest litigation is just like filing a general writ in High Court or Supreme Court.[99]

In High Court:

If a PUBLIC INTEREST LITIGATION is filed in a High court, then two (2) copies of the petition have to be filed. Also, an advance copy of the petition has to be served on each respondent, i.e. opposite party, and this proof of service has to be affixed on the petition.[100]

In Supreme Court:[101]

If a PUBLIC INTEREST LITIGATION is filed in the Supreme Court, then (4) + (1) (i.e. 5) sets of petition have to be filed. Opposite party is served, the copy only when notice is issued.

Court Fees:

A Court fee of RS. 50, per respondent (i.e. for each number of opposite party, court fees of RS. 50) has to be affixed on the petition.

Procedure:[102]

1. Proceedings, in the PUBLIC INTEREST LITIGATION commence and carry on in the same manner, as other cases.

---

97 AIR 1980 SC. 1623

98 Available at: http://www.lawteacher.net., accessed on 30/6/2015.

99 *Ibid.,*

100 *Ibid.,*

101 *Ibid.,*

102 *Ibid.,*

2. However, in between the proceedings if the judge feels he may appoint a commissioner, to inspect allegations like pollution being caused, trees being cut, sewer problems, etc.

3. After filing of replies, by opposite party, and rejoinder by the petitioner, final hearing takes place, and the judge gives his final decision.

Letter treated as PIL: Epistolary Jurisprudence

In early 90's there have been instances, where judges have treated a post card containing facts, as a PUBLIC INTEREST LITIGATION.

Some of them are:

1. Letter alleging the illegal limestone quarrying which devastated the fragile environment in the Himalayan foothills around Missouri, was treated as a PUBLIC INTEREST LITIGATION.

2. A journalist complained to the Supreme Court in a letter, that the national coastline was being sullied by unplanned development which violated the central government directive was treated as a PUBLIC INTEREST LITIGATION.

In a landmark judgment, in *D.K. Basu v State of West Bengal,* the court acted upon a letter petition which drew attention to the repeated instances of custodial deaths in West Bengal. The court further mandated that a relative of the arrested must be promptly notified. It made clear that the failure to comply with this direction would be punishable as contempt of court. The early PILs had witnessed the award of compensation by the court to victims of human rights violations.

In the case of *Upendra Bakshi v Union of India* a letter highlighting the pathetic condition of the young offenders was sent to S.C judge which was taken into consideration.

Secondly in the case of *HINDUSTAN TIMES V CENTRAL POLLUTION BOARD* a news paper cutting was taken as complaint by the court of law. In other case *Kamal Nath v Union of India,* Kamalnath had a lakeside hotel in mussorie. The proprietors wanted to increase the area. They encroached the canal and built rooms there, thereby violating right to clean environment by taking pollution at grievous level. A news

item of the same appeared and it was considered by the court.[103] (Emphasis supplied throughout paragraph)

Explaining the reason for treating letters as writ petitions, BHAGWATI, J. has said in *Bandhua Mukti Morcha*[104] *case* that when a member of the public acting *bona fide* moves the Court for enforcement of a Fundamental Right on behalf of a person, or class of persons, who on account of poverty or disability or socially or economically disadvantaged position cannot approach the Court for relief, such member of the public may move the Court even by just writing a letter, because it would not be right or fair to expect a person acting *pro bono publico* to incur expenses out of his own pocket to approach a lawyer and prepare a regular writ petition for being filed in the Court for enforcement of the Fundamental Rights of the poor.

Lakshmi Kant Pandey v. Union of India[105], was initiated on the basis of a letter by an advocate complaining of malpractices indulged in by social organisations in the matter of offering Indian Children in adoption to foreign parents. He based his letter on press reports on this issue. The Court formulated a series of guidelines to be applied in such matters.

WHERE TO FILE PIL?

Now a chief question comes in the mind that where should a public spirited person file this petition to take remedy by this. So the answer of this chief question is this that all PILs are filed in High Court or Supreme Court. If a person wants to go to High Court to filing that then he can go under article 226 of Indian constitutional law and if any person wants to go to Supreme Court then he can go under article 32 of the Indian constitutional law but Article 226 is something distinguished from article 32 of constitutional law. Under article 32 that person can go to Supreme Court whose fundamental rights are violated only and nothing else but any person can go to HC on violation of not only

---

103 Available at: http://www.lawteacher.net., accessed on 30/6/2015

104 AIR 1984 SC at p 817.

105 AIR 1985 SC at p 652.

fundamental right but also constitutional right and any other legal right. Secondly we can see by this view that it will purely and solely depend on the "Nature of the case", if the question involves only a small group of people being effected by action of State authority, the PUBLIC INTEREST LITIGATION can be filed in High court. For e.g. if there is a sewage problem in a locality effecting 50 families, the PUBLIC INTEREST LITIGATION can be filed in High court. If a large section of people is affected whether by State Government or Central Government, PUBLIC INTEREST LITIGATION can be filed in Supreme Court for e.g. placing a ban on adult movies, prohibition industrial unit from causing pollution etc. So we can say that both of the courts have power to entertain the public interest litigation.

Who Can File PIL?[106]

As we already said that any public spirited person even a foreigner can file a PIL on behalf of others but this is necessary that only the person who is filing a PIL should not get benefit. Meaning there by any PIL whoever is filing should be only and only in for the benefit of peoples. If only one person is getting affected by any act then that is not a ground for filing PIL. Although earlier only the person whose interest was in question could go for litigation.

So these are the essential points for that person who can file any public interest litigation.

- He is a member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury.
- He is not a mere busy body or a meddlesome interloper.
- His action is not motivated by personal gain or any other oblique consideration.[107]

As we can see that in the society there are some people who come in the picture for the same as *M.C. MEHTA, MACHILIPATNAM*, *Lankisetti Balaji* are in the lime light in this domain. There is a case

---

106 Available at: http://www.lawteacher.net., accessed on 30/6/2015.

107 *Ibid.,*

named ***M.C.Mehta V Union of India***[108], in this case Shriram Food and Fertilizers Industry a subsidiary of Delhi Cloth Mills Limited was producing caustic and chlorine. On December 4th and 6th 1985, a major leakage of oleum gas took place from one of the units of Shriram Food and Fertilizers Limited in the heart of the capital city of Delhi which resulted in the death of several persons that one advocate practicing in the Tees Hazari Courts died.[109]

The leakage was caused by a series of mechanical and human errors. This leakage resulted from the bursting of the tank containing oleum gas as a result of the collapse of the structure on which it was mounted and it created a scare amongst the people residing in that area. Hardly had the people got out of the shock of this disaster when, within two days, another leakage, though this time a minor one took place as a result of escape of oleum gas from the joints of a pipe.[110]

Shriram Foods and Fertilizer Industries had several units engaged in the manufacture of caustic soda, chlorine, hydrochloric acid, stable bleaching powder, super phosphate, vanaspati, soap, sulphuric acid, alum anhydrous sodium sulphate, high test hypochlorite and active earth. All units were set up in a single complex situated in approximately 76 acres and they are surrounded by thickly populated colonies such as Punjabi Bagh, West Patel Nagar, Karampura, Ashok Vihar, Tri Nagar and Shastri Nagar and within a radius of 3 kilometers from this complex there is population of approximately 2, 00,000.

On 6th December, 1985 by the District Magistrate, Delhi under Section 133(1) of Cr.P.C, directed Shriram that within two days Shriram should cease carrying on the occupation of manufacturing and processing hazardous and lethal chemicals and gases including chlorine, oleum, super-chlorine, phosphate, etc at their establishment in Delhi and within 7 days to remove such chemicals and gases from Delhi. At this juncture M.C.Mehta moved to the Supreme Court to claim compensation

---

108 AIR (1987) 4 SCC at p 463.

109 Available at: http://www.lawteacher.net., accessed on 30/6/2015.

110 *Ibid.,*

by filing a PIL for the losses caused and pleaded that the closed establishment should not be allowed to restart. So this was one of the cases of PIL.[111]

Indian council for *Enviro-legal action v union of India* chemical industry were causing problem of pollution, affecting right to life, NGO filed petition on behalf of the aggrieved people. Secondly in the case of *Banvasi seva Ashram v state of U.P* in this case, the NGO filed a petition on behalf of the tribal's of the affected area.[112]

Relief's Available by Public Interest Litigation?[113]

By such a petition many kinds of relief are available here to secure the public interest at large. That relief is:

Interim Measures

The court can afford an early interim measure to protect the public interest till the final order for example:

1. Release of under trial on personal bonds ordering release of all under trial who have been imprisoned for longer time, than the punishment period, free legal aid to the prisoners, imposing an affirmative duty on magistrates to inform under trial prisoners of their right to bail and legal aid. Or

2. Closure of Industrial plant emitting poisonous gas, setting up victim compensation scheme, ordering the plaint reopening subject to extensive directions etc. Or[114]

3. Prohibiting cutting of trees or making provisions for discharge of sewage, till the disposal of final petition.

Relief in most of the PUBLIC INTEREST LITIGATION cases in the Supreme Court is obtained through interim orders.[115]

Appointing a Committee

---

111 Available at: http://www.lawteacher.net., accessed on 30/6/2015.

112 *Ibid*.,

113 *Ibid*.,

114 *Ibid*.,

115 Available at: http://www.lawteacher.net., accessed on 30/6/2015.

1. The court may appoint a committee, or commissioner to look into the matter, and submit its report.

2. Such committee or commissioner may also be given power to take cognizance of grievances and settle it right in the public intent.

Final Orders

The court may also give final orders by way of direction to comply within a stipulated time.

Can a Writ Petition Be Treated As a Public Interest Litigation?[116]

Yes, a writ petition filed by the aggrieved person, whether on behalf of group or together with group can be treated as a PUBLIC INTEREST LITIGATION however,

1. The writ petition should involve a question, which affects public at large or group of people, and not a single individual.

2. Only the effected/Aggrieved person can file a writ petition.

There should be a specific prayer, asking the court to direct the state Authorities to take note of the complaint/allegation.[117]

Misuse of PIL [118]

In the last few years, there have been serious concerns about the use and misuse of public interest litigations and these concerns have been expressed at various levels. The time has come for a serious re-examination of the misuse of public interest litigation. There are numerous cases in the history of law where PIL has been misused. As in the case of *Shubhash Kumar V State of Bihar*. In this case there was a person who was fired by the director of the company. So he filed a PIL that this company is acting something wrong so this should be tried. So in this case by the fact of the case we can see that this is purely misuse of PIL nothing else. This misuse comes in various forms. The first is what

---

116 *Ibid.,*

117 *Ibid.,*

118 Available at: *http://www.lawteacher.net.,* accessed on 30/6/2015.

Justice Pasayat in the case of *Ashok Kumar Pandey v. State of W.B.* Described as "busybodies, meddlesome interlopers, wayfarers or officious interveners who approach the court with extraneous motivation or for glare of publicity". Such litigation is described as "publicity interest litigation" and the courts have been fraught with such litigation. How else would one describe a public interest litigation filed for "reliefs" such as that the higher judiciary would be provided with private planes and special transport? A petition to this effect was filed by a lawyer practicing in U.P. As could be expected, it was summarily rejected, but not before the gentleman had his day in the sun, however momentary it was. Examples of this kind of litigation are innumerable. No sooner has an event of public interest or concern occurred than there is a race to convert the issue into a PIL.[119]

Cautioning the High Courts on the misuse of the PIL, the Bench said "PIL is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking". The Bench made it clear that a PIL should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. It observed that it should not be allowed to become "publicity interest litigation or private interest litigation or politics interest litigation or, the latest trend, praise income litigation.[120] The laudable concept of PIL was for extending the long arm of sympathy to the poor, ignorant and oppressed", the Bench said and added the "brand name" should not be allowed to be used by imposters and meddlesome interlopers impersonating as public-spirited holy men.

In the case of *Chhetriya Pradushan Sangarsh Samiti v State of U.P* the jhunjhunwala mills purchased a land form the member of samiti long back because increasing land prices the heirs of the persons, who sold the property asked to return it when they could not succeed in that they

---

119 *Ibid.,*

120 *Ibid.,*

started launching criminal offence complaints and that the that mills polluting the environment. SC held that samiti has not come with clean intention and hence PIL cannot be entertained. Because of those cases, the SC laid down certain condition for PIL.

Secondly in *Sheela Barse v Union of India*[121] no PIL to protect the interest of criminals be filed.

In *S.P. Gupta v Union of India*[122] P.N. Bhagwati in the instant case lays down certain specific case where PIL cannot be entertained namely.

1. If the person is engaged in socio- economic crime then there is no PIL.

2. If offence is against the woman, no PIL should be filed on behalf of the criminal.

Criticism of PIL:[123]

Criticism of PIL has been given by many learned people of the field of law but one of the main criticisms is given here:

Liberalizing the requirement of standing in PIL- M.N. Chaturvedi

Mr. Chaturvedi in his article points out 2 criticisms against PIL namely:

1. It encourages vexatious litigation to file unmerited, odious, fictitious claims and abuse of the process of the court.

Comment: - PIL has protected public interest.

2. It shows immobility & inefficiency in administration.

Comment:- administration to go according to the manner in which they want till the order of the court. For example in *Ratlam municipality v Vardhichand*[124] only when the direction came, the municipality worked but administrative inefficiency is also because of its supervisors or offences.

3. In the PIL court sits in the judgment of the political branch of the state. Judiciary comes into conflict with the political branch.

---

121 AIR 1986 SC at p..378

122 AIR 1980 SC.1624

123 Available at: http://www.lawteacher.net., accessed on 30/6/2015.

124 AIR 1980 SC at p. 1622.

Comment:- In *Wadhera Vishaka* case directions were issued, but not effective. This may be true but in the most of the cases victims were given relief.

4. PIL is trying to wither away the doctrine of separation of power.

Comment:- Montesque's doctrine that there should be separation of power i.e. the organs of the govt. should confine their role. In the PIL judiciary encroaches into the domain of Legislation and executive but to Chaturvedi, the doctrine is not followed strictly in India. When the Executive and Legislature has not taken any action the judiciary has to take lead.[125]

Recent Case of PIL:

Recently in the territory of India many cases from the area of PIL has come into picture which has been filed in the court of law. As in 2008 a case was decided by Supreme Court named *Common Cause (A Regd. Society) v. Union of India*[126] in this case PIL Petitioner filed public interest litigation praying to court to enact a Road Safety Act in view of the numerous road accidents but in this case court held that court cannot direct legislation A perusal of the prayers made in this writ petition clearly shows that what the petitioner wants the courts to do is legislation by amending the law, which is not a legitimate judicial function, so this Petition was dismissed by court of law.

Secondly *Sanganmal Panday v state of U.P.,* the Lucknow bench of Allahabad Court on Saturday stayed construction activities from Jail Road trisection to Kanshiram memorial till September 22 on a PIL alleging the Uttar Pradesh government's move was affecting the green belt in the area. A division bench comprising Pradeep Kant and Rituraj Awasthi passed this directive on a PIL filed by a local lawyer Sangamlal Pandey. Earlier, on September 17, the apex Court had disposed off Pandey's petition allowing him to file the PIL in the High Court. In his PIL, Pandey had contended that the government move was not

---

125 Available at: *http://www.lawteacher.net.,* accessed on 30/6/2015.

126 AIR 2008 SC at p 2116.

environment-friendly and construction work was going on in the green belt land.

The grievance in a public interest action, generally speaking, "is about the content and conduct of governmental action in relation to the constitutional or statutory rights of segments of society and in certain circumstances the conduct of government policies." To facilitate filing of such cases by public minded citizens, the Court has lowered the "*locus standi* thresholds".[127] The dispute is not comparable to one between private parties and the relief is generally "corrective" rather than "compensatory".

The Court may refuse to take cognizance of a public interest litigation petition if there is undue delay on the part of the petitioner to file the same.[128]The range and scope of public interest litigation is vast as it is a mechanism to agitate any socio-economic public issue before the court which can be brought within the legal and constitutional mould. PIL is the result of judicial activism. The basic reason for the growth of PIL in India is bureaucratic unresponsiveness to public needs. No effective mechanism has been established as yet for the redressal of public grievances against the Administration. The result is that any person having a grievance against the Administration has no alternative but to take recourse to the courts for the redressal of his grievance against the Administration.[129]PIL has flourished in India mainly because of the lack of any sense of accountability and responsibility on the part of the government. Had the administration discharged its role faithfully and effectively, there would be no need for people to knock at the doors of the courts to assert their rights and ensure that the Administration acts according to law. Many statutes remain on the statute book without the Administration taking any steps to implement the same. On the other hand, the courts have played their role in a constructive manner with a

---

127 *Ranji Thomas v Union of India*, (2000) 2 SCC at p 81.

128 *Narmada Bachao Andolan v Union of India,* (2000) 10 SCC at p 664.

129 Supra 5 at p. 1330.

view to promote the welfare of the people and strengthen the democratic fabric in the country.[130]

Conclusion

PIL is undoubtedly "voice to voiceless" and a laudable step on the part of Supreme Court for introduction of concept like this which came a long way, giving teeth to rights of poor and underprivileged and making justice to reach to thresholds of lesser mortals – poor and backward sections of society. Though it was introduced with all good intentions and has achieved much in tune with its purpose but still more needs to be done for it to reach to its intended beneficiaries. As with time concept got diluted with every Tom, Dick and Harry wanting to jump the PIL fray for wrong reasons like money and their publicity. This way the good spirit behind the concept of PIL began to loose its riches and justice again played hide and seek with intended poor beneficiaries. **But just because PIL is abused and misused, which every law ultimately faces, doesn't mean we will throw away baby with bath water** but else we should guard this beautiful concept against such frivolous elements so that it achieves that for which it was introduced.

Suggestions

Thus we can say with all confidence that PIL when used properly and when not misused as a tool for personal promotion like rightly said by the Hon'ble Supreme Court once that when not used as "Publicity interest litigation" or "Paisa interest litigation", or "a 'pill' for all ills", is a potent weapon in the hands of commoners – economically disadvantaged and underprivileged sections of society included – for vindication of their rights. If adherence is made towards proper channels of redressal through PIL and its spirit not compromised, PIL could bring a revolution in spheres of quality justice. Suggestions in this regard would be that in order to keep up the spirit of such a laudable and efficient step and lofty concept of PIL, it should remain guarded against frivolous elements – which poke nose in every important affair squeezing positivity out of every important concept. As enumerated in preceding sections, there definitely is misuse and abuse of PIL by

---

130 *Ibid.,*

“chronic litigants” – who want to file PIL for the sake of it – and therefore make PIL a ploy for their cheap publicity stunts. So in order to assure that right people approach courts for vindication of their genuine rights and redressal of their genuine problems and in order that justice intended to reach its “intended beneficiaries” through PIL – the very purpose of introduction of PIL – there should be a sort of mechanism within courts to filter “frivolous litigations and PILs” at outset to save the time of court so that courts will give time wholly and solely to redressing of genuine grievances without wasting its precious time on “frivolous PILs”. Though what needs to be mentioned is the provision of compensation to be paid to opposite party in case of frivolous complaint and even Consumer Protection Act, 1986 was amended to the effect and this is a welcome step.

.

Traditional Knowledge And Intellectual Property Rights

Gazala Sharif*

Abstract

Indigenous and local communities justly cherish traditional knowledge (TK) as a part of their very cultural identities. Maintaining the distinct knowledge systems that give rise to TK can be vital for their future well-being and sustainable development and for their intellectual and cultural vitality. For many communities, TK forms part of a holistic world-view, and is inseparable from their very ways of life and their cultural values, spiritual beliefs and customary legal systems. This means that it is vital to sustain not merely the knowledge but the social and physical environment of which it forms an integral part. TK also has a strong practical component, since it is often developed in part as an intellectual response to the necessities of life: this means that it can be of direct and indirect benefit to society more broadly. There are many examples of important technologies being derived directly from TK. But when others seek to benefit from TK, especially for industrial or commercial advantage, this can lead to concerns that the knowledge has been misappropriated and that the role and contribution of TK holders has not been recognized and respected. One of the challenges posed by the modern age is to find ways of strengthening and nurturing the roots of TK, even in times of social dislocation and change, so that the fruits of TK can be enjoyed by future generations, and so that traditional communities can continue to thrive and develop in ways consistent with their own values and interests. At the same time, TK holders stress that their TK should not be used by others inappropriately, without their consent and arrangements for fair sharing of the benefits; more generally, it leads to calls for greater

* Ph.D Scholar GGS Indraprastha University, Dwaraka, New Delhi

respect and recognition for the values, contributions and concerns of TK holders.

Keywords: *Traditional knowledge, intellectual property rights, patents,*

Introduction

Several international forums are discussing the issue of "traditional knowledge" without, however, having so far been able to establish an internationally agreed definition of this term. Nevertheless, several particular characteristics can generally be attributed to this form of knowledge: « Traditional knowledge is knowledge that has been developed based on the traditions of a certain community or nation. Traditional knowledge, is for that simple reason, culturally driven.[131]Traditional knowledge thus consists of tradition-based innovations and creations that originate from and are used in indigenous and local communities.[132]Because its generation, preservation and transmission is based on cultural traditions, [traditional knowledge] is essentially culturally-oriented or culturally-rooted, and it is integral to the cultural identity of the social group in which it operates and is preserved.[133]Traditional knowledge is transmitted from generation to generation, often in oral form or by way of example, whereas written sources may not exist at all or only in local languages. It is constantly being improved and adapted to changing environments and needs, and is therefore not static knowledge. Traditional knowledge is usually not the property of an individual, but held in common by the

---

131 World Intellectual Property Organization, 2002a, paragraph 33.

132 Traditional knowledge can also be found outside of local and indigenous communities in «Western» societies. Examples are «grandmother's remedies» to cure minor illnesses, methods for preparing foodstuff such as the preservation of vegetables and fruit for long-term storage or the making of cheese, methods for the construction of buildings and roads, and traditional farming practices. This traditional knowledge, however, has so far generally not been the subject of the international discussions on traditional knowledge. Thus, this paper does not address the issues that may arise with regard to this form of traditional knowledge.

133 World Intellectual Property Organization, 2002e, paragraph 28.

community. And finally, this knowledge is intended to support the livelihood of its creators and users, and its creation is neither profit-oriented nor profit-driven.

Besides the lack of an internationally agreed definition of «traditional knowledge,» the issue of terminology is further complicated by the following factors: In some cases, a distinction is made between almost identical or at least closely related forms of traditional knowledge. It is thus much rather a difference in terminology than substance, that is, different terms are used to designate the same or at least similar forms of traditional knowledge. In other cases,terms used to designate differing forms of traditional knowledge are at the same time used interchangeably to designate one and the same form of traditional knowledge. This confusion in the use of terminology applies to terms such as «indigenous knowledge,» «traditional indigenous knowledge,» «elder's knowledge,» «local knowledge,» and «traditional ecological knowledge.» To worsen matters, folklore, also termed traditional expressions of culture, is in some cases also considered to be a form of traditional knowledge.

In its work and documents, WIPO has proposed and applied the following definition of traditional knowledge "*Traditional knowledge' refers to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. «Tradition-based» refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; «expressions of folklore» in the form of music, dance, song, handicrafts, designs,*

stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of [traditional knowledge] would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of «heritage» in the broad sense"[134]

This definition of WIPO takes into account the particular characteristics that can be attributed to traditional knowledge and covers a very broad range of the many forms of this knowledge. The definition thus presents a good basis for the further international discussions on the protection of traditional knowledge, especially with regard to the necessary establishment of a working definition of this term.

Traditional knowledge, its protection and its interrelationship with intellectual property rights (IPRs) have been the subject of international debate for several years. This debate covers issues such as the relationship between the North and the South; the protection of the environment and the conservation of biological diversity; modern biotechnology, in particular genetic engineering, and the protection of its results through IPRs; access to genetic resources[135] and traditional knowledge[136] and the fair and equitable sharing of the benefits arising from their use; and the rights of indigenous and local communities. Key words that are frequently used in this debate are green gold ,bio piracy, exploitation of the South, erosion of traditional knowledge, environmental degradation, loss of biological diversity, fair and

---

134 World Intellectual Property Organization, 2002c, paragraph 25.

135 Genetic resources» means genetic material, that is, any material of plant, animal, microbial or other origin containing functional units of heredity, of actual or potential value (see Article 2 of the CBD [Biodiversity Convention, 1992])

136 Traditional knowledge means tradition-based innovations and creations that originate from and are used in indigenous and local communities.

equitable benefit sharing, Farmers' Rights,[137] and self-determination of indigenous peoples.

Several international forums have been involved in this debate, including the Convention on Biological Diversity (Biodiversity Convention, CBD),[138] the Food and Agriculture Organization (FAO),[139] the World Intellectual Property Organization (WIPO),[140] the World Trade Organization (WTO),[141] and various human rights bodies of the United Nations. Generally, this debate has rather been controversial, clearly showing the divergent views that exist among the various stakeholders involved, which include developed and developing countries, indigenous and local communities, private industry, and non-governmental organizations (NGOs). Up to now, this debate has not brought the necessary results allowing for the effective and efficient protection of traditional knowledge. It has clearly shown, however, that many complex legal, political, economic and scientific issues need to be resolved and that presently a great deal of information on these issues is still lacking. This paper addresses the issue of traditional knowledge, its protection and its interrelationship with IPRs.

What Are Intellectual Property Rights (IPRs)?

The Convention Establishing the World Intellectual Property Organization defines in Article 2(viii) the term intellectual property as including « *the rights relating to:-*

- *Literary, artistic and scientific works,*

---

137 See generally Girsberger, 1999.

138 See generally www.biodiv.org. The German translation of the convention text can be found at www.admin.ch/ch/d/sr/0_451_43/index.html.

139 Seegenerally www.fao.org, in particular www.fao.org/ag/cgrfa/default.htm.

Seegenerallywww.wipo.int,in particular www.wipo.int/tk/en/issues/overview/index.html.

141 See generally www.wto.org.

- *Performances of performing artists, phonograms, and broadcasts,*
- *Inventions in all fields of human endeavor,*
- *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.*[142]

Examples of IPRs are patents, plant breeders' rights, trademarks, copyrights, and trade secrets.

The importance and scope of Traditional and indigenous knowledge (TK) has been used for centuries by indigenous and local communities under local laws, customs and traditions. It has been transmitted and evolved from generation to generation. TK has played, and still plays, an important role in vital areas such as food security, the development of agriculture and medical treatment. However, Western societies have not, in general, recognised any significant value in TK nor any obligations associated to its use, and have passively consented to or accelerated its loss through the destruction of the communities' living environment and cultural values.

Recently, Western science has become more interested in TK and realised that TK may help to find useful solutions to current problems, sometimes in combination with "modern" scientific and technological knowledge. Despite the growing recognition of TK as a valuable source of knowledge, it has generally been regarded under Western intellectual property laws as information in the "public domain", freely available for use by anybody. Moreover, in some cases, diverse forms of TK have been appropriated under intellectual property rights by researchers and commercial enterprises, without any compensation to the knowledge's creators or possessors.

---

142 Word Intellectual Property Organization, 1979.

TK is a central component for the daily life of millions of people in developing countries. Traditional Medicine (TM) serves the health needs of a vast majority of people in developing countries, where access to "modern" health care services and medicine is limited by economic and cultural reasons. For instance, the per capita consumption of TM products is, in Malaysia, more than double that of modern pharmaceuticals. TM is also significant in more advanced developing countries such as South Korea, where the per capita consumption of TM products is about 36% more than modern drugs[143]. It is often the only affordable treatment available to poor people and in remote communities.

TM also plays a significant role in developed countries, where the demand for herbal medicines has grown in recent years. The world market for herbal medicines has reached, according to one estimate, US$43 billion, with annual growth rates of between 5 and 15%. For China, the leading country in this field, WHO estimates that TM generated income of about $5billon in 1999 from the international and $ 1 billion from the domestic market. The European market in 1999 was calculated to be $ 11.9 billion (where Germany had 38%, France 21% and United Kingdom 12%)[144]. Moreover, many pharmaceutical products are based on, or consist of, biological materials[145]. Plants, in particular, are an important source of medicines[146]. The knowledge of traditional and indigenous farmers relating to cultivated plants has also been a central element for the development of new plant varieties and, most importantly, for food security on a global scale.

The importance of TK for its creators and for the world community at large, and the need to foster, preserve and protect such knowledge, has gained growing recognition in international

---

144 WHO, 2000, p vi and Pranoto, 2001, p 2

145 Ten Kate and Laird, 1999

146 See, eg, Lambert, Srivastava and Vietmeyer,1997, p 1

flora. Thus, in 1981 a WIPO-UNESCO Model Law on Folklore was adopted; in 1989 the concept of "Farmers Rights" was introduced in the FAO International Undertaking on Plant Genetic Resources[147]; in 1992 the Convention on Biological Diversity (CBD) specifically addressed the issue (article 8(j))[148]. In 2000, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established by the World Intellectual Property Organisation (WIPO) and it first met in April 2001[149].

Application of existing IPRs

The possibility of applying the existing modes of IPRs protection to different components of TK has been extensively explored.

Some elements of traditional medicine may be protected under patents. Patents have been granted on natural components, as well as on combinations of plants for therapeutic use[150]. However, since most of the TK is not contemporary and has been used for long periods, the novelty and/or inventive step requirements of patent protection may be difficult to meet. It would be easier to comply with a more flexible novelty requirement such as that for plant varieties in UPOV for plant varieties that had been previously commercialised or disposed of for purposes of exploitation. According to article 6 of UPOV:

"The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise

147 FAO Resolution 4/89

148 See also the Report of the UN Secretary General on the Intellectual Property of Indigenous Peoples,EICN.41

Sub.2/1992/30

149 Subsequently referred to as 'the WIPO Committee

150 51Eg EP 0519777 on formulations made from a variety of fresh plants; and WO 93/11780 on a skin therapeutic mixture with cold processed aloe vera extract (with yellow sap and aloin removed). Correa, 2000c

disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety (i) in the territory of the Contracting Party in which the application has been filed earlier than one year before that date, and (ii) in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date".

Some valuable TK may be kept secret, such as in cases of applications of plants for therapeutic purposes. Holders of this knowledge may be protected against disclosure under unfair competition rules, which do not require previous registration or other formalities. Most laws require, as a condition for protection,[151]that the person in control of the information adopt the steps necessary, under the relevant circumstances, to keep the information confidential. In other words, there should be deliberate acts aimed at protecting, as secret, the relevant information. This may happen in certain cases of possession of TK (eg by tribal healers) but in others (eg plant varieties) the communities' practice is generally to permit and even promote the exchange and use of the knowledge by other farmers. Such exchange would not necessarily lead, however, to a loss of secrecy if the knowledge does not become generally known to persons within the circles that normally deal with the kind of information in question[152]

The UNESCO/WIPO Model Provisions for National Laws for the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions[153], provide a possible framework for the protection of this component of TK. The Model Provisions attribute rights not only to individuals, but also to communities, and allow the protection of on-going or evolutionary creations. Some countries, such as Bolivia and Morocco, have

---

151 See also Section 7 of the TRIPS Agreement

152 See article 39.2 (a) of the TRIPS Agreement

153 See WIPO, 2000

implemented rules based on the framework of the Model Provisions. In China, copyright protection also includes expressions of folklore. Some national laws and constitutions have also recognised, more broadly, intellectual rights to communities.

Protection of TK under existing modes of IPRs[154]

Copyright

Copyright can be used to protect the artistic manifestations of TK holders, especially artists who belong to indigenous and native communities, against unauthorised reproduction and exploitation. It could include works such as: literary works, e.g tales, legends and myths, traditions, poems; theatrical works; pictorial works; textile works, eg, fabrics, garments, textile compositions, tapestries, carpets; musical works; and, three-dimensional works, e.g, pottery and ceramics, sculptures, wood and stone carvings, artifacts of various kinds. Related rights to copyright, such as performing rights, could be used for the protection of the performances of singers and dancers and presentations of stage plays, puppet shows and other comparable performances.

Inventions

The patent system could be used for the protection of technical solutions that are industrially applicable and universally novel and involve an inventive step. For genetic resources and TK, patents may be taken out for instance for products isolated, synthesised or developed from genetic structures, micro-organisms and plants or animals or organisms existing in nature. Patent protection may also be obtained for processes associated with the use and exploitation of those resources, and also processes known to the native communities that meet the same conditions. All the results of biotechnology applied to genetic and biological resources, and also undisclosed techniques for obtaining practical results, could in principle be protected with patents.

Plant varieties

New plant products, cultivars and varieties of all species of plants may be protected under plant breeders' rights (PBRs). To be

---

154 Source: GRULAC, 2000

protected, a variety has to be different from known varieties anduniform and stable in its essential characteristics, even after a number of reproduction cycles.

Industrial designs

The design and shape of utilitarian craft products such as furniture, receptacles, garments and articles of ceramics, leather, wood and other materials may qualify for protection as industrial designs.

Trademarks

All goods manufactured and services offered by manufacturers, craftsmen, professionals and traders in native and indigenous communities, or by the bodies that represent them or in which they are grouped (cooperatives, guilds, etc), may be differentiated from each other with trademarks and service marks. The trademark is an essential element in the commercial promotion of goods and services both nationally and abroad.

Trade names

Any manufacturer, craftsman, professional person or trader in a native or indigenous community, including the bodies that represent such persons or in which they are grouped (cooperatives, guilds, etc), may identify themselves with trade names. The trade name is also used to promote the activities of the person or entity that it identifies, both within and beyond the borders of the country of origin**.**

Geographical indications and appellations of origin

Geographical indications, especially appellations of origin, may be used to enhance the commercial value of natural, traditional and craft products of all kinds if their particular characteristics may be attributed to their geographical origin. A number of products that come from various regions are the result of traditional processes and knowledge implemented by one or more communities in a given region. The special characteristics of those products are appreciated by the public, and may be symbolised by the indication of source used to identify the products. Better exploitation and promotion of traditional geographical indications would make it possible to afford better

protection to the economic interests of the communities and regions of origin of the products.

Repression of unfair competition

The protection of undisclosed information is achieved by the repression of unfair competition. The provisions against unfair competition may also be used to protect undisclosed TK, for instance traditional secrets kept by native and indigenous communities that may be of technological and economic value. Acknowledging that secret TK may be protected by means of unfair competition law will make it possible for access to that knowledge, its exploitation and its communication to third parties to be monitored. Control over the knowledge, and regulation of the manner in which it may he acquired, used and passed on, will in turn make possible to arrange contracts for the licensing of secret TK and derive profits from its commercial exploitation. It is necessary to publicise more, within the sectors and communities concerned, the opportunities that the secrecy regime offers for controlling the dissemination an exploitation of TK.

Conclusions

The protection of TK raises a number of policy issues, notably the objectives and modalities of such protection, and its impact and implications for its intended beneficiaries. Such issues are extremely complex, since there are broad differences about the definition of the subject matter, the rationale for protection, and the means for achieving its purposes. The issues relating to TK should be addressed in a holistic manner, including ethical, environmental and socio-economic concerns. There are, in addition, many still unresolved technical issues such as the problem of collective ownership and the modes of enforcement of rights. The development of any regime for the protection of TK should be grounded on a sound definition of the objectives sought, and on the appropriateness of the instrument selected to achieve them. IPRs may be one of the tools to be used, but their limits and implications should be clearly understood. In particular, a balance should be obtained between the protection and the promotion of the use of such knowledge. It is unclear the extent to which the

various proposals made for the protection of TK reflect the aims and cultural values of the traditional and indigenous communities they intend to serve. There is a risk of transferring to such communities' concepts and paradigms which are not suited to their realities, or which may prove ineffective to solve the problems they are supposed to address. The consideration of TK protection should not overshadow the fact that the preservation and use of TK requires above all ensuring the survival and improvement of living conditions, in their environment and cultural milieu, of such communities. Given the lack of clarity about the objectives, nature, scope and implications of possible IPRs-based regimes for TK protection, it seems premature to promote the development of international standards in the framework of WTO and other fora. A possible intermediate approach, until the outstanding issues are clarified, may be to develop global rules to prevent the misappropriation of TK and to undertake the other activities described for ODA . Future action in this field may thus include:

- promoting the development, at the national level, of an holistic approach towards the

protection of TK, including the resolution of underlying issues such as land rights and the need to respect and maintain the lifestyles of local and indigenous communities;

- considering the differing needs for the protection and promotion of TK in different areas, such as TM and plant genetic resources;
- implementing Farmers Rights at the national level;
- moving towards, in the short term, the establishment of a misappropriation regime;
- continuing work in WIPO, UNCTAD, WTO and in other fora in order to clarify the possible role, scope and content of systems of protection for TK;
- Ensuring a broad and effective participation of representatives from local and indigenous communities in the definition and implementation of any system forthe protection of TK.

Frye and Daubert Standards: Utility in Indian Judicial System

Abstract

This research article highlights the relevance and admissibility of scientific evidence in the Indian courts. A review of the Frye and Daubert Standards followed by the relevant sections of the Indian Evidence Act, 1872 is presented. With the rapid advancement of the society, use of technology based evidence or scientific evidence needs to be accepted. However, in case of doubt, Daubert guidelines needs to be relied on. There is requirement to formulate certain fair standards with regard to the admissibility of scientific evidence, so that there would be no discrepancies with the scientific evidence in the court of laws.

Keywords: *Frye standards; Daubert standards; Scientific evidence; Expert opinion; Admissibility; Indian Evidence Act;*

Introduction

The testimony of an expert continues to play an important role in the twenty-first century. However, scientific findings of an expert, no matter how relevant, have no real meaning in law until they are presented before the court of law. The admissibility of an expert evidence is a question of law that is to be decided by the judge.[155] The principle of law of evidence is that every witness is a witness of fact and not of opinion. This means that a person who appears before a court is entitled to tell the court only the facts of which he has personal knowledge and not his opinion, inferences, beliefs or mere speculations about the facts. He should speak of what he knows and not what he believes. His beliefs are irrelevant

---

[155] Carol Handerson, *Scientific Evidence Review: Admissibility and Use of Expert Evidence in the Courtroom,* American Bar Association, (2003), p. 1.

and have not meaning to the court.[156] The weight that ought be attached to the opinion of the expert is a different matter from its relevance. Indian Evidence Act only provide about the relevancy of expert opinion but gives no guidance as to its value. The value of expert opinion has been viewed in the light of many adverse factors. Firstly, there is danger of error or deliberate falsehood. Secondly, expert opinion is after all opinion and human judgment is fallible. Thirdly, it must be borne in mind that an expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favor of the side which calls him. It is on the basis of these presumed factors that it has been remarked of an expert that "the witnesses now in worst repute are called expert witnesses".[157]At present there are no such fixed guidelines by which legitimate evidence can be differentiated from an illegitimate one.

The American Law on Scientific Evidence

In America, debate in the legal community arose regarding standards for the admissibility of scientific evidence. Judge Cox grouped evidence into three levels:

I. Some scientific principles are so greatly accepted that the principle need not be established each time (e.g. dactylography, bite marks);[158]

II. Some junk principles that are universally discredited which can be outrightly rejected (e.g. Astrology);[159]

---

156 For more details see: *http://www.shareyouressays.com/119180/evidentiary-value-of-expert-evidence-under-indian- evidence-act-1872,* (Accessed on 31.01.2015).

157 Avtar Singh, *Principles of the Law of Evidence*, Central Law Publications, (2009), p.260.

158 M.P.Kantak, M.S.Ghodkirekar & S.G.Perni, Utility of Daubert Guidelines in India, *Journal of Indian Academy of Forensic Science*, 2004; 26 (3), p. 110.

159 *Ibid.*

III. Some novel scientific methods which can neither be accepted nor be rejected outrightly (e.g. polygraphy, DNA typing).[160]

The Frye Test/General Acceptance Test

The concept of determining whether an expert evidence is admissible or not dates back to the *Frye case*[161]. The Frye test was the first attempt to formulate various guidelines for the admissibility of an expert evidence. The *Frye v. United States*[162] was a case discussing the admissibility of polygraph test as an expert or scientific evidence. The court in this case has held that expert testimony must be based on scientific methods that are sufficiently established and accepted.[163] The court has held that when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting experimental testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[164]

The Frye test has two aspects:

a. The principle or scientific technique;

b. The acceptance.[165]

The criticisms of the test were :

---

[160] *Ibid.*

[161] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[162] 293 F. 1013 (D.C. Cir. 1923).

[163] For more details see: *http://en.wikipedia.org/wiki/Frye_standard*, (Accessed on 01.02.2015).

[164] *Supra* note 7.

[165] *Supra* note 4 at 110 & 111.

a. There will have to be a considerable time lag for the scientific method to be accepted by the community;

b. It puts more faith in the scientific community than in the court of law.[166]

The Federal Rules of Evidence: Rule 702 Testimony by Expert Witnesses

The Rule 702 of the Federal Rules of Evidence were framed in 1975. The Rule 702 states "a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

b) the testimony is based on sufficient facts or data;

c) the testimony is the product of reliable principles and methods; and

d) the expert has reliably applied the principles and methods to the facts of the case."

The Federal Rules instead of solving the matter led to more confusion because it neither included the Frye standard nor made a mention of the general acceptance standard.[167]

The Daubert Standards

The *Daubert case*[168] involves children and their parents who were plaintiffs in a case involving alleged birth defects which were caused by the mother's ingestion of an anti-nausea drug (Bendectin) which was manufactured and marketed by Merrell Dow Pharmaceuticals. The defense expert concluded that, based on his review of multiple published studies, using Bendectin in the first trimester of pregnancy was not a risk for birth defects. The plaintiffs did not disagree with the defense expert but rather

---

166 *Id.* at 111.

167 *Ibid.*

168 *Daubert v. Merrell Dow Pharmaceuticals,* 293 U.S. 579 (1993).

countered with eight experts of their own who concluded that Bendectin could cause birth defects with a myriad of different types of testing and re-analysis of previously published studies. The trial court ruled that the Plaintiff's experts' evidence did not meet the general acceptance test for admission. As stated previously, the general acceptance test refers to people in the specific field/career at issue who would handle/view the situation similarly. The Appeals Court agreed, citing the *Frye* ruling in their decision. The Supreme Court reversed the decision, stating that the Federal Rule of Evidence supersede the *Frye* test. The Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals,*[169] is crucial to the admissibility of expert testimony in that it provides a detailed framework to help the judge when determining the relevance and reliability upon hearing evidence. *Daubert's case*[170] lays down the following standards for the admissibility of the expert testimony.

1. The content of the testimony can be (and has been) tested using the scientific method;

2. The technique has been subject to peer review, preferably in the form of publication in peer review literature;

3. There are consistently and reliably applied professional standards and known or potential error rates for the technique;

4. Considers general acceptance within the relevant scientific community.

In 2000, Rule 702 was amended in an attempt to codify and structure elements embodied in the "*Daubert* trilogy." The rule then read as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form

---

169 293 U.S. 579 (1993).

170 *Ibid.*

of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[171]

In 2011, Rule 702 was again amended to make the language clearer. The rule now reads:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

i. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

ii. The testimony is based on sufficient facts or data;

iii. The testimony is the product of reliable principles and methods; and

iv. The expert has reliably applied the principles and methods to the facts of the case.

While some federal courts still rely on pre-2000 opinions in determining the scope of Daubert, as a technical legal matter any earlier judicial rulings that conflict with the language of amended Rule 702 are no longer good precedent.[172]

The Indian Position

According to Section 45 of the Indian Evidence Act, 1872,when the court has to form an opinion upon a point of foreign law, or science, or art, or as to identity of handwriting or finger impression[173], the opinion upon that point of person especially skilled in such foreign law, science, art or in questions as to identity of handwriting[174] or finger impressions[175] are

---

171 *Supra* note 9.

172 *Ibid.*

173 Inserted by the Indian Evidence (Amendment) Act, 1899.

174 *Ibid.*

relevant facts. Such persons are called experts. The test of judging the competency of an expert as put by Lord Russel is this: Is he peritus? Is he skilled? Has he adequate knowledge?[176]

The India Evidence Act does not refer to any particular attainment, standard of study or experience, which would qualify a person to give evidence as an expert. Generally, a witness is considered as an expert if he is skilled in any particular art, trade or profession, and possessed of peculiar knowledge concerning the same. He must have made special study of the subject or acquired special skill therein. Thus, no formal qualifications are necessary to qualify a witness as an expert. An instructive illustration is to be found in the decision of the Mysore High Court in *Abdul Rehman v. State of Mysore*,[177] where the opinion of a professional goldsmith as to the purity of the gold in question was held to be relevant as the opinion as an expert, though he had no formal qualifications. Similarly, Punjab and Haryana High Court in *Kishan Singh Case*[178], principal of a school of deaf and dumb has been held to be an expert for the purpose of certifying the disability.

In a very important case of *Malay Kumar Ganguly* v. *Dr. Sukumar Mukherjee,*[179] the Hon'ble Supreme Court has answered the question in negative. It has been held that a Court is not bound by the evidence of the experts which is to a large extent advisory in nature. The Courts have full powers to derive its own conclusion upon considering the opinion of the experts which may be adduced by both sides, cautiously, and upon taking into

---

175 For details whether " Finger Impressions" include "Thumb Impressions", see Gazette of India, 1898, p.24.

176 M. Monir, *Text Book of the Law of Evidence*, Universal law Publishing, (2011), p. 201.

177 (1972) Cr. L. J.407.

178 A.I.R. 1953 P.& H. 373.

179 A.I.R.2010 SC 1162.

consideration the authorities on the point on which he deposes. It has been further emphasized that in the cases involving Medical Science complex questions are involved and therefore expert evidence is very assisting. However, the court for the purpose of arriving at a decision on the basis of the opinions of experts must take into consideration the difference between an 'expert witness' and an 'ordinary witness'. The opinion must be based on a person having special skill or knowledge in medical science. The opinion could be admitted or denied. Whether such an evidence could be admitted or how much weight should be given thereto, lies within the domain of the Court. The evidence of an expert should, however, be interpreted like any other evidence.[180]

Conclusion

There is an international recognition of the *Daubert* guidelines. In 2000, Supreme Court of Canada in *R v. Mohan*[181] has expressly adopted Daubert Standards with regard to the admissibility of expert evidence. Likewise, in 2005, the United Kingdom House of Commons Science and Technology Committee recommended the creation of a Forensic Science Advisory Council to regulate forensic evidence in the UK and observed "the absence of an agreed protocol for the validation of scientific techniques prior to their being admitted in court is entirely unsatisfactory. Judges are not well-placed to determine scientific validity without input from scientists. We recommend that one of the first tasks of the Forensic Science Advisory Council be to develop a "gate-keeping" test for expert evidence. This should be done in partnership with judges, scientists and other key players in the criminal justice system, and should build on the US *Daubert* test"[182].

---

180 *Ibid.*

181 [1994] 2 S.C.R. 9.

182 House of Commons Science and Technology Committee (2005).

However, in India it can be said, there are no such specific standards or guidelines with regard to the admissibility of scientific or expert testimony. The Courts in India are generally very much reluctant in admitting scientific evidence. While admitting expert testimony courts for now take help of Section 45 of the Indian Evidence Act, 1872 which itself is not enough. For the fair dispensation of justice, scientific evidence needs to be accepted. However, for the general acceptance of the scientific evidence either Daubert Standards should be adopted or similar guidelines should be framed so that there can be no discrepancies with the scientific or expert evidence.

Dr. Mudasir A. Bhat*

* B.Sc, LL.B, LL.M, PhD, DFSC, (Panjab University, Chandigarh), Assistant Professor, School of Legal Studies, Central University of Kashmir, Srinagar.

Schedule Tribes of India as Indigenous Peoples: An International Perspective

Abstract

"Indigenous" are those original inhabitant of a territory who for the historical reasons are reduced to a non-dominant or isolated or marginal population and, who are socially and culturally distinct from other segments of the predominant population.

"Scheduled Tribes" of India are "Indigenous People" or not was debated both in Geneva and India. The Indian Council of Indigenous and Tribal Peoples (ICITP), which was formed in 1987 and affiliated to the World Council of Indigenous Peoples – an organization which received consultative status with the United Nations Economic and Social Council, recognised the fact and organized a symposium at New Delhi in April 1992, entitled, "who are the Indigenous Peoples of India?" In the symposium, the ICIPT admitted the fact that the "Scheduled Tribes" (Adivasis) of India fall under the UN definition of indigenous peoples. In the symposium, it was further elaborated that the Adivasi areas are subject to internal colonialism; Adivasis are treated as the subjects of colonizers even by the Government of India, that millions of Adivasis are displaced, that there is constitutional crisis in the Adivasi areas which has even been acknowledged by the official reports of the Government of India.

In 1994, the Indian participants from mainland India, of the United Nations Workshops on Indigenous and Tribal Peoples' Struggle for Right to Self-determination and Self-government, held in New Delhi also asserted that Adivasis of India are basically the Indigenous/Tribal peoples, have referred to themselves as Adivasis, a term which includes the concept of indigenous/tribal. This paper attempts to critically examine the legal framework related to the issues of Schedule Tribes of India as Indigenous Peoples in International perspective

Keywords: *Indigenous, Convention, Indian Council of Indigenous and Tribal Peoples, World Council of Indigenous Peoples International Labour Organisation, Right to Self Determination and Self Govt., World Bank, Operational Directive, Schedule Tribes.*

Introduction

According to the Oxford dictionary "indigenous" means native, belonging naturally, that of the people regarded as the original inhabitants of an area[183]. Thus indigenous people are generally so called because they were living on their lands before settlers came from elsewhere; they are the descendents of those who inhabited a country or a geographic region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means[184]. This meaning conveys the domination over the original inhabitants of an area in the historical chronological sense.

However, the concept of "indigenous" is not capable of precise, inclusive definition that can be applied in the same manner to all regions of the world. Therefore, indigenous people themselves generally deny the need for a definition and instead emphasize the right to self-definition[185]. They are opposed to a rigid definition, as they fear that some groups will be excluded and consequently will be left outside the purview of specific indigenous rights norms. On the other hand, only an explicit definition of "indigenous" entails a clear obligation to guarantee specific rights for those being identified as indigenous. In this sense, the reluctance of some states to adopt a broad definition has to be understood; as such a definition would deprive them of the possibility to decide for themselves on the existence of indigenous peoples within their territory and the entitlement of such groups to specific rights provided by law[186].

Despite the problem of adopting a uniform definition of "indigenous", in the international context three types of definitions are

---

183 A S Hornby, *Oxford Advanced learner's Dictionary of Current English* 3rd ed. Oxford university press (1974).

184 UN *the Human Rights Fact sheet No. 9.* Centre for Humam Rights, Geneva (1990) at p.3.

185 Erica – Irene A. Daes. *Report of the UN Working Group on Indigenous Populations.* See, UN Doc. E/CN 4/Sub-2/1986/7/Add. 1 para 5.

186 UN Doc. E/CN 4/Sub-2/1986/7/Add. 1 paras 379-380...

used. The first definition is found in an international law instrument, the *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169 of 1989)* of ILO. The second definition is a *Working definition* which has been accepted as an *Operational definition* in the elaboration of an instrument that is international in character. And third definition is found in the World Bank's Operational Directive.

(i) International Labour Organisation Definition

In 1957 the general conference of the ILO adopted a convention concerning protection and integration of indigenous and other tribal and semi-tribal population in independent countries. The convention framed general international standards for facilitating government actions towards protecting and promoting progressive integration of these people into the respective national communities (Convention No. 107). Article 1(1) of the Convention No. 107 defines "indigenous"[187] as:

---

[187] In 1953, the ILO reviewed various definitions and criterion used by national governments and social scientists and concluded that there was no single universally valid definition of indigenous peoples. The review highlighted the difficulties encountered in formulating a definition in international character. This was sparked off with the publication of the book : *Indigenous Peoples : Living and Working Conditions of Aboriginal Populations in Independent Countries* by ILO. This book, however, proceeds to offer a provisional description of indigenous populations as a purely empirical guide to the identification of indigenous persons in independent countries as "Indigenous persons are descendents of the aboriginal population living in a given country at the time of settlement or conquest (or of successive waves of conquest) by some of the ancestors of the non-indigenous groups in whose hands political and economic power at present lies. In general these descendents tend to live more in conformity with the social, economic and cultural institutions which existed before colonization or conquest …. Than with the culture of the nation to which they belong". This description served as a basis of the definition that was later included in the ILO *Convention No. 107* of 1957 (Indigenous and Tribal Populations *Convention, 1957). Convention No. 107,* Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Counties (Indigenous and Tribal Populations Convention, 1957) was adopted by the International Labour Conference at its 48th Session at Geneva on 26 June 1957. For the text of this Convention, see, ILO. *Conventions and Recommendations adopted by the International Labour Conference 1919-*

… members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong".

Thus, in *Convention No. 107* of 1957 the term "indigenous" was conceptualized as the pre-European invasion of the America, Australia and New Zealand. As this Convention envisaged the tribal peoples as representing a transitory phase in the evolutionary scheme of human social organization, it was considered unsatisfactory, not only by the increasingly self-conscious indigenous and tribal peoples, but also by social scientists and social historians with wider humanist vision. However, by 1985 the ILO felt the need to revise the convention on account of changes in attitudes and approaches towards these peoples worldwide. The ILO had earlier proposed integration as the desired objective but this was no longer being seen as appropriate. This was so because the international organizations and increasing number of governments were moving toward greater recognition of the rights of indigenous and tribal people to retain their specific identities and to participate fully in the planning and execution of the activities affecting their way of life. Accordingly the ILO adopted a revised *Convention (No 169)*[188] in 1989 after the expert committee appointed by the ILO gave its recommendation and the same was passed in consultation with other international bodies. The definition contained in the *Convention No. 107* has not been abrogated but is supplanted by the definition adopted in ILO *Convention No. 169* of 1989. Article 1(1)(b) of the revised Convention No. 169 defines "indigenous" as follows :

1966. Geneva (1966). See also Martinez Cobo Report, UN Doc. E/CN.4/Sub.2/1982/2/Add. 1, pp. 63-72.

188 ILO *Convention No. 169, Concerning Indigenous and Tribal Peoples in Independent Countries* was adopted by the International Labour Conference at its 76th Session at Geneva on 7 June 1989. For the text of this Convention No. 169, see, *ILM,* Vol. 1389 of 1989.

"People in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".

According to this definition indigenous peoples need not be a special category or tribal peoples and need not be confined to a particular part of the world. They may be peoples who have been affected (obviously in a non-dominant way) during the establishment of the present state boundaries and who retain some of their economic, cultural and political institutions.

(ii) United Nations' Definition

Another type of definition has been used in the *UN Study on Discrimination against Indigenous Populations*. In order to carry out the UN study Special Rapporteur developed a definition which is known as *working definition*. After the completion of the study they recommended a comprehensive definition in the "conclusions, Proposals and Recommendations" of the study for the purpose of international action, which was subsequently accepted as *Operational definition*.

(a) Working Definition

In 1971, the Sub-Commission appointed Mr. Jose R. *Martinez Cobo* as *Special Rapporteur* to make, in terms of the relevant Economic and Social Council resolution, "a complete and comprehensive study … and to suggest the necessary national and international measures for eliminating … discrimination". In order to carry out his study[189] the *Special Rapporteur* in the light of the historical considerations developed a *Working definition* as follows:

---

[189] One of the most comprehensive survey in recent years of the status of indigenous communities in all regions of the World is UN Human Rights sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Population.* The original documents are, in order of publication : UN Does. E/CN.4/Sub/2/476/Adds1-6 (1981);E/CN.4/Sub.2/1982/2/Adds. 1-7 (1982) and E/CN.4/Sub.2/1983/21/Adds. 1-7 (1983). (Jose R. Martinez Cobo. Special Rapporteur) (hereinafter Martinez Cobo Study/Report).

"Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant[190]".

So as to include those isolated or marginal populations which, for some reason, have not been conquered, the *Working definition* is supplemented to read as follows : "although they have not suffered conquest or colonization, isolated or marginal population groups existing in the country should also be regarded as covered by the notion of 'indigenous populations' for the following reasons : (a) they are descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there; (b) precisely because of their isolation from other segments of the country's population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterised as indigenous; (c) they are, even if only formally, placed under a State structure which incorporate national, social and cultural characteristics alien to theirs[191].

Thus according to the *Working definition* "indigenous" are those original inhabitant of a territory who for the historical reasons are reduced to a non-dominant or isolated or marginal population and, who are socially and culturally distinct from other segments of the

---

190 Martinez Cobo. *Preliminary Report of the Study of the Problem of discrimination against Indigenous Population,* UN. Doc.E/CN.4/sub.2/L.566 at para. 34.

191 Ibid., at Para 45.

predominant population. This definition has been supplanted by the *Operational definition* which is discussed below.

(b) Operational Definition

In the "Conclusions, Proposals and Recommendations" of the *Martinez Cobo* study it is stated the fact that a definition proposed does not mean that the discussion is concluded but that "the following lines are intended …. simply to stimulate reflection and analysis leading to the formulation of more formal proposals for definitions"[192]. Accordingly it was proposed that "indigenous populations may… be defined as follows for the purposes of international action that may be taken affecting their future existence"[193]. The study goes onto state that:

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sections of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems[194]".

This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

(a) Occupation of ancestral lands, or at least of part of them;

(b) Common ancestry with the original occupants of these lands;

(c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);

---

192 Martinez Cobo Study. *Third part : Conclusion, Proposals and Recommendations.* UN. Doc. E/CN.4/Sub.2/1983/21/Add. 8 at Para 367.

193 Ibid. Para 378.

194 Ibid., Para 379.

(d) Language (whether used as the only language, a mother tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);

(e) Residence in certain parts of the country, or in certain regions of the world;

(f) Other relevant factors[195].

This definition is supplemented as follows: "On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference"[196].

Thus according to this definition "indigenous" are those who having a historical continuity and consider themselves ethnically distinct from other sections of the society and they are non-dominant group. This definition for the first time included the subjective criteria, such as self-identification as indigenous (group consciousness) and acceptance by the group concerned, with the definition. This definition was accepted as an *Operational definition* in 1982 by the United Nation Human Rights *Sub-commission on Prevention of Discrimination and Protection of Minorities' Working Group on Indigenous Populations* for the purpose of international action[197]. In 1985, the *United Nations Economic and Social Council* expressed its appreciation and requested its publication and wide dissemination[198].

(iii) World Bank's Definition: Operational Directive

---

195 Ibid., Para 380.

196 Ibid., Para 381.

197 The decision was adopted by the Working Group in 1982 in its first session, see, Erica-Irena A. Daes. *Report of the Working Group on Indigenous Populations on its First Session.* U. Doc. E/CN.4/Sub.2/1982/15.

198 Economic and Social Council decision 1985/137 of 30 May 1985.

The difficulties with defining the term "indigenous" are also emphasized in *Operational Directive* 4.20 of the World Bank, which states: "Because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity[199]. Without claiming universal validity, the *Operational Directive* lists the following criteria, which are usually fulfilled by indigenous groups:

"The terms indigenous peoples', 'indigenous ethnic minorities', 'tribal groups', and 'scheduled tribes' describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, 'an indigenous person is the term that will be used to refer to these groups ….

Indigenous peoples are commonly among the poorest segment of a population. They engage in economic activities that range from shifting agriculture in or near forests to wage labour or even small-scale market-oriented activities. Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:

(a) a close attachment to ancestral territories and to the natural resources in these areas;

(b) self-identification and identification by others as members of a distinct cultural group;

(c) an indigenous language, often different from the national language;

(d) presence of customary social and political institutions; and

(e) Primarily subsistence-oriented production[200]".

While the *Operational Directive* takes a rather functional view of indigenous peoples for the specific purposes of World Bank

---

199 World Bank's Operational Manual : Operational Directive 4.20 of September 1991, Para 3. see, UN.doc.E.CN.4/Sub.2/AC.4/1995/3 at p.12. For a discussion of the dynamics leading to the adoption of World bank Operational Directive 4.20, see, Michael Cernea. *Sociologists in a Development Agency : Experiences from the World Bank 19-21.* (1993).

200 Ibid., Paras. 4 and 5.

development activities, the criteria listed reflect details already known from the Cobo study. They also capture well not only indigenous peoples in areas of former European colonization where descendants of European settlers now represent the majority population, but also indigenous peoples in Asia and Africa. In this context, it is worth mentioning that some recent international environmental documents and treaties do not use the term "indigenous" altogether. Instead they emphasize the traditional way of living, while also adhering to a functional view for the specific circumstances and environmental purposes underlying the respective environmental document or treaty.

Despite all the differences among indigenous peoples around the world, common themes prevail in the various attempts for a definition listed above. First and foremost, this is the distinct culture of indigenous peoples in relation to the majority population. Such a culture can comprise different elements, for example, a distinct language, religion, specific customs and traditions, as well as the specific uses of the territory and resources. Furthermore, self-identification as a subjective criterion is fundamental. Self-identification consists of two elements: the group-consciousness of persons who believe they belong to a certain indigenous group, and the group's acceptance that the respective individual is a part of their community.

B. Whether Scheduled Tribes in India are Indigenous People?

(i) Criteria for Identifying Schedule Tribes in India

Before demonstrating the issue: whether "scheduled tribes" in India are indigenous peoples or not, it is essential to examine the criteria for identifying a group of persons or community as tribal in India[201]. As a

[201] The Anthropological Survey of India under the 'People of India Project' identifies 461 tribal communities in India. They are enumerated at 67,583,800 persons constituting 8.08 per cent of the total populations as per the 1991 census. The share of the scheduled tribe population to the total population in 1971 and 1981 was 6.94 and 7.85 per cent respectively. The question of tribes in India is closely linked with administrative and political considerations. Hence there has been increasing demand by groups and communities for their inclusion in the list of scheduled tribes of the Indian Constitution. That partly explains the steady increase in the proportion of the scheduled tribe population in

matter of fact there is no precise definition of the term "tribe" on which there can be general agreement. It is generally applicable to a community or a cluster of communities' characterisd by a common territory, language and a cultural heritage, on an inferior technological level[202]. Accordingly to *Majumdar*, a tribe is "a collection of families or group of families bearing a common name, members of which occupy the same territory, speak the same language and observe certain taboos regarding marriage, profession or occupation and have developed a well-assessed system of reciprocity and mutuality of obligation[203]. *Amir Hasan* listed the following that a tribal community has generally as attributes:

(a) It lives in an isolated area as a distinct group culturally and technically.

(b) It has originated from one of the oldest ethnological sections of the population.

(c) It follows primitive occupations such as gleaning, hunting and gathering of forest product and is, therefore, backward economically and also educationally.

(d) Its members profess a primitive religion, are not always within the Hindu fold in the usual sense. Even when they are treated as Hindus, they do not exactly fit in Hindu casts hierarchy.

(e) It has its own common dialect.

(f) Its members love drinking and dance.

(g) It is largely carnivorous.

(h) Its members dress scantily[204]

India especially in the period between 1971 and 1981. See generally, Virginius Xaxa, ":Tribes as Indigenous Peoples of India", *Economic and Political Weekly,* December, 18, 1999 (34), pp.3598-595.

202 Melville Jacobs and Bernhard J. Stern. *General Anthropology,* Barns and Nobel, New York, 1964, at p.41.

203 D.N. Majumdar, *Races and Cultures of India.* Universal Publications, Lucknow, 1981 at p.93.

204 Amir Hasan. *Tribal Administration in India.* B.R. Publishing, Delhi, 1988, at p.2.

Thus, anthropologists and social scientists use a number of criteria to determine a community as tribal. The Constitution of India introduced the term "Scheduled Tribes" and technically defined it. Article 366(25) of the *Constitution of India* defines "Scheduled Tribes" to mean such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution. Article 342(1) empowers the President of India to specify the tribals or tribal communities in India. Hence the President has exercised his power vested in him by virtue of this Article in specifying and identifying various tribal communities in India since 1950 till date. As a result number of Constitutional orders have been issued[205] and identified various communities as tribals those who have an ethnic identity who have retained their traditional cultural identity; who have a distinct language or dialect of their own; who are economically backward and live in seclusion governed by their own social norms and largely having a self-contained economy. The Government of India, however, has adopted the following criteria for identifying a tribe and included it in the Schedule:

(a) Autochthony,

(b) Groupism or a very strong community fellowship, if not descent from a common ancestor or loyalty to a common headman or chief,

(c) A principal, if not an exclusive habitat,

(d) A distinctive way of life, primitive or backward by modern standards and apart and aside from the main current of culture,

---

[205] These Constitutional Orders are the Constitution (Scheduled Tribes) Order, 1950 (C.O.22); the constitution (Scheduled Tribes) (Union Territories) Order, 1951 (C.O. 33); the Constitution (Andaman and Nicobar Islands) Scheduled Tribes Order, 1959 (C.O 58); the Constitution (Dadra and Nagar Haveli) Scheduled Tribes Order, 1962 (C.O. 65); the Constitution (Scheduled Tribes) (Uttar Pradesh) order, 1967 (C.O. 78); the Constitution (Goa, Daman and Diu) Scheduled Tribes Order, 1968 (C.O. 82); the Constitution (Nagaland) Scheduled Tribes Order, 1970 (C.O. 88); and the Constitution (Sikkim) Scheduled Tribes Order, 1978 (C.O. 111), the Constitution (Scheduled Tribes) Order (amendment) Act 1991; the Constitution (Scheduled Tribes) Order (second Amendment) Act, 1991.

(e) Economic, political and social backwardness[206].

(ii) UN Debates

Whether, the "Scheduled Tribes" of India are "Indigenous Peoples" or not was debated both in Geneva and India. While India led a concrete attack on the *UN Working Group on Indigenous Populations* in 1984, that was the initiative of an individual representing India in Geneva at that point. In the Working Group the representatives of the Government of India have repeatedly stated that the "Scheduled Tribes" of India are not "indigenous peoples"[207]. They stated India has long been a "melting pot". They refer to an Indian sociologist as saying that:

---

206 *Report of the Commissioner for Scheduled Castes and Scheduled Tribes.* Manager of Publications, Government of India, Delhi (1952).

207 Erica-Irene a. Daes. *Report of the Working Group on its Third Session*. UN. Doc. E/CN.4/Sub.2/1984/25 at p.35. Much of the discussion questioning the indigenous people's status in India has centred on the complex historical processes of the movement to the population and their settlement in the subcontinent. It is said that unlike in the Americas, Australia, New Zealand with a recent history of conquest, immigration and colonization in India identification of indigenous people is not easy. Rather there have been in India waves of movement of populations with different language, race, culture, religion dating back centuries and millennia. Even groups or communities described as tribes have not been outside of this process. Given this, how far back should one go in history to determine people who are natives and who are immigrants. Indeed any demarcation is going to be arbitrary and hence extremely contentious. And indeed so has been the case as we can see from the discussion below. It is also maintained that the communities described as tribes have been living in close proximity with the non-tribal people for over centuries leading to much acculturation and even assimilation into the larger Hindu society. The Indian experience, it is stated, is different from that of the new world where it was marked by conquest, subjugation and even decimation. It is hence argued that it is not only the point of departure that is problematic but also the Indian experience. It is with the people described as tribes that the term indigenous people has generally come to be associated in India. It is assumed that they have been the original settlers of what geographically constitutes India today or at least people who inhabited the region before the coming of the more dominant sections of the Indian society, viz, the Aryans. They are said to belong to social groups other than the Aryans and speak a variety of dialects belonging presumably to two main linguistic families, viz, the Dravidian and the Austric. The plausibility of groups speaking Tibeto-Burman languages is not altogether ruled out from the purview of the

"….in India hardly any of the tribes exist as a separate society and they have all been absorbed, in varying degrees, into the wider society of India. The ongoing process of absorption is not recent but dates back to the most ancient times[208].

The Indian representative of the *UN Working Group* in 1992 took off his glasses to show the present writer the facial features around his eyes, evidence, he said, of the extent of intermarriage in India. The extent of intermarriage made it impossible, he said to say who was tribal and who was not. In his statement to the Working Group, he said that it was now "very difficult" to come across communities which retain "all their pristine tribal character". The "melting pot" history meant the statement continued that historians and anthropologists find it very difficult to arrange the various distinct cultural, ethnic and linguistic groups in any chronological order[209]. Again the Indian representative in the *UN Working Group's* meeting in 1993 at Geneva argued that the term "indigenous" was not adequate for his country. Because it's entire population had been living on its land for several millennia. All these people were indigenous and any attempt to make a distinction between indigenous and non-indigenous would be artificial. He elaborated further on the efforts made to promote the rights and interests of the scheduled

---

status of the original inhabitants in India. These groups have generally been described as adivasis or the original people by social workers, missionaries, political activist's scholars and administrators since the beginning of the present century. The communities of people of today whom the anthropologists call tribals, happen to be the indigenous, autochthonous (adivasis, adimjati) people of the land, in the sense that they had long been settled in different parts of the country before the Aryan-0speaking peoples penetrated India to settle down first, in the Kabul and Indus valleys and then within a millennium and half, to spread out in slow stags, over large areas of the country and push their way of life and civilization over practically the entire area of the country along the plains and the river valleys. See generally, B.K. Roy Burman, "Transformation of Tribes and Analogous Social Formation", *Economic and Political Weekly* (1993).

208 UN. Doc. E/CN.4/sub.2/1984/25 at p.35.

209 Ibid., Report on its Tenth session. UN. Doc./E/CN.4/Sub.2/1992/33 at p.13.

castes and tribes : a National Commission had been constituted to monitor all matters relating to the safeguards provided for those groups. Moreover, poverty alleviation and development programmes had been designed to strengthen the economic and social status of those most vulnerable groups of society[210].

The permanent mission of India to the *United Nations Office* has a different story. While agreeing to the difference between indigenous peoples and minorities, they asserted that indigenous peoples can not be equated with "Scheduled castes and Scheduled tribes" as they are created by the Constitution for the purpose of positive discrimination to secure for them special privileges and to ensure their accelerated progress on account of backwardness due to historical reasons. By refusing to acknowledge that there are indigenous peoples in India, all that the government seeks to achieve is to ensure that there are no problems for it to discuss in the UN Sub-Committee. The fear of the government to accept the existence of Indigenous Peoples is that the acceptance would eventually mean ratification of the Declaration of the Rights of Indigenous Peoples in future making it much more obligatory for the government of India to fulfil the demands of autonomy as per the Constitution, on the one hand, while on the other more such demands are obviously going to emerge from other areas as the process of internal colonization of adivasis gain momentum in the make of the opening up of the nation for the imperialists[211].

(iii) Debates in India

The debate on whether the "Scheduled Tribes" of India are "indigenous peoples" or not also took place in India. The *Indian Council of Indigenous and Tribal Peoples* (ICITP)[212], which was formed in 1987

---

210 Ibid., Report on its Eleventh Session. UN. Doc.E/CN.4/Sub.2/1993/29 at p 22.

211 C.R. Bijay, "Emergence of the Submerged : Indigenous People at UN". *EPW* 28 (1992) at p.1360.

212 With the initiative taken primarily by the activists of the Jharkhand Movement, the ICIPT was formed in 1987. The ICIPT has been a regular invitee in the meetings of the Working Groups on Indigenous Populations

and affiliated to the *World Council of Indigenous Peoples* – an organization which received consultative status with the *United Nations Economic and Social Council*, recognised the fact and organized a symposium at New Delhi in April 1992, entitled, "who are the Indigenous Peoples of India?" In the symposium, the ICIPT admitted the fact that the "Scheduled Tribes" (*Adivasis*) of India fall under the UN definition of indigenous peoples. In the symposium, it was further elaborated that the *Adivasi* areas are subject to internal colonialism; *Adivasis* are treated as the subjects of colonizers even by the Government of India, that millions of Adivasis are displaced, that there is constitutional crisis in the Adivasi areas which has even been acknowledged by the official reports of the Government of India, for example, the 29th Report of the Commission for Scheduled Castes and Scheduled Tribes, 1988 where there is even a section titled "constitutional crisis in Tribal Areas"[213].

In 1994, the Indian participants from mainland India, of the *United Nations Workshops on Indigenous and Tribal Peoples' Struggle for Right to Self-determination and Self-government*, held in New Delhi also asserted that Adivasis of India are basically the Indigenous/Tribal peoples, have referred to themselves as Adivasis, a term which includes the concept of indigenous/tribal[214]. The workshop also recognised that :

"…. many indigenous/tribal communities are no longer isolated from the so-called mainstream. Their lands and resources have been taken over by outsiders and these peoples have been completely marginalized in their own ancestral homeland. The case of Tripura in north-east India is unique where, within the last 45 years, the Tripura/Kokborok indigenous peoples have been reduced to a minority

---

since its formation see. Douglas Sanders, "Indigenous Peoples on the International Stage", SA, 43(1993) p.6.

213 C.R. Bijoy. "Emergence of the Submerge". Op. cit. at p. 1359.

214 Summary of Resolutions of Workshop on Indigenous and Tribal Peoples Struggle for Right of Self-determination and Self-government in India. UN. Doc. E/CN.4/sub.2/AC.4/1994/4/Add. 1 at Para. 8.

by a constant influx of outsiders from India and erstwhile East Pakistan, now Bangladesh[215].

The participants, however, felt that the United Nations definition of indigenous peoples relies too much on the Western experience and, therefore, recognises only those peoples as indigenous whose fore parents were conquered by foreign invaders. The workshops, therefore, developed the following criteria for defining the *adivasi*/indigenous/tribal people in India:

(a) Relative geographic isolation of the community;

(b) Reliance on forest, ancestral and water bodies within the territory of the community for food and their necessities;

(c) A distinctive culture which is community oriented and gives primacy to nature;

(d) Relative freedom of women within their society;

(e) Absence of a division of labour and caste system;

(f) Lack of food taboos[216].

Conclusion

The above mentioned views of the *Indian Council of Indigenous and Tribal Peoples*, the Indian Participants of the *United Nations Workshops on Indigenous and Tribal Peoples' Struggle for Right to Self-determination and Self-government*, and the criteria adopted by the Government of India for identifying a tribe made it clear that "Scheduled Tribes" in India falls very well within the scope of the current understanding of the term "indigenous peoples". Moreover, India is a party to the International Labour Organisation *convention No. 107* of 1957[217] on Indigenous and Tribal Populations. India participated in the

---

215 Ibid., Para 5.

216 Ibid., Paras 3 and 10.

217 ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, 1957. for the text of the convention, see, International Labour Organisation. *Intentional Labour Conventions and Recommendation, 1919-1981,* at p. 858; see also UN. Doc.E/CN-4/Sub.2/1982/2/Add. 1 at p.63.

drafting of the Convention and supported the document at the early stages when it only used the term "indigenous". India had also made an official acknowledgement at the international level by being one of the first signatories of the ILO *Convention No. 107* of 1957 on the protection of Indigenous and Tribal Populations and its accompanying recommendation No. 104. This remains the only international instrument adopted by any international organization for the protection of indigenous and tribal populations till date. India was among the first few countries to ratify this in 1958[218], although the revised Convention No. 169 of 1989 (it is the revised *Convention No. 107* of 1957) is yet to be ratified by India, in 1991 the World Bank on its own declared that in India the term "indigenous peoples" means "Scheduled Tribes"[219]. Thus the status of "indigenous peoples" should be be attributed to the "Scheduled Tribes" of India.

Dr. Mohammadi Tarannum*

---

[218] Altogether 27 States have ratified the Convention No. 107 of 1957. These States are Angola, Argentina, Bangladesh, Belgium, Bolivia, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, Egypt, El Salvador, Ghana, Guinea-Bissan, Haiti, India, Iraq, Malavia, Mexico, Pakistan, Panama, Paraguay, Peru, Portugal, Syria and Tunisia. The convention was adopted by ILO on 26 June 1957 and came into force on June 2, 1957.

[219] *UN News Letter,* New Delhi, August 8, 1992, see also B.K. Roy Burman, "UN and analogous Peoples", *The times of India,* new Delhi, January 6, 1994 at p. 11; B.K. Roy Buman. *Indigenous and Tribal Peoples : Cathering Mist and New Horizon.* Mittal Publications, New Delhi (1994) at p.7.

* Assistant Professor-In-Law, Surendranath Law College,
24/2, Mahatma Gandhi Road, Kolkata – 700 009, WEST BENGAL

Presidents Pleasure on Governor's Post: An Overview

Abstract

The state has governor as, the President is for the whole of India. The Governor is usually a distinguished elder statesman, who can discharge his perfunctory duties with dignity and who is on a position to exercise what Gandhi called an "all pervading moral influence". The governor of a state is the repository of the executive powers of the state, which are exercised by him in accordance with the Constitution of India. All the executive powers are exercised by the cabinet in the name of the Governor who acts constitutionally on the advice of the council of Ministers He has the right to be kept informed of the decisions of the state ministry. He represents the centre in the state, and the state at the centre. It is he who helps in building up the image of the state and of the state Government at the centre. He focuses on the needs and the interests of the state at the central level. However despite of this utmost importance few former Governors complained that their offices had become redundant. They pleaded that the office of the Governor may either be abolished or given certain functions to perform. Apart from these, presently removal of Governors is relevant and hot issue in the World of Law. The present paper would focus on procedure for removal of governor and also on the recommendations suggested by various committees for appointment and removal of governor.

Keywords*: Governor of a state, Constitution of India, Federalism, the President of India, Commissions*

The Governor: An Introduction

Governor is regarded as an important figure not only in the Indian constitution, but also a well reputed personality almost all over the world[220]. Governors have many roles and responsibilities in common, the scope of gubernatorial power varies from state to state in accordance with state constitutions, legislation, and tradition, and governors often are ranked by political historians and other observers of state politics, according to the number and

220 Governors, serve as the chief executive officers in the fifty states and five common wealths and territories

extent of their powers[221]. The Governor of a state has a dual role to play - as the constitutional head of the state and as the agent or representative of the centre.

Role and Relevancy in Democratic Setup:

The Governor is a ceremonial head of the state. The constitution provides for a Council of Ministers with a Chief Minister at the head to aid and advise the Governor in the exercise of this functions except when he can act at his discretion[222]. The Council of Ministers is collectively responsible to the state Legislative Assembly.

All the executive powers are exercised by the cabinet in the name of the Governor who acts constitutionally on the advice of the Council of Ministers. The constitution, however, specifically lay down that except in matters where the Governor is required to act in his discretion, he shall not be bound to follow the advice of the council of Ministers, but act in his discretion[223].If any question regarding the exercise of the discretion of the Governor arises, the

---

221 These powers are often mentioned under Article 167 c, Article 200, Article 213, Article 355, etc of Indian constitution

222 The constitution of India , article 163 (1949) says: there shall be a council of ministers with the Chief Minister at the head to aid and advise the governor in the exercise of his functions, except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion

223 In U.N. Rao v. Indira Gandhi 1971 air 1002, 1971 SCR 46 Justice Sikri speaking for a unanimous court, after reiterating 'that we are interpreting a constitution and not an Act of Parliament', "a constitution which establishes a parliamentary system of government with a cabinet thought it was proper to keep in mind the conventions at the time the constitution was framed. For a centrally appointed constitutional functionary to keep a dossier on his ministers or to report against them or to take up public stances critical of government policy settled by the cabinet or to interfere in the administration directly−these are unconstitutional faux pas and run counter to parliamentary system. In all his constitutional functions it is the ministers who act; only in the narrow area specifically marked out for discretionary exercise by the constitution, he is untrammelled by the state ministers acts and advice. Of course, a limited free−wheeling is available regarding choice of chief minister and dismissal of the ministry, as in the English practice adapted to Indian conditions ".

decision of the Governor shall not be called in question[224]. The courts of the land do not have the power to question the action of the Governor taken in his discretion and the decision of the Governor shall be final[225]. In *Pratap Singh Raojirao Rane v/s Governor of Goa*[226] court held that the Governor is not answerable to court even in respect of charge of malafide.

Governor: Discretionary Power

The following functions fall within the discretionary powers of the Governor, as being the head of the State Government[227].

(i) Appointment of Chief Minister[228],

(ii) Dismissal of ministry[229];

---

224 By virtue of article 163(1) governor is given discretionary powers, for proper functioning of the constitution he has prima facie discretion in deciding whether a proposed law by a state is violative of the constitution. He also has discretion with regard to dissolution of legislative assembly when it does not function according to the constitution.

225 Article 163(2) clearly says" if any question arises whether any matter is or is not a matter as respects which the governor is by or under this constitution required to act in his discretion, the decision of the governor in his discretion shall be final , and the validity of anything done by the governor shall not be called in question on the ground that he ought or ought not to have acted in his discreation"

226 AIR 1999 bom. 53.

227 For details see article 163

228 In appointing a chief minister, the judgment of the governor is decisive and final." This is particularly so in the era of defection, indiscipline in the national political parties and regional parties and splinter groups ever gaining strength .the emergence of svds in Rajasthan and Uttar Pradesh after the general elections in 1967 enabled the governors to exercise discretionary power-whether he should call the leader of single largest party to form the government or of the svd factions vying with each other during election but forging an alliance after the election. On March 2, 2005, governor of Jharkhand misusing his discretionary power invited Shibu Soren (UPA) to form government without verification of authenticity of 42 MLAs who were being quoted to be at his back. It led to political turmoil and eventual stepping down of Soren on March 11, 2005 as he failed to show his majority on the floor of the house.

229 On July 2, 1984 Governor Jagmohan dismissed Farooq Abdullah's Ministry and did not dissolve the Assembly on the advice of the outgoing C.M as the latter had lost the majority

(iii) Dissolution of legislature[230];
(iv) Right to advise, warn and suggest;
(v) Withhold assent from a bill; and
(vi) Discretionary powers of the Governor of Assam, Nagaland, Arunachal Pradesh, Sikkim, Mizoram, Tripura and Meghalaya[231].

The Governor: Strengthener of Federalism

Apart from being the constitutional head of a state, the Governor also acts as the agent or representative of the Central Government. In fact, he is the only constitutional link between the centre and the states. As his appointment is made by the President of India as per Article 155 and Article 156 of the Constitution, a Governor of a state is an appointee of the President, and he or she holds office "during the pleasure of the President". He is inclined to remain more loyal to the centre than to the states. He ensures that the directives issued by the centre to the states are carried out and the Government of the state is carried on in accordance with the provisions of the constitution. It is on the recommendations of the Governor that the President usually issues a proclamation of emergency in the state on account of constitutional breakdown of the state machinery[232].

---

230 Ibid

231 The constitution vests in the governor of Assam two discretionary powers which are embodied in the sixth schedule of the constitution. Firstly, according to section 9(2) of the schedule if any dispute arises as to the share of such royalties (accruing from the lease of mining rights within the autonomous districts) to be made over to a district council, it shall be referred to the governor for determination. The amount determined by the governor in his discretion, is to be payable to the district council; secondly, according to section 18(2 and3) of the sixth schedule, the administration of certain tribal areas and tracts of Assam is to be carried on by the president through the governor of Assam, as his agent. In the discharge of these functions, as the agent of the president, the governor acts in his discretion

232 the constitution of India, article 356 (1949) : provides that in case of failure of constitutional machinery in state if the president, on receipt of report from the governor of the state or otherwise, is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of this constitution, the president may be proclamation assume to himself all or any of the functions of the government of the state and all or any of the powers vested in or exercisable by the governor or anybody or authority in the state other than the legislature of the state

Even after the state is placed under Presidents rule, the Governor is the chief representative of the President in the State to run the administration of the state on his behalf. When President's Rule, has been imposed on a state the Governor ceases to be a constitutional ruler of the state and acts as an agent of the President. V. V. Giri, the Former Governor of Mysore[233], called himself to be an 'Ambassador' [234]of the Central Government to the state administration. Governor Sri Prakasa[235] also called himself an "agent of the centre".

Thus, Governor represents the centre in the state, and the state at the centre, he does it through periodic reports submitted to the President, Governor's conferences, besides usual meetings with the President from time to time[236]. It is he who helps in building up the image of the state and of the state Government at the centre. He focuses on the needs and the interests of the state at the central level

Power of Governor: An Evolutionary Approach

Governors were so Powerless during the 1950-67 period that some of them wondered whether the office they held was of any consequence of all. Sri Prakasa and Vijaylakshmi Pandit who were former Governors complained that the office of the Governor was redundant. They pleaded that the office of the Governor may either be abolished or given certain functions to perform. Prof. K.V. Rao asserts, The role of the Governor was restricted in the Nehru era because there was one political party that was in power in the centre, as well as, in most of the states.

During this period, the channels[237] through which the interaction between the states and the centre took place were outside the

---

233 V. V. Giri, governor of Uttar Pradesh (1956–1960), Kerala (1960–1965) and Karnataka (1965–1967)

234 See volume no- mea library ministry of external affairs

235 Governor Sri Prakasa served as India's first high commissioner to Pakistan (1947- 1949), Governor of Assam (1949 -1950), governor of madras (1952- 1956) and governor of Bombay (1956- 1962).

236 Under Article 200,201,217 of constitution

237 Like secretaries, home secretaries for details see G. Austin infra note

office of the Governor and, therefore, they did not have much opportunity of playing an important role. The Governors came into great prominence after 1967[238].This provided Governors an opportunity to exercise their discretionary powers. It was argued that the Governors were exercising their constitutional powers neither in their discretion nor according to their individual judgement but according to the advice of the Prime Minister who was abusing the office to advance her own interests and those of her party.[239] The foregoing analysis would show that the key issue concerning the office of the Governor today is not one of rehabilitation but of role differentiation. The problem of role differentiation which could not take place and get institutionaliased so far largely on account of one party dominance, has assumed such serious proportions today as to become a case of crisis of confidence in the political system itself.

Removal of the Governor: Guiding Principles

In 2010, a constitutional bench of the Supreme Court interpreted these provisions and laid down some binding principles *B.P. Singhal v. Union of India*[240] In this case, the newly elected central government had removed the Governors of Uttar Pradesh, Gujarat, Haryana and Goa in July, 2004 after the 14th Lok Sabha election. When these removals were challenged, the Supreme Court held: Firstly, the President, in effect the central government, has the power to remove a Governor at any time without giving him or her any reason, and without granting an opportunity to be heard. Secondly this power cannot be exercised in an arbitrary, capricious or unreasonable manner. The power of removing Governors

---

238 It was a coalition era: when no one political party could secure a clean majority

239 Working of Indian Constitution by G. Austin working a democratic constitution: the Indian experience". *Oxford University Press*

240 7 may, 2010) (Judgment by R. V. Raveendran j.) Retrieved from: *Indiankanoon.org/doc/1471968/*

should only be exercised in rare and exceptional circumstances for valid and compelling reasons.

Thirdly, the mere reason that a Governor is at variance with the policies and ideologies of the central government, or that the central government has lost confidence in him or her, is not sufficient to remove a Governor. Thus, a change in central government cannot be a ground for removal of Governors, or to appoint more favourable persons to this post.

Fourthly, a decision to remove a Governor can be challenged in a court of law. In such cases, first the petitioner will have to make a prima facie case of arbitrariness or bad faith on part of the central government. If a prima facie case is established, the court can require the central government to produce the materials on the basis of which the decision was made in order to verify the presence of compelling reasons.

In summary, this means that the central government enjoys the power to remove Governors of the different states, as long as it does not act arbitrarily, without reason, or in bad faith.

Removal of Governor: Recommendations of Commissions

The Sarkaria Commission [241] recommended that

a. Governors must not be removed before completion of their five year tenure, except in rare and compelling circumstances. This was meant to provide Governors with a measure of security of tenure, so that they could carry out their duties without fear or favour.

b. The procedure of removal must allow the Governors an opportunity to explain their conduct, and the central government must give fair consideration to such explanation.

c. The Chief Minister should be consulted before appointing the Governor. For proper working of the Parliamentary system there has to be a personal rapport between the Governor and the Chief Minister

M M Punchhi Commission Report (2010):[242]

---

241 The government constituted a commission vide ministry of home affairs notification no.iv/11017/1/83-csr dated June 9, 1983 under the chairmanship of justice R.S. Sarkaria with Shri B. Sivaraman and Dr. S.R. Sen as its members.

Taking into account Governor's key role in maintaining Constitutional governance in the State, M M Punchhi in the report stated that utmost importance have been conferred by the Constitution on the office of the Governor and thus it is important that the Constitution should lay down explicitly the qualifications or eligibility for being considered for appointment and removal. It suggested that:

Governors should be given a fixed tenure of five years and their removal should not be at the sweet will of the Government at the Centre. The phrase "during the pleasure of the President" in Article 156(i) should be substituted by an appropriate procedure under which a Governor who is to be reprimanded or removed for whatever reasons is given an opportunity to defend his position and the decision is taken in a fair and dignified manner befitting a Constitutional office.

It is necessary to provide for impeachment of the Governor on the same lines as provided for impeachment of the President in Article 61 of the Constitution. The dignity and independence of the office warrants such a procedure. The "pleasure doctrine" coupled with the lack of an appropriate procedure for the removal of Governors is inimical to the idea of Constitutionalism and fairness. Given the politics of the day, the situation can lead to unsavoury situations and arbitrariness in the exercise of power. Of course, such impeachment can only be in relation to the discharge of functions of the office of a Governor or violations of Constitutional values and principles. The procedure laid down for impeachment of President, mutatis mutandis can be made applicable for impeachment of Governors as well.

The above recommendations however were never made into law by Parliament. Therefore, they are not binding on the central government.

Conclusion

Thus, we may conclude that the Governor has dual roles to play .i.e; the representative of the centre and as the head of the state

---

242 The **second commission on centre-state relations** (27th april 2007), chaired by Justice Madan Mohan Punchhi(, former chief justice of India)

Government. As the representative of the centre in the state, it is his responsibility to see that the federal balance and political stability are not sought to be destroyed or undermined. In his role as the head of the state Government, he has discretionary powers. He is not merely a figurehead or a nominal head, or a passive spectator. But the exact range of his powers would greatly depend upon the political situation that exists in the state. If there is great deal of political harmony in the state, the burden of the Governor is greatly reduced. If political stability in the state is being undermined the role of the Governor naturally becomes much larger. Further decision to remove a Governor by newly elected government should be challenged in a court of law. In such cases, first the petitioner shall make a prima facie case of arbitrariness or bad faith on part of the central government. If a prima facie case got established, the court should require the central government to produce the materials on the basis of which the decision was made in order to verify the presence of compelling reasons.

Nusrat Pandit*

* LLM, Net, Dept. of Law, University of Kashmir, J&K (India)

Commercial Advertisements and Approach of Judiciary: A Comparative Study

Abstract

The commercial advertisements have occupied central stage in the promotion of sale of goods or services. These commercial advertisements were put to use ever since human beings felt need to market their goods. However, the form of these advertisements changed with the progress in technology. It transformed from original drumbeats to highly technology oriented television commercials and now the internet commercials. Whatever be its form and the medium through which these commercials are expressed, the cardinal question for a constitutional lawyer remains the same i.e., whether these commercial advertisements qualify for speech and expression as understood in Art 19 of the Indian Constitution.. For advertisers, part of the problem is that it remains difficult to determine at times what constitutes "Commercial Speech ".The courts attempt to balance the right of the individual to receive a message with the right of an individual or company to send it. In this article an attempt has been made to address issues that surround the constitutional protection accorded to commercial advertisements in USA and India in light of leading case law on this point.

Keywords: *Advertisement, Constitutional protection, freedom of speech, information*

Introduction

From the standpoint of advertising information, sometimes known as the "market competition" model, the economic role of advertising is to provide information to the market place. This model assumes that consumers are quite active, seeking new products and brands; they look to advertising or information and are more price sensitive, which forces advertisers to be more careful about how much they charge for their products. This holds price in check and encourages competition as more companies enter the marketplace, using advertising to create awareness for their offerings.

Advertising is essentially to induce consumption, to make people buy things they do not want[243]. In recent years, the advertising industry has grown by leaps and bounds. The deeper problems connected with advertising come less from the unscrupulousness "deceivers" than from our pleasure in being deceived, less from the desire to seduce than from the desire to be seduced.[244]Question arises whether 'advertising' or commercial 'speech' enjoys the protection of constitution. Whether the fundamental right to freedom of speech and expression include the right to advertise? Or does traders have right of commercial speech?

Rabindra Nath Tagore wished that stream of reasons should have run all through our land, and the mind should have been without fear and lead forward "into ever widening thought and action". The framers of the Constitution felt inspired with his vision, and therefore, decided to ensure “Liberty of thought, expression, belief and faith....." for all citizens. They gave to the people of India the liberty of thought and discussion, and distinct right to the freedom of speech and expression[245]. This freedom is intended to preserve their right to hold, express and disseminate opinion that is right to say, or to write what they feel. Expression means communication, dissemination, and propagation: including "the right to express one's conviction and opinions freely by word of mouth, writing, printing, painting, and feeling or by any other manner". It thus includes the expressions of one's ideas in any language and through any communicating medium, demonstration or representation such as film, a tape and the like. Its essence is communication with one and all, this is publication and transmission. Therefore, freedom of expression includes the

---

243 Jawaharlal Nehru quoted in kyon Na Azmayein? A brief history of Indian advertising (Para 2), Vikram Doctor.

244 Daniel J. Boorstin, The image: A guide to Pseudo - Events in America, 6 (Introduction), 1961.

245 Article 19(1) (a)-“All citizens shall have right to freedom of speech and expression”.

freedom to talk, converse, communicate, publish or propagate ideas, and their publication and circulation.[246]

Article 19 is a very important article in the Constitution of India. The right to freedom embodied in this article is the product of compromise between the two extremes. When India became independent, there was a demand for the grant of an unfettered freedom. The people of this country were sick of restrictions imposed by the Government during the British days and they would like to finish them all. However, there was also a realization that India was an infant state and she could grow only if there was stability. That was not possible if anyone was allowed to do whatever he wanted to do. It was realized that while people must be given freedom, reasonable restrictions must be imposed on that freedom. It is for this reason that the Drafting Committee of the Constitution chooses a golden mean between the two extremes and the result was the present articles which were later on amended in the year 1951.[247]

Article 19 in the present form, provides that citizens shall have the right to freedom of speech and expression, to assemble peaceable and without arms, to form associations or unions, to move freely throughout the territory of India, to reside in any part of the territory of India, to acquire, hold and dispose of property and to practice any profession or to carry on any occupation, trade or business. However, the right to freedom of speech and expression, shall not affect the operation of any existing law or prevent the state from making any law in so far as such law imposes reasonable restrictions on the exercise of that right in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to offence.[248] The freedom of speech and

---

246 Per Govinda Menon J. in K. A. Mohammad Khan v. State of Kerala AIR 1964, Ker. 104 (105)

247 Ibid.

248 V. D. Mehajan, Constitutional History of India and Nationalist Movement Part- 11 9, ed,P.75

expression protects opinion, although wholly irrelevant, unpopular and unorthodox. It ensures to the minority and non-conformist an unimpaired right to dissent and uninterruptedly to debate, discuss and discourse; and give his ideas a free play. The state is not the guardian of the public mind; neither can it stifle opinion, speech and writing. It must allow unrestricted flow of ideas and ideologies. It is none of its duty to go out of its way in affording protection to the minority opinion against any idea, ideology or doctrine, even if it might be false and dangerous. The people must be given the permission to differ, and to dissent. They should be left to find the truth themselves. It must permit citizen to express his thought or feeling through any medium of his choice by words of mouth, written words, visuals, device, a newspaper column, a film, or a photograph. The media of expression include advertisement which is extra commercial demonstration[249].

The commercial advertisements have occupied central stage in the promotion of sale of goods or services. These commercial advertisements were put to use ever since human beings felt need to market their goods. However, the form of these advertisements changed with the progress in technology. It transformed from original drumbeats to highly technology oriented television commercials and now the internet commercials. Whatever be its form and the medium through which these commercials are expressed, the cardinal question for a constitutional lawyer remains the same i.e., whether these commercial advertisement quality for speech and advertisements qualify for speech and expression as understood in Art 19 of the Indian Constitution.

American Experience

The United States Supreme Court found for the first time an opportunity to discuss constitutional validity of the commercial advertisements in *Valentine, Police Commissioner of thse city of New York v. Christensen.*[250] The court gave free hand to Governments to regulate advertisements. It was laid down that

---

249 Hamadard Dawakhana v.Union of India AIR 1960 SC 554

250 316 US 52. 62 S, Ct. L.ed. 1262 (1942).

there are no constitutional restrictions on the Government if it wishes to control advertisements. However, this opinion was later on overruled in *Commarona v. United States*[251]**.** This court called the opinion in valentine as offhand which has not survived reflection and lay down that the profit motive should not be the criterion to uphold the constitutionality the statute.

This expansion of first amendment protection to commercial speech seems to have retreated with the court decision in *Posadas and Fox*. Still commercial speech does enjoy first amendment protection, but not the same as is extended to other forms of speech such as political, artistic and cultural expressions. Nonetheless, this protection by no means is absolute. This was made clear in a landmark decision in *Virginia State Board v. Virginia Citizens Consumers Council* Inc.,[252]

Over breadth Doctrine

In America, in view of the limited first amendment protection accorded to the commercial speech, the courts have wrestled over the years with a key question: what is/are the appropriate mechanism(s) for determining the constitutionality of commercial speech restrictions? One such mechanism is the first amendment safeguard of over breadth. Over breadth is a term used to describe a situation where a statute proscribes not only what constitutionally may be proscribed, but also forbids conduct which is protected, e.g., by the first amendment safeguards of freedom of speech and press.[253] In US the courts have expressly stated that the over breadth doctrine does not normally apply to commercial speech.[254] This doctrine was challenged in *Board of Trustees of the*

---

251 358 US 498,513-14(1959).

252 425 US 748 96 SC 1817, 48 L. Ed. 2d. 346 (1976).

253 Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, 425 U. 5.748(1976)

254 Bates v. State Bar of Arizona, 433. U. S. 350 (1977).

State University of New York v. Fox[255]. The regulation challenged addressed limitations of University dormitory use. The challenged regulation stated: "no authorization will be given to private commercial enterprises to operate on state University campuses or in facilities furnished by the University other than to provide food, legal beverages, campus bookstores, laundry, dry-cleaning, banking, barber and beautician services and cultural events.

Viewing the challenged application of the Universities regulation as a restriction on commercial speech, the appeals court applied the test articulated in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*[256] The four part test designed to determine the constitutionality of a commercial speech regulation is as follows:

1. Is the commercial speech as an illegal activity or is it misleading? If the answer is yes, then the speech can automatically be restricted. If the answer is no, then the following three questions must be answered affirmatively.

2. Is the Government suppressing commercial speech substantially?

3. Does the proposed regulation directly advance the Government interest asserted?

4. Does the proposed regulation go no further than necessary to advance that interest?

The US Supreme Court overturned the appeal court's decision. In doing so, it addressed two key issues which are crucial to determine the application of over breadth doctrine to commercial speech:

1. The court specifically addressed the over breadth challenge to the resolution; and.

2. The court invalidated the appeal court's interpretation of part 4 of the Central Hudson test.

---

255 492 U. S. 469, 1601. Ed. 2d. 388 (1989)

256 447U .S.557(1980).

The four part test was intended to guide the courts in determining whether a commercial speech restriction was constitutional and sufficiently narrowly tailored.

The US court has reaffirmed its position that commercial speech enjoys only limited protection under the first amendment. It has also mentioned the rationale that commercial speech is economically motivated and not easily deterred or chilled;

Therefore, it is not in need of stringent protection such as that provided by the over breadth doctrine.

The Central Hudson Test was the mechanism established to ensure narrowly tailored, thereby constitutional, commercial speech restrictions. Given the court's reinterpretation of the fourth test that the "regulation must only be reasonable", commercial speech is left -without a stringent guide as to what will or will not constitute an overly broad restriction. The same tests have subsequently been applied in a casino advertising case in Puertorico in 1986 The case involved the distribution of shopping flyers on news racks in Cincinnati Ohio and in the right to advertise liquor prices in Rhode Island[257] *. In each case, the Supreme Court has gone through the steps of the test to determine whether it is appropriate to regulate and / or prohibit the various forms of commercial speech.*

Judicial Trends in India

In India there is no express constitutional protection guaranteed to commercial advertisements. This issue has been debated in India right from 1960. The courts, like other parts of the globe, have not adopted consistent line of reasoning. The opinions have been changed by the courts after realizing that there should be no fetters to dissemination of information. However, there are still various questions left unanswered. Is constitutional protection to commercial advertisements corollary of constitutional guarantee of freedom of speech? Can constitutional protection be extended to commercial advertisements within the letters of Article 19(a).

---

257 Liquor mart e.al. vs. Rhode Island, 1996 116 S. Ct. 1495.

The *Hamdard Dawakhana v. Union India*[258] is the first case which came up before the Supreme Court in which Constitutional protection to commercial advertisements was debated and decided. In this case constitutional validity of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was challenged on the grounds that unreasonable restrictions have been imposed on freedom of speech.

The preamble of the Act in question provided:

An Act to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualifies and to provide for matters connecting therewith.

The petitioners in their writ petition alleged that soon after the Act came into force they experienced difficulty in the matter of publicity for their products and various objections were raised by the authorities in regard to their advertisements. The petitioners contended that the advertisement is a vehicle by means of which freedom of speech guaranteed under Article 19 (1) (a) is exercised and the restrictions imposed by the Act are not covered by clause (2) of Article 19.

It was laid down that an advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Article 19 (1) (a) which it seeks to aid by bringing it to the notice of public. When it takes the form of commercial advertisement which has an element of trade and commerce it no longer falls within the concept of freedom of speech for the object is not propagation of ideas social, political or economic or furtherance of literature or human thought; but, as in the present case, the commendation of the efficacy, value and treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business even though as described its creative part and it was being used for the purpose of furthering the business of the practitioners and has no relationship

---

258 AIR I960 SC. 554

with what may be called the essential concept of the freedom of speech. It cannot be said that the right to publish and distribute commercial advertisements and advertising an individual's person business is a part of freedom of speech guaranteed by the Constitution[259]. It was held that the advertisements prohibited by Section 3 of Act of, 1954 relate to commerce and trade and not to the propagation of ideas. The advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public which cannot be speech within the meaning of freedom of speech and would not fall within Article 19 (1) (a).[260]

It is submitted that the above judgment of the Supreme Court is erroneous. To say that information that is not in the interest of general public cannot reap the benefits of guarantee enshrined in Article 19 (1) (a) is one thing, but to say that information with the motive to promote commercial interest of the general public cannot qualify for the "speech" so as to enjoy the constitutional guarantee of freedom is entirely different.

The importance of information to the operation of efficient markets is by now fairly well accepted. For the proper utilization of money and right purchasing decision, the consumer must have information[261]. Advertising is a medium of information and persuasion, providing much of the day to day education and facilitating the flexible allocation of resources necessary to free enterprise economy. Neither profit motivation nor desire to influence private economic decision necessarily distinguishes the peddler from the preacher, the publisher or the politician[262]. However, this should not be interpreted to mean that the advertiser has a right to be wrong but there should be no censure on the dissemination of truthful information needed by the large section

---

259 Id. at 563

260 Ibid.

261 Ibid.

262 Developments in the law - Deceptive Advertising (1967) 80 Har. L. Rev. 1027.

of the society designated as consumers merely on the ground that the information has commercial motives. This will naturally need the gleaning of information necessary for sub serving public good from that which is false, deceptive or misleading.

The above cited opinion of the Supreme Court was borrowed from the US Supreme Court expressed in Valentine v Christensen[263], wherein it was laid down that the Constitution imposes no such restraint on Government as respects purely commercial advertising. It is amusing to note that this judgment had already been disapproved when our apex court quoted[264] it with approval. In Cammarano v. United States,[265] it was stated:

Valentine v. Christensen[266] ruling was casual, almost offhand and it has not survived reflection. That freedom of speech of the press directly guaranteed against encroachment by the federal Government and safeguarded against state action by the due process clause of the fourteenth Amendment, it not in terms or by implication confined to discourse of a particular kind and nature. Those who make their living through exercise of first Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.

The Supreme Court in *Indian Express Newspaper Bombay Ltd., v. Union Territory of India*[267] over ruled the *Hamdard Dawakhana* Case and held that the observations made in that case are too broadly stated. In this case, the majority of petitioners were certain companies. Their shareholders and their employers were engaged in the business of editing, printing and publishing of newspapers. The petitioners alleged that the imposition of Custom duty has compelled them to reduce the extent of the area of the newspaper and consequently has adversely affected their revenue

---

263 Supra Note 8.

264 Quoted at 563 Supra Note 7.

265 Supra note10

266 Ibid

267 AIR 1986 SC 515.

from advertisements. This indirectly impinges their constitutional guaranteed freedom of speech and expression. In meeting the above contentions, the Government while relying on the decision in *Hamdard Dawakhana* pleaded in defense of its action that the right to publish commercial advertisement is not the part of freedom of speech and expression. The Supreme Court carefully considered the decision in *Hamdard Dawakhana's* case. It was held that "the main plank of decision was that the type of advertisement involved in that case did not carry with it the protection of Article 19 (1) (a). On examining the history of the legislation, the surrounding circumstances and the scheme of the Act which has been challenged in that case namely the Drugs and Magic Remedies (Objectionable Advertisement) Act 1954(21 of 1954) the court held the object of that Act was to prevent self medication and self treatment by prohibiting instrument which may be used to advocate the same or which tend to spread the evil. It was further held that there is no doubt that some of the observations referred to above go beyond the needs of the case and tend to affect the right to publish all commercial advertisements. Such broad observations appear to have been made in the light of the decisions of the American court in Lewis J, Valentine v. F. J. Christensen, But it is worthy of notice that the views expressed in this American case have not been fully approved by the American Supreme Court itself in subsequent decisions.

In view of the above explicit stand of the American Supreme Court, the Indian Supreme Court held that the observations made in *Hamdard Dawakhana's* case (supra) are broadly stated and Government cannot draw much support from it. It was thus conclusively held that all commercial advertisements cannot be denied the protection of Article 19(1) (a) of the Constitution merely they are issued by businessmen[268].

In *TATA Press Ltd. v Mahanagar Telephone Nigam Ltd*.,[269] the Supreme Court went ahead by extending the protection of

---

[268] Ibid.

[269] AIR 1 995 SC 2438.

Article 19 (1) (a) not only to advertisers but also consumers. It was laid down that this Article guarantees not only the freedom of speech and expression; it also protects the rights of the individual to listen, read and receive the said speech. So far as the economic needs of citizens are concerned, their fulfilment has to be guided by their information disseminated through the advertisements. The protection of Article is available to the speaker as well to the recipient of the speech[270].

This issue was also discussed by the Supreme Court in *Sakal Papers (p) Limited v. Union of India.*[271] That case arose out of a constitutional challenge to the validity of the Newspaper (Price and Page) Act, 1956 which empowered the Government to regulate the prices of newspapers in relation to their pages and size and to regulate allocation of space for advertisements. The court held that the curtailment of advertisements would be hit by Article 19(1) (a) since it would have a direct impact on the circulation of newspapers.

Again, Section 3(1) of the act in so far as it permits the allocation of space to advertisements also directly affects the freedom of circulation. If the area for advertisements is curtailed the price of the newspaper will be forced up. If that happens, the circulation will inevitably go down. This would be no remote, but a direct consequence of curtailment of advertisements.....

If, on the other hand, the space for advertisement is reduced, the loss or close down or raise its price. The object of the Act in regulating the space for advertisements is stated to be to prevent 'unfair' competition. It is thus directed against circulation of a newspaper. When a law is intended to bring about this result there would be a direct interference with the right of freedom of speech and expression guaranteed under Article 19(1) (a)[272].

---

270 Id. At 2448.

271 AIR 1962 S.C 305.

272 Supra n. 33 paras 33-34, p. 313

The above observation recognizes the importance of advertising in making free flow of information through press. In *Bennett Coleman and Co. v. Union of India*[273], the Supreme Court reaffirmed that advertisements are essential for circulation of any newspapers and any restraint on advertisements would affect the fundamental rights of propagation, publication and circulation under Article 19 (1) (a). Since the decision in *Hamdard Dawakhana*[274], there has been a sea-change in the economy and advertising has come to acquire a vital role not only in shaping public choices but also in influencing the economy as a whole. In the present economy, where new products continue to flood the market everyday and generate cut throat competition, the importance of advertising which may give one product an edge over another, has grown by leaps and bounds. Also, it is advertising which effectively sustains the media, whether it be the print media or broadcasting. Other forms of entertainment such as sports events and motion pictures also receive financial backing from corporate sponsors. In *Tata Press v. Mahanagar Telephone Nigam Ltd.*,[275] the Supreme Court recognized the invaluable role of advertising in the economy:

Advertising is considered to be the cornerstone of our economic system. Low prices for consumers are dependent on mass production, mass production is dependent upon volume sales, and volume sales are dependent upon advertising. Apart from the lifeline of the free economy in a democratic country, advertising can be viewed as the life blood of free media, paying of the costs and thus making the media widely available. The newspaper industry obtains 60/80% of its revenue from advertising. Advertising pays a large portion of the costs supplying the public with newspaper. For a democratic press the advertising 'subsidy' is crucial. Without advertising, the resources

---

273 (1972) 2 SCC 788: AIR 1973 SC 106.

274 (1972) 2 SCC 788: AIR 1973 SC 106.

275 AIR 1960 SC. 554.

available for expenditure on the 'news' would decline, which may lead to an erosion of quality and quantity. The cost of the 'news' to the public would increase, thereby restricting its 'democratic availability'.[276]

The Supreme Court reiterated the importance of advertising and its nexus with the circulation of newspapers in *Hindustan Times v. State of U.P*[277]. In this case, the Supreme Court struck down an order issued by the state Government of U.P. under Article 162 of the Constitution directing a deduction of 5% from bills payable to newspapers with a circulation of above 25,000 copies for publication of Government advertisements. The object of the deduction was to implement a pension and social security scheme for full-time journalists. The court held that advertisements in newspapers play an important role in generating revenue and have a direct nexus with circulation. Advertising revenues enable newspapers to meet the cost of newsprint and other financial liabilities. Advertising also enables the reader to purchase a newspaper at an affordable price[278]. The owner of a newspaper was not liable to undertake the burden of the impugned tax which was struck down as unconstitutional[279]. The bargaining power of the state and newspapers in matters of release of advertisements was unequal and that any unjust condition on newspapers would be in violation of Article 14 of the Constitution as also Section 23 of the Contract Act.

Advertising as a facet of the right to information

A vital aspect of advertising that makes it part of Article 19 (1) (a) is that it facilitates the dissemination of information about who is selling what product and at what price. Advertising enables

---

276 (1995) 5 SCC 139.

277 (2003)1 SCC 591.

278 Ibid, para 33-38, pp. 601-04.

279 Ibid, paras 27 - 30, 00. 601 - 02.

the citizen to make well-informed and intelligent economic choices. More important than the right of expression of the advertiser is the right of the recipient to the information which he receives from the advertisement. The Supreme Court observed in *Tata Press v. Mahanagar Telephone Nigam Ltd.*[280]

Examined from another angle, the public at large has a right to receive the "commercial Speech". Article 19(1) (a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech. So far as the economic needs of a citizen are concerned, their fulfilment has to be guided by the information disseminated through the advertisements. The protection of Article 19(1) (a) is available to the speaker as well as to the recipient of the speech. The recipient of "commercial speech" may be having much deeper interest in the advertisement giving information regarding a life saving drug may be of much more importance to general public than to the advertiser who may be having purely a trade consideration.[281]

Reasonable Restrictions

An advertisement within the permissible limits, i.e., which does not disparage the goods, services or trade of another by giving false or misleading facts, is a medium which promotes competition and does not hinder it.

The following statement of the Monopolies and Restrictive Trade Practice Commission outlines the importance of advertisements[282].

"When to advertise, where to advertise and how much to advertise, these are the questions properly within the management of every company". It cannot be the subject matter of a judgment

---

280 (1995) 5 SCC 139.

281 Id. para 24, p, 156 (SCC).

282 Society for Civil Rights v. Colgate Palmolive (I) Ltd.., (1991) 72 Camp. Cas. 80.98.

by the commission as to where and as to how much a particular company should advertise. Advertising is a well recognized market strategy. In a competitive market, it has a definite role to play. Different companies manufacturing the same or similar products have to compete for the attention of consumers. This they can do by indulging in advertising. The extent of advertisement required in a particular field or for a particular product will naturally depend upon the nature of the field and the nature of the product. It cannot however, be doubted that advertising serves the need for information about the identity and the location of the seller, about the types of goods, available in the market and the terms of the sale of the products. Advertisement may be persuasive, it may be educative. It cannot be said that an advertiser should insert an advertisement once or twice and leave it to the consumer to decide it. The advertiser has to repeat the message relating to his product over and over again because the class of consumers is a fluctuating.[283]

Where to advertise, when to advertise, how to advertise, what to advertise itself demands that there is a need to regulate commercial advertisements by imposing restrictions. But these restrictions cannot be arbitrary, fanciful and capricious. They have to be reasonable. The term "reasonable restrictions" has been interpreted by the Supreme Court of India on various occasions. In *Chintaman Rao v. State of Madhya Pradesh*[284], the Supreme Court observed that "the determination by the legislature of what constitutes the reasonable restriction is not final or conclusive. It can he reviewed by courts. In the matter of Fundamental Rights, the High Court and Supreme Court acts as a watch dog for the rights guaranteed by the

Constitution and in exercising its functions, it has a power to set aside an Act of the legislature if it is in violation of the freedoms guaranteed by the Constitution". It is not possible to formulate an effective test which could enable a person to

---

283 Avtar Singh; Law of Consumer Protection.

284 AIR 1951 SCI 18: 1950 SCR 759.

pronounce any particular restriction to be reasonable or unreasonable. All the attendant circumstances have to be taken into consideration. It is not possible to dissociate the actual content of the restriction from the manner of its imposition or the mode of putting it into the practice. In the words of the Supreme Court, "the nature of the right alleged to have been infringed, the underline purpose of the restriction imposed, the extent and urgency of the evils sort to be remedied their by, the disproportion of the imposition, the prevailing conditions at the time, all enter into judicial verdict.

However, this freedom is not absolute, unlimited and unfiltered at all times and in all circumstances for the reason that an unrestricted freedom of speech and expression would amount to an uncontrolled license. If it were wholly free even from, reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to disregard its duty to be responsible. In fact, the element of responsibility must be present in the conscience of the advertisers. In an organized society the rights of press have to be recognized with its duty and responsibility towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of advertising press freedom must not be thrown open for wrong doings. If an advertiser publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by court of law[285]. The law which confers arbitrary and uncontrolled power upon the executive the matter of regulating trade or business cannot be held reasonable. Restrictions must be reasonable both from substantive and procedural point.

A state legislature is within its power to decide what should be the proper penalty for failure to comply with a particular provision of law. The penalty cannot be said to be unreasonable merely because it is more drastic than what is prescribed by some other legislature in another country[286].

---

285 SCC 1996 Vol. 6. P. 468.

286 Id.

The test of reasonableness has to be applied to every individual statute attacked and no abstract or general principles of reasonableness applicable in all the cases can be laid down. What is required is that the limitation imposed upon a person in the enjoyment of a right must not be arbitrary or excessive and beyond what is required in the interests of the public. There must be a proper balance between the freedom guaranteed and the social control permitted by Article19.

In *Ashwin Jajal v. Municipal Corporation of Greater Mumbai*[287], the Bombay High Court held that restrictions can be laid down for commercial advertisements. The present petition seeks to highlight environmental and health hazards likely to be caused by illuminating hoardings and advertisements by neon lights.

The court held that keeping in view the environmental and health hazards and nuisance value, it is always open to the authorities to regulate advertisement in a reasonable manner to the extent permissible[288]. It is held in *Blue Nile Advertising Private ltd. v. Commissioner of Bangalore, Mahanagar Palika*[289] that there is no prohibition against club to have recreational activities but state authorities have right to take appropriate action against advertisements of illegal games of betting, wagering etc. In Manoj Upadhyay v. Medical Council of India[290], it was held that power and reach of the media, both print as well as electronic for dissemination of advertisements, is tremendous. It has to be exercised in the interests of public goods. A free press is one of very important pillar on which the foundation of Rule of Law and democracy rests. At the same time, it is also necessary that freedom must be exercised with utmost responsibility.

---

287 AIR 1999

288 Id. At 37.

289 AIR 2005 Kant. 189

290 AIR 2005 SC 2473.

In view of the Supreme Court decision in *Tata Press Ltd, v. Mahanagar Telephone Nigam Ltd,*[291] the ruling in *Hamdard Dawakhana* case[292] has now a limited application that is prohibiting an obnoxious advertisement and cannot be applied to advertisements in general. The court has held that commercial speech is a part of the Freedom of Speech and expression guaranteed under Article 19(1) (a) of the Constitution. The commercial speech cannot be denied the protection of Article 19(1) (a) of the Constitution merely because the same are issued by businessmen. Describing the advertising as the cornerstone of India Economic System, the judges said that low prices for consumers are dependent upon mass production. Mass production is dependent upon volume of sales, and volume of sales is dependent upon advertising.

Conclusion

Commercial advertisements have both positive and negative effects on the consumers. A consumer is the asset of the nation and thereby he is having every right for the choice of the products, and that is possible when the product is advertised. It is the constitutional right of the consumers to receive information relating to the products and the goods, and no one can restrict this right except as provided under the constitution. Commercial advertisements have been held by the Supreme Court of India within the definition of freedom of speech and expression under article 19(1) (a) of the constitution. But the Supreme Court of India at the same time made it clear that if Commercial advertisement relating to products is misleading and false it can be regulated by the govt. So long as Commercial advertisements relating to products are correct there is no problem. But the problem arises only when the advertisements are misleading and false.

---

[291] Supra note 27.

[292] Supra note 16.

Mashooq Ahmad*
Rukhsana Bano**

Transmission Of Copyright Works:An Overview

Abstract

Copyright works are tangible expressions of one's ideas based on ingenuity, creativity and innovation that law protects in order to provide incentive to its creator or inventor. There are a number of ways in which a copyright work can be exploited. In the case of a novel, for instance, it can be exploited in a variety of ways. It can be published as a volume, as a serial in a newspaper or a magazine or converted into a cinematographic film etc. It can be transmitted by licensing or converted into dramatic works or translated, or filmed and so on. Besides there is a separate set of rights, known as performers' rights, each of these rights can be separately assigned or licensed for a limited term or for the whole of the copyright term. Licenses can be exclusive or non-exclusive. An assignment is in essence a transfer of ownership even if it is partial; on the other hand, a license is a permission to do something which but for the license would be the infringement. A licensee's freedom to alter the work is more limited than that of any assignee. If the license is not exclusive, the licensor can license the same right to another person as well. Since registration of assignment is not compulsory the assignee has no means of knowing whether there are prior assignments or licenses except through the assignor. He has, therefore, to take some risk. there has been a far reaching changes copyrigt licensing of late but the question remains how far it has secured the interest of a copyrigt holder or licensor. In this paper an attempt is made to assess the implications of the latest amendments to ensure copyright protection in India.

* Mashooq Ahmad Wani, LL.M (UGC-NET). Assistant Professor (Contractual) School of Legal Studies, Central University of Kashmir

** Research Scholar at school of legal studies Central university of Kashmir Nowgam campus

Keywords*:Copyright,Tramission,Licences,Assignment,Statuto ry Provisions*

Introduction

An assignment under the Copyright Act 1957 may be for the whole of the rights or for part only. [293] Partial assignment may take various forms: (i) It may limit to one or more but not all; (ii) All the acts which the owner of the copyright has the exclusive right to do; (iii) It may be limited to one or more, but not all of the countries where the owner has the exclusive right (iv) It may be limited to part of the period for which copyright subsists (v) No order of revocation of assignment shall be made within a period of five years from the date of such assignment.[294]

Any assignment of copyright whether it may be of the legal or equitable interest must be in writing[295]. The combination of ways in which he may assign his rights is almost endless. A mere agreement to assign does not operate to pass the property right but gives equitable rights, i.e. it operates as an equitable assignment of copyright, as and when, the work comes into existence.[296] Where there is substantial similarity and the other party has no evidence to refute the same in his favor, then there is infringement of copyright.[297]

A person holding a right of another may himself make further assignments. In these ways there may be a multiplicity of rights all stemming from the original work but all different and capable of separate assignment. Thus, in respect of a particular work each of the acts specified in section 14 may be assigned to different persons. Each of

---

293 See Sections 18,19,19A of Copyright Act 1957 ;

294 Sec 19 Copyright Act 1957

295 See section 19 of Indian Copyright Act; see also the decision of United Kingdom, Robin Jig vs. Taylor (1979) FSR 130(CA) at 143 based on S.36 of the Copyright Act 1956(U K)]

296 Reoti Saran Sharma v. Numero Uno International, 1995 PTR 132.

297 Godrej Soaps (p) Ltd. V. Dora Cosmetics co. 2001 PTC 407 Delhi.

the Several rights arising under the Act becomes the subject of a separate copyright.[298]

Copyright can be assigned or licensed to different persons for different territories. The copyright owners of literary, dramatic or musical work today exploit their work through publishers, reloading companies etc. by way of assignment or exclusive license. By this arrangement they can prevent the importation of copies of the work produced in one country to another[299].

In *Raj Video Vision v. K. Mohanakrishnan*[300], a producer of the film had assigned all negative rights in a film in 1961, naturally this assignment could not have covered video and television rights, since video and television came into existence subsequently. A partial assignee can independently sue for infringement of his rights without joining the assignor for he is the exclusive owner of the rights acquired by the assignment[301].

It has been held that the grant of the exclusive right of performing a play is an assignment of the performing right in the play even though the grant was limited to an area and the consideration was payment of royalty and in the agreement the parties were referred to as licensor and licensee[302]. Under the UK Act assignment, transmission and licenses are dealt with in S.90 of the Act[303].

Transmission of Copyright by Operation of Law

---

298 See Albrt v/s fletcher Construction 1976 RPC 615 at p.620 (New Zealand)

299 See Polder v/s Harliquen (1980) FSR 194, 392 (CA), WHO Group v Stage One (records) [1980] FSR 268, and CBS (UK) v Charmdal 1980 FSR 289.

300 AIR 1988 Mad. 294

301 See also Jonathan cape v/s Consolidated press [1954] All ER 253, [1954] WLR 1313

302 See Messenger v British broadcasting {1929}AC 151 at p 156(HL) LOEWS inc v Little{1958} CH 650 {1958} 2 all ER {200}(ca)

303 Copyright, Designs and Patents Act 1988. (Section 90).

Copyright is a kind of personal movable property it can therefore be transferred by assignment, by a testamentary disposition or by the operation of law as in the case of similar properties. When the owner of the copyright whether published or unpublished dies the copyright will pass to his personal representatives as part of his estate if the owner dies intestate. Sec 20 expressly provides that if the manuscript of the literary, dramatic or musical work or an artistic work has been bequeathed to a beneficiary without specifically bequeathing copyright the bequest will carry with it the copyright also unless the contrary intention appears from the will. When the owner of the copyright becomes bankrupt the copyright will vest in the official receiver and will pass to the trustee of the bankrupt's estate as assets for distribution amongst creditor.

Rights Of Author To Relinquish Copyright

The author of a work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyright and thereupon such rights shall subject to the provision of sub-section 3 ceases to exist from the date of the notice.

On receipt of a notice under sub-section 1 Registrar of Copyright shall cause it to be published in the official Gazette and in such other manner as he may deem fit.

The relinquishment of all or any of the rights comprised in the copyright in the work shall not affect any rights subsisting in favour of any person on the date of the notice referred to in sub-section 1.

Equitable Assignment

If the assignor assigns his copyright to another then, in the absence of express terms, the condition is implied that the assignor will not do anything that will render what he has conveyed valueless and futile. As for example, if an author assigns the copyright in a literary work, another literary work on the same subject and having the same scope, arrangement and system as the previous work may be an infringement of copyright in the earlier work, where such copyright has been assigned[304].

---

[304] Educational Co of Ireland v Fallon et al.[1919]. ir.R.62

Hubbard in his book on the laws of England[305] has pointed out "an equitable assignment may be created by agreement express or implied. An agreement which contemplates that a further document of assignment is to be executed has been held to take effect as an equities assignment". According to the learned author, it was contented by the respondent in the present case that the effect of the agreement was to create an equitable right which would operate as an equitable assignment of each manuscript when it comes into existence, and that the publication of such a manuscript by a third party could be challenged as an infringement of copyright by them as the equitable assignees, provided that they join the legal owner of the copyright in the action[306].

Publishing Agreement And Assignment

Sometimes an agreement between an author and the publisher to publish the copyrightable work is deemed to be an assignment. In *William Butler Yeast vs. Prof. Eric Dickinson*[307], the question before the court was regarding the interpretation of an agreement as it was contended that this publishing agreement is an assignment. The relevant provisions of that agreement were:

(i) That the author (W.B Yeats) shall grant the publisher the sole and exclusive license to print, publish and sell in book form in the English language, in the United Kingdom of Great Britain, its colonies and dependencies and in Ireland, a volume containing all the political, non dramatic works, written by him and at present entitled "collected poems" .

(ii) That the author shall also grant to the publishers license to sell the said volume in book form, in the English language in any other part of the world, except the United States of America.

(iii) That the published price of the said volume shall be fixed by the publisher at about ten shillings and pence net and they shall pay to author a royalty of twenty percent of the published price on all copies of the said volume which they may sell…

---

305 4th Edition. Pt.viii p.556 para 870

306 Ibid

307 AIR 1938 Lah. 173 at p.174

(iv) That all rights in the said volume other than those herein granted are reserved by the author…..

(v) That the entire copyright of the said volume is to remain the property of the author and at the expiration of five years from the day on which it is first published in book form by publisher or at the expiration of any subsequent period of one year after this agreement may be terminated by either party on giving six months notice to that effect.

The court held, as per Clause (1) of this agreement, it amounted to a complete assignment[308].

Manuscript Ownership

When an author sends the manuscript of his work to a publisher for publication, the question whether the publisher becomes the owner of the manuscript, will depend upon the terms of contract between the publisher and the author, the nature of the work and the circumstances under which the manuscript was submitted to the publisher by the author. Neither the delivery of the manuscript nor the act of entering into an agreement by themselves is regarded as an intention of the owner of copyright to transfer the ownership to the publisher[309].

Where under a bequest a person is entitled to the manuscript of a literary dramatic or musical work or to an artistic work and the work was not published before the death of the testator, the bequest shall unless the contrary intention as indicated in the testators will or any codicil there to be constructed as including the copyright in the work in so far testator was the owner of the copyright immediately before his death[310].

Under Hindu law a Hindu may dispose by will of his or her separate or self-acquired property. This applies both to the *Dayabhaga and Mitakshara* School of law[311].

---

308 Ibid

309 Moor House v. Angus & Robertson (1980) FSR 231.

310 Copyright in a published or unpublished work is regarded as a movable property capable of testamentary disposition by the owner.

311 See Mulla's Hindu law 8th edition.430

Under the Mohammedan law, a Mohammedan may dispose of, by way of the testament, his personal property (including copyright) provided the value thereof is not more than one- third of the surplus of his estate after payment of funeral expenses. However, any bequest made in excess of one-third can take effect if the heirs consent thereto after the death of the testator. The ownership of an author's manuscript after his death can devolve, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published not performed in public; not delivered in public. It shall be prima-facie proof of the copyright being with the owner of the manuscript.

A provision in a will prohibiting publication could not be effective as against the author's representative if they considered it their duty to sell to pay his debts, and if the copyright law giving out right to a legatee a condition against publication could not be legally enforced . Publication, however, could be prohibited for a limited period by means of a conditional gift to the legatee if any attempt was made to publish it.

Future Work

Section 18 provides that copyright can be assigned even in respect of future works of the author before their coming into existence but in this case the assignment will take effect only when the work comes into existence[312] . A mere agreement to assign does not operate to pass the

---

312 Section 18 of the Copyright Act provides:

(1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole of the copyright or any part thereof:
Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence;

Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work. ..

property right but gives equitable rights, as and when the work comes into existence[313]. The Madras High Court got an occasion to discuss the purpose of assignment vide sections 18 and 19 of the Act in *Gokulam Chit* case[314] and held that an assignment serves two purposes: for the assignee, it confers the right of exploitation for a specified period in a specified territory and for assignor, it confers the right to receive a royalty. The rights conferred by an agreement of assignment on the assignee flow only one way. While after the expiry of the period of assignment, the copyright flows back to the assignor, the royalty paid to the assignor never gets repaid to the assignee. In this case there was an agreement in respect of a Malayalam film titled 'Body Guard' and its remake Tamil version 'Kavalan'. The Madras High Court held that an agreement, the sole purpose of which was to just prevent others from exploiting the copyrights of the owner and to enable the assignee to get back the loan, cannot be an agreement of the assignment[315].

There is a catena of cases where the courts have upheld the sanctity of agreements aimed at assignment of copyright.[316] In *Gujarat Bottling*

---

(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned , and the assignor as respects the rights not assigned , shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

(3) In this section ,the expression 'assignee' as respects the assignment of the copyright in any future work includes the legal representatives of the assignee , if the assignee dies before the work comes into existence.

313 Reoti Saran Sharma v. Numero Uno, see supra note 5 at 132.

314 Sri Gokulam Chit and Finance Company (P) Ltd. V. Johnny Sagriga Cinema Square, 2011 (46) PTC 513 (Mad).

315 Ibid

316 See Prentice Hall India Pvt.Ltd v Prentice Hall Inc and others decided on May 10 2002 Del HC page 511 PTC; Gramophone Co. of India Ltd v Mars Recording Pvt.Ltd and ors Aug 31,1999 HC Karnataka at Bangalore page 117 PTC; Sunil Aggarwal and anr v Kum Kum Tandon and Ors April 28,1995 HC DEL Page 709 PTC.

Co. Ltd v. Coco Cola Co[317], it has been held that the terms of the assignment based on contract were not a restraint of trade, but restrictions within the continuation of the contract[318]. The Delhi High Court in *Chancellor Master and scholar of the University of Oxford v Orient Longman Pvt Ltd*[319] tried to examine the nature of the negative covenant in the contract of assignment of copyright and held that a negative covenant in contract of assignment does not make it a restraint of trade.

Assignor's Liability For Infringement

An author of a work who has assigned some specified right relating to his copyright can be restrained from exercising those rights by assignee. Since the authors of literary, dramatic, musical or artistic work has a distinctive style of giving form to their ideas, they may be asked to produce similar work besides the same ideas on which the assigned work is based, but without copying from it. Under such circumstances despite similarity, it will be difficult to establish infringement in such cases.

Statutory Provisions

Sec 18 to 21 of the Act, the provision relating to assignment transmission or relinquishment of copyright is on the similar lines as defined in S.3 of Transfer of Property Act [320]. Since copyright is a beneficial right in movable property, the owner of the right has actual or constructive possession of the same[321]. Assignment of a copyright is valid only if it is in writing and signed by the assignor or his duly authorized agent[322].

---

317 1995 (5) SCC 545

318 See also Zee Telefilms Ltd v Aalia Production and others 2000 PTC 382.

319 2003 (26) PTC 186 (Del).

320 The Copyright Amendment Act 2012 and Copyright Rules 2013 have overhauled the provision of transmission, licensing, assignment and relinquishment.

321 Savitvi Devi v Dwarak Prasad AIR 1939 all 305 at p.308

322 See also srimagal v books Indian AIR 1973 mad 49, subaih v muniswamy AIR 1966 mad 175 at p.176

The assignment of copyright in a work should identify the work and specify the right assigned and the duration and territorial extent of such assignment[323].

The assignment of copyright in any work should also specify the amount of royalty payable, if any of the author or his legal heirs during the currency of the assignment and the assignment will be subject to revision, extension or termination on terms mutually agreed upon the parties. If the period of assignment is not stated, it will be deemed to be five years from the date of assignment[324].

Registration of deed of assignment is not for its validity. However, registration of the assignment in the register of copyright has some evidentiary value[325] contained in Sec 18 to 21. The owner of a copyright is an existing work may assign to any person the copyright in the work. Since copyright consists of a bundle of rights the owner may assign the whole of these rights or only some of them. An assignment may be general i.e. without limitation or subject to limitation. It may be for the whole terms of copyright or for any part thereof[326], it may be limited to a particular territory or country. The prospective owner of a copyright in a future work may also assign the work in a similar manner, but in such a case the assignment will take effect only when the work come into existence[327] where the assignee of the future work dies before the work comes into existence his legal representative will be treated as the assignee[328].

---

323 London printing and publishing alliance v c ox [1893CH 291(CA) exparte Hachins [1879]QBD 483(CA)RC zudis musical composition [1907]1 CH 651(CA)

324 If the territorial extent of assignment of the rights is not specified it will be presumed to extent with in India.

325 Section 48

326 See 18(1)

327 Sec 18(1) proviso see also Indian performing rights society v eastern Indian motion picture association AIR 1977 SC 1443 at p.1447

328 Section 18(3)

The assignee of copyright in respect of right assigned and the assignor in respect of rights not assigned are treated as the owner of the respective right[329]

An Oral Assignment of Copyright

There is no particular form prescribed for the assignment and it may be affected even by a letter[330]. To identify the subject matter of assignment oral evidence may be admitted[331]. An assignment being a conveyance or sole must be stamped under the stamp act. Copyright dose doesn't come within the scope of actionable claim[332].

Disputes with Respect to Assignment of Copyright

If the assignee fails to make sufficient exercise of the rights assigned to him, and such failure is not attributable to any act or omission of the assignor, then the Copyright Board may on receipt of a complaint from the assignor and after holding such inquiry as it may deem necessary, revoke such assignment[333].

If any dispute arises with respect to the assignment of any Copyright Board may on receipt of a complaint from the aggrieved party and after holding such inquiry as it consider necessary pass such order as it may deem fit including an order for the recovery of any royalty payable[334].

Author/Publisher-Royalty Disputes

Disputes between authors and publishers are not uncommon. The authors allege nonpayment or underpayment of royalty by the publishers

---

329 Section 18(2)

330 London Printing and Publishing Alliance v Cox [1891]3 CH 291(CA); Exparte Hutchins [1879]4 6 BD 483 (CA) re judis musical Composition [1907]1 CH 651(CA)

331 E.w savoyvs world of golf [1914] 2 ch566 (CA).

332 Venagopala Shety V Saryakanta (1992) PTC 55 (Karnataka. HC)

333 Section 19(4) of Copyright Act

334 The Copyright Board shall not pass any order under this sub section to revoke the assignment unless it is satisfied that the terms of assignment are harsh to the assignor in case the assignor is also the author.

and the latter denies it and substantiate the denial by production of documents, bills and statistics regarding printing and reprinting of the author's book. It is an accepted fact that authors have no means of checking the statistics given by the publishers so the only alternative before them is either to have trust on the publisher who happens to be the big fish or turn into publishers themselves.

In *PHI Learning Private Ltd. v. Dr. (Mrs.) P. Meenakshi*[335] the defendant /author had assigned the copyright in a book written by her in favor of the plaintiff/publisher for the entire term of copyright. During the subsistence of the assignment the author re-assigned the rights to another publisher on the ground that the first publisher was not paying the right amount of royalty to her though the latter had produced all statements regarding print, reprint and sale of the books before the court. The court passed a decree of permanent injunction restraining the defendant from assigning the copyright including the right to re-print, publish, sell and distribute the book to any person during subsistence of the agreement with the plaintiff[336].

In a recent significant legal development, the Copyright (Amendment) Act 2012 has amended section 18 of the Copyright Act 1957, which deals with 'Assignment of Copyright'. Section 18 (1) provides that the owner of a copyright in any work or prospective owner of a future work may assign the copyright. The proviso to this subsection clarifies that in case of future work, assignments will come into force only when the work comes into existence. A second proviso has been inserted in this section by providing that no such assignment shall apply to any mode of exploitation that did not exist or was not known in commercial use when the assignment was made, namely: -

Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless

---

335 2011 (47) PTC 548 (Del).

336 Ibid

the assignment specifically referred to such medium or mode of exploitation of the work.

The above amendments strengthen the position of the author if new modes of exploitation of the work come to exist. In continuum, the significance of the instant case lies within the realm of the unfairness and invalidity of contracts covering future assignments where rapid advancements in technology keeps changing the character of intellectual property rights. *Sholay Media & Entertainment Pvt. Ltd.* (Sholay Media), the owner of all rights to the movie *Sholay*, filed a suit alleging copyright infringement by Vodafone Essar Mobile Services Ltd. over sale of music and dialogues from the movie as ringtones / caller tunes. Vodafone, cellular service provider offers various value added services such as ringtones, true tunes, caller tunes, Internet radio etc. to their subscribers. The Court granted an ex-parte injunction restraining Vodafone from offering ringtones / caller tunes of the movie *Sholay* to its subscribers without prior permission / license from Sholay Media. Subsequently, Phonographic Performance Ltd (PPL) and Universal Music India Pvt. Ltd (Universal Music) impleaded (joining the suit as a party) themselves in the suit. The case was later heard on plaintiff's application for interim injunction and the defendant's application for setting aside of the ex-parte injunction order.[337]

A Licence As A Mode Of Transmission

Four basic conditions must be met for affecting a valid license:

i. The licensor must have ownership of the relevant IP (or authority from the owner to grant a license);

ii. The IP must be protected by law or at least eligible for protection;

iii. The license must specify what rights with respect to IP it grants to the licensee; and

iv. The payment or other assets to be given in exchange for the license must be clearly stated.

---

337 **Sholay Media & Entertainment Pvt. Ltd vs. Vodafone Essar Mobile Services Ltd. I.A. Nos. 3258/2011 & 4504/2011 in CS (OS) No. 490/2011.**

The owner of the copyright in any existing work or prospective owner of the copyright in any future work may, grant any interest in the right by license in writing signed by him or by his duly authorized agent. The license may be confined to one or more interest or to the entire copyright. A license is an authorization of an act which without such authorization would be an infringement[338] licensing usually involve only some of the rights and not the whole. An author of a novel may license the right to reproduce the work in hardback to one person and paperback to another, the serialization rights to newspaper or magazines film rights and dramatization rights to others and the translation rights in any language to yet another license can be exclusive or non exclusive[339].

Licensing is a marketing and brand extension tool that is widely used by everyone from major corporations to the smallest of small business. Entertainment, sports and fashion are the areas of licensing that are most readily apparent to consumers, but the business reaches into the worlds of corporate brands, art, publishing, colleges and universities and non-profit groups, to name a few[340].

Grant Of A License

The owner of the copyright in any work, the work may be an existing work or a future work, may grant interest in the right by license. Such instrument granting a license is required in writing by the owner of the copyright and it should be signed either by the owner of the copyright or by his duly authorized agent. Thus the requisites of the valid license are as fallows:

---

338 In Muskeh v Hill [1804]5 Bing NC 694 Tind all CJ observed a dispensation or license properly passes no interest, but only makes an action lawful which, without it could have been lawful.

339 Licensing is the process of leasing a legally protected (that is, trademarked or copyrighted) entity – a name, likeness, logo, trademark, graphic design, slogan, signature, character, or a combination of several of these elements. The entity, known as the property or intellectual property, is then used in conjunction with a product. Many major companies and the media consider licensing a significant marketing tool.

340 Trademarkinindia.com: copyright…expo-2013.

(1) The instrument transferring the license in the work is to be written.

(2) It is to be signed by the owner of the copyright or by his duly authorized agent.

In the case of license relating to a copyright in any future work, it has been provided that the instrument of the license shall take effect only when the work comes into existence.

In case of death of the licensees before the future work comes into existence, the legal representative of the licensee shall be entitled to the benefit of the license there could be a contract to the contrary that such benefit may not develop upon the legal representatives[341].

Interpretation Of License Of Deed

Where it is different to infer that the an agreement between the owner of the copyright and the publisher was a partial assignment of the copyright or it was a license for publishing the work the balance of convenience may be considered while interpreting such agreement or license deed. *In K.P.M Sunduram v. M/S Rattan Prakashan Mandir*[342] the plaintiff (author) of some books had claimed that the publishing agreement with the defendants was only licenses and not any assignment of the copyright in the books. The court had to go into the question of interpretation of three agreements entered into between the plaintiff and defendants. The agreement of March 21, 1959 for the book "principles of economics read as follows".

An agreement made this twenty first day of march, 1950 between Rattan Prakashan Mandir (hereinafter called the publisher which terms shall include their heirs, Executors, administrators and assigns of the first party) and prof Mc views of baralseni collage Aligarh and prof K.P.M sundhram of Sri ram collage of commerce Delhi and his/their heirs, Executors administrators or assigns (hereinafter called the author/ authors of the second party).

---

341 Indian performing rights society ltd vs eastern Indian motion picture association air 1977 sc 1443 at p .1450

342 A.I.R 1983 Delhi 461 at pp 465,466,467

Whereas they have agreed to paper work on the principles of economy and were as the parties wish to enter into the formal agreement. It is hereby mutually agreed as follows:

1) The authors undertake to deliver the manuscript of the work together with the actual material for illustration, maps or diagrams, free charge or copyright free, ready for the printer and block maker not later than 311st July1959.

2) That the publisher undertake to bring out at their own cost the work mentioned above.

3) That the royalty account should be submitted to the authors for verification by the middle of January and will be paid off by the end of march every year.

A license may be for a term of the year or for a definite period. In which case, in the absence of anything to the contrary in the contract, the publisher will not be restrained from selling, after the expiration of the time specified in the agreement, copies printed during that period[343]

Where under an agreement between an author and his publisher of the license is conferred on the publisher without limitation to any definite period and was payment to the author is by royalties or by a share in the profits. The license, although excluded so long as it exist, is revocable, and the author can restrain the publication of any edition subsequent to the notice of revocation[344].

The part owner of dramatic entertainment cannot grant a license for its representation without the consent of all the other owners.

Where the owner of the undivided moiety of the copyright of an opera had alone granted a license for its representation. In an action by the other owner of the other moiety to recover a penalty under the dramatic copyright act 1833 Sec 2, it was held by the court that, having regard to that act and the copyright act 1842 the license was illegally

---

343 Warne vs. Roatleage (1874) C.R. 18EQ. 497 and howiTT vs. hall (1862)6 L.T.348

344 Ready vs. bentllyn (1858)4 K & J 656 and warn v Routledge (1874)18EQ 497 at p.498

granted and the defendant was liable to pay plaintiffs in one half of the penalty of 40S for each representation[345].

An injunction was granted to restrain the printing of the unpublished historical manuscript a copy of which had been given by the representative of the author to a person under whom defendant claimed but not with the intention that he should publish it[346].

Compulsory Licenses In Work Withheld From Public

(1) If at any time during the term of copyright in any Indian work which has been published or performed in public a complaint is made to the Copyright Board that the owner of the copyright in the work-

(a) Has refused to republish or allow the republication of the work or has refused to allow the performance in public of the work and by reason of such refusal the work is withheld from public or

(b) Has refused to allow communication to the public by broadcast or such work in the case of a [347]sound recording the work recorded in such sound recording in terms which the complainant considers reasonable;

The Copyright Board after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyright to grant the complainant license to republish the work, perform the work in public or communicate the work to the public by broadcast as the case may be subject to payment to the owner of the copyright of such compensation and subject to such other terms and condition as the Copyright Board may determine and there upon the Registrar of Copyright shall grant the license to the complainant in accordance with the direction of the Copyright Board on payment of such fee as may by prescribed.

---

345 Powell v head (1879)12 Ch.D 686:48 C.J CH 731:41LT 70

346 Queemsberry (Duke) v Shebeare (1758)2Edn 329:28 ER 924

347 Subs for record by the Copyright (Amendement act). 1994 (38 of 1994) Sec 2.

Where two or more people have made a complaint under sub-section (1) the license shall be granted to the complainant who in the opinion of the Copyright Board would best serve the interest of the general public.

Copyright Board has been authorized under the section to exercise to following functions namely

(i) The Copyright Board may hold an inquiry that the compulsory license may be issued to the complainant to republish the work, perform the work in public or communicate the work to the public by broadcast, the Copyright Board is to direct the registrar of copyright to grant such a license to its being satisfied that the ground for such refusal are not reasonable.

(ii) The Copyright Board has been authorized to fix the amount of compensation to be paid to the owner of the copyright for republishing the work or for performing the work in public or for communicating the work to the public by broadcast.

(iii) The Copyright Board may determine such other terms and conditions which would be applicable for granting such license to the complainant.

(iv) In case two or more people have made a complaint, the Copyright Board has to make an opinion that which of the complainants is to be granted the license that would best serve the interest of the general public.

(v) The Copyright Board has been authorized to direct the registrar of copyright to grant a compulsory license and there upon the registrar of copyright is to grant the license to the complainant in accordance with the direction of the Copyright Board of the payment of such fee as may be prescribed.

Statutory Licence For Cover Versions

Section 31C provides for making of cover version , a sound recording in respect of any literary, dramatic or musical work[348]. Rule 23 of Copyright Rules 2013 provides:

---

[348] Explanation to section 31C inserted by Copyright (A) Act 2012, states that 'cover version' means a sound recording made in accordance with this section. See Rule 23 to 28 of Copyright Rules 2013.

1) Any person intending to make a cover version, · being a sound recording in respect of any literary, dramatic or musical work under sub-section (1) of section 31 C shall give a notice of such intention to the owner of the copyright in _such works and to the Registrar of Copyrights at least fifteen days in advance of making the cover version and shall pay to the owner of the copyright in the original literary, dramatic and musical works, along with the notice, the amount of royalties due in respect of a minimum of fifty thousand copies and if the number is more, for all the copies of cover version to be made, at the rates detennined by the Board in this regard under rule 27 and provide copies of all covers and labels with which the cover versiot\ is to be sold[349].

Provided that in respect of works in a particular language or dialect for which the Board by general order has fixed a lower minimum as per proviso to sub-section (4) of section 31C, the applicant shall pay the royalty for the lower minimum fixed by the Board and if the number is more, for all the copies of the cover version.

Provided further that any person intending to make a cover version shall give a notice under this Chapter only after the royalty to be paid is determined by the Board under rule 27 and published in the Official Gazette and in the website of the Copyright Office and the Board.

2) Such notice shall contain the following infonnation, namely:-

a) the particulars of the work in respect of which cover version is to be made;

b) altration, if any, which are proposed to be made for the adaptation of the work to the cover version and the evidence of consent of the author of work, if required, for making such alteration;

c) the name, address and nationality of the owner of the copyright in the work;

d) particulars of the sound recording made previously of the work;

e) the total number of copies of the cover version and the calendar year in which it is proposed to be made;

---

349 Ibid

f) the medium in which the sound recording was last made and the cover version is proposed to be made;

g) the price ~ which the cover version is proposed to be sold; and

h) the details of the advance payment of royalties paid as determined by the Board in this regard under rule 27.

Conclusion

Copyright can be transmitted through many ways, be it assignment, license or franchise, or sale. The assignment of copyright has been overhauled by latest amendment in copyright law and the rules made thereof.

Imran Ahad*

* Lecturer Kashmir Law College, Nowshera, Srinagar.

The Environment and Human Rights: Role of Supreme Court of India in addressing Environmental Issues from a Human Rights Perspective

Abstract

All human beings depend on the environment in which we live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the right to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity. At the same time, protecting human rights helps to protect the environment. In recent years, the recognition of the link between human rights and the environment has greatly increased. The number and scope of international and domestic laws, judicial decisions, and academic studies on the relationship between human rights and the environment have grown rapidly. Incorporating a right to a healthy environment in the Constitution of India by Supreme Court has extensively widened the scope of Art 21. This paper analyzes the judicial remedies available for environmental protection and some remarkable principles and doctrine propounded by the Indian Judiciary. It further views upon the constitutional aspects and the new trends in judicial approach in environmental protection

Keywords: *Human Rights, Constitutional Remedies, Environment.*

Introduction

Judiciary in every country has an obligation and a Constitutional role to protect Human Rights of citizens. As per the mandate of the Constitution of India, this function is assigned to the superior judiciary, namely the Supreme Court of India and High courts. The Supreme Court of India is perhaps one of the most active courts when it comes to the matter of protection of Human Rights. It has great reputation of independence and credibility. The preamble of the Constitution of India encapsulates the objectives of the Constitution-makers to build a new

Socio-Economic order where there will be Social, Economic and Political Justice for everyone and equality of status and opportunity for all. This basic objective of the Constitution mandates every organ of the state, the executive, the legislature and the judiciary working harmoniously to strive to realize the objectives concretized in the Fundamental Rights and Directive Principles of State Policy. The judiciary must, therefore, adopt a creative and purposive approach in the interpretation of Fundamental Rights and Directive Principles of State Policy embodied in the Constitution with a view to advancing Human Rights jurisprudence[350]. The promotion and protection of Human Rights depends upon the strong and independent judiciary. The main focus here would be to analyse the functional aspect of the judiciary especially the Apex judiciary in achieving success while discharging the heavy responsibility of safeguarding Human Rights in the light of our Constitutional mandate. The major contributions of the judiciary to the Human Rights jurisprudence have been two fold: (1) the substantive expansion of the concept of Human Rights under Article 21 of the Constitution, and (2) the procedural innovation of Public Interest Litigation

Writ Jurisdiction of the Supreme Court and the High Courts

The most significant aspect of the Fundamental Rights is the exclusive right to Constitutional remedies under Articles 32 and 226 of the Constitution of India. Those persons whose rights have been violated have right to directly approach the High Courts and the Supreme Court for judicial rectification, redressal of grievances and enforcement of Fundamental Rights. In such a case the courts are empowered to issue appropriate directions, orders or writs including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-warran to, and Certiorari. By virtue of Article 32, the Supreme Court of India has expanded the ambit of Judicial Review to include review of all those state measures, which either violate the Fundamental Rights or are violative of the Basic

350 Paras Diwan & Peeyushi Diwan, Human Rights & the Law, (1998 edition), Deep & Deep Pubications, New Delhi

Structure of the Constitution. The power of Judicial Review exercised by the Supreme Court is intended to keep every organ of the state within its limits laid down by the Constitution and the laws. It is in exercise of the power of Judicial Review that, the Supreme Court has developed the strategy of Public Interest Litigation. The right to move to the Supreme Court to enforce Fundamental Rights is itself a Fundamental Right under Article 32 of the Constitution of India. This remedial Fundamental Right has been described as "the Cornerstone of the Democratic Edifice" as the protector and guarantor of the Fundamentals Rights. It has been described as an integral part of the Basic Structure of the Constitution. Whenever, the legislative or the executive decision result in a breach of Fundamental Right, the jurisdiction of the Supreme Court can be invoked. Hence the validity of a law can be challenged under Article 32 if it involves a question of enforcement of any Fundamental Rights.[351]

The Right to Constitutional remedy under Article 32 can be suspended as provided under Articles 32(4), 358 and 359 during the period of promulgation of emergency. Accordingly, in case of violation of Fundamental Rights, the petition under Article 32 for enforcement of such right can not be moved during the period of emergency. However, as soon as the order ceases to be operative, the infringement of rights made, either by the legislative enactment or by executive action, can be challenged by a citizen in a court of law and the same may have to be tried on merits, on the basis that the rights alleged to have been infringed were in operation even during the pendency of the presidential proclamation of emergency. If, at the expiration of the presidential order, the Parliament passes any legislation, to protect the executive action taken during the pendency of the presidential order and afford indemnity to the execution in that behalf, the validity and effect of such legislation may have to be carefully scrutinized.

Under Article 226 of the Constitution of India, the High Courts have concurrent jurisdiction with the Supreme Court in the matter of granting relief in cases of violation of the Fundamental Rights, though the High Courts exercise jurisdiction in case of any other rights also. The

351 Pandey J.N Constitutional Law.

Supreme Court observed that where the High Court dismissed a writ petition under Article 226 after hearing the matter on merits, a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same relief filed by the same parties, will be barred by the rule of Resjudicata. The binding character of the judgment of the court of competent jurisdiction is in essence, a part of the rule of law on which, the administration of justice is founded[352]. Thus, the judgment of the High Court under Article 226 passed after hearing the parties on merits must bind the parties, till set aside in the appeal as provided by the Constitution and can not be permitted to be avoided by a petition under Article 32.

Article 226 contemplates that notwithstanding anything in Article 32, every High Court shall have power, throughout the territorial limits in relation to which it exercises jurisdiction, to issue to any person or authority including the appropriate cases, any government, within those territories, direction, orders or writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-warranto and Certiorari or any of them for the enforcement of Fundamental Rights conferred by part-III and for "any other purpose". Hence, the jurisdiction of a High Court is not limited to the protection of the Fundamental Rights but also of the other legal rights as is clear from the words "any other purpose". The concurrent jurisdiction conferred on High Courts under Article 226 does not imply that a person who alleges the violation of Fundamental Rights must first approach the High Court, he can approach the Supreme Court directly. This was held in the very first case *Ramesh Thapper vs. State of Madras*[353]

But in *P.N. Kumar vs. Municipal Corporation of Delhi* [354] the Supreme Court expressed the view that a citizen should first go to the High Court and if not satisfied, he should approach the Supreme Court.

---

352 Daryao Vs. State of U.P AIR 1961 SC 1457

353 AIR 1950 SC 124

354 AIR 1989 SC 1285; 4 AIR 1982 SC 149

Innumerable instances of Human Rights violation were brought before the Supreme Court, as well as, the High Courts. Supreme Court as the Apex Court devised new tools and innovative methods to give effective redressal

Rule of Locus Standi vis-à-vis Public Interest Litigation

The traditional rule is that the right to move the Supreme Court is only available to those whose Fundamental Rights are infringed. A person who is not interested in the subject matter of the order has no Locus Standi to invoke the jurisdiction of the court. But the Supreme Court has now considerably liberalized the above rule of Locus Standi. The court now permits the "public spirited persons to file a writ petition for the enforcement of Constitutional and statutory rights of any other person or a class, if that person or a class is unable to invoke the jurisdiction of the High Court due to poverty or any social and economic disability. The widening of the traditional rule of Locus Standi and the invention of Public Interest Litigation by the Supreme Court was a significant phase in the enforcement of Human Rights.

In *S.P. Gupta vs. Union of India and others*[355] the seven member bench of the Supreme Court held that any member of the public having "sufficient interest" can approach the court for enforcing the Constitutional or legal rights of those, who cannot go to the court because of their poverty or other disabilities. A person need not come to the court personally or through a lawyer. He can simply write a letter directly to the court complaining his sufferings. Speaking for the majority Bhagwathi, J. said that any member of the public can approach the court for redressal where, a specific legal injury has been caused to a determinate class or group of persons when such a class or person are unable to come to the court because of poverty, disability or a socially or economically disadvantageous position. In the instant case, the court upheld the right of lawyers to be heard on matters affecting the judiciary. By this judgement Public Interest Litigation became a potent weapon for the enforcement of "public duties" where executive inaction or misdeed resulted in public inquiry.

355 AIR 1982 SC 149

While expanding the scope of the "Locus Standi", Bhagwathi, J. expressed a note of caution and observed

> *But we must be careful to see that the member of the public, who approaches the court in case of this kind, is acting bonafide and not for personal gain or private profit or political motivation or other consideration. The court must not allow its process to be abused by politicians and other.*

Hence the court was aware that this liberal rule of Locus Standi might be misused by vested interests. As a result of this broad view of Locus Standi permitting Public Interest Litigation or Social Action Litigation, the Supreme Court of India has considerably widened the scope of Article 32 of the Constitution. The Supreme Court has jurisdiction to give an appropriate remedy to the aggrieved persons in various situations. Protection of pavement and slum dwellers of Bombay, improvement of conditions in jails, payment of Minimum Wages, protection against Atrocities on Women, Bihar blinding case, Flesh trade in protective home of Agra, Abolition of Bonded Labourers, Protection of Environment and Ecology are the instances where the court has issued appropriate writs, orders and direction on the basis of Public Interest Litigation.

The strategy of Public Interest Litigation has been evolved by this court with a view to bringing justice within the easy reach of the poor and disadvantaged sections of the community[356]. In *Peoples Union for Democratic Rights vs. Union of India*[357], the Supreme Court held that Public Interest Litigation is brought before the court not for purpose of enforcing the right of one individual against another as happened in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of Constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantageous position should not go unnoticed and unredressed.

---

356 Bihar Legal Support Society vs. Chief Justice of India (1986) 4 SCC 767

357 AIR 1982 SC 1473

In *Bandhu Mukti Morcha vs. Union of India*[358], the Apex Court held that the power of the Supreme Court under Article 32 includes the power to appoint Commission for making enquiry into facts relating to the violation of Fundamental Rights. The Apex Court further held that Public Interest Litigation through a letter should be permitted, but expressed the view that, in entertaining such petitions, the court must be cautious so that, it might not be abused. The court suggested that all such letters must be addressed to the entire court and not a particular judge and secondly it should be entertained only after proper verification of materials supplied by the petitioner. This is known as epistolary jurisdiction.

The advent of Public Interest Litigation is one of the key components of the approach of "Judicial Activism" that is attributed to the higher judiciary in India. The verdict of Bhagwati, J. in *M.C.Mehta vs. Union of India*[359], opened the doors of the Apex Court of India for the oppressed, the exploited and the down – trodden in the villages of India or in urban slums. The poor in India can seek enforcement of their Fundamental Rights from the Supreme Court by writing a letter to any judge of the court even without the support of an Affidavit. The court has brought legal aid to the door steps of millions of Indians which the executive has not been able to do, despite of spending lot of money on new legal aid schemes operating at the central and state level.

A study of the notable cases of the Supreme Court speak of the fact that the Indian judiciary has adopted strong sentiments in favour of Public Interest Litigation and the functioning of judiciary reveals that it has exercised its powers in the most creative manner and devised new strategies to ensure the protection of Human Rights to the people. The Supreme Court of India has used the strategy of Public Interest Litigations as an aid to enforce the rights of prisoners, workers, pensioners, victims of environmental pollution and others.

The Public Interest Litigation plays an important role in ensuring the Principle of Rule of Law by making the administration accountable

358 AIR 1984 SC 803

359 AIR 1987 SC 1087

to the people. The Supreme Court of India in *Narmada Bachao Andolan vs. Union of India*[360] held that Public Interest Litigation was an invention essentially to safeguard and protect the Human Rights of those people who were unable to protect themselves.

In the recent past Public Interest Litigation has acquired a new dimension. Apart from securing several non–justifiable socio–economic rights as guaranteed under the Fundamentals Rights, the Supreme Court has frequently resorted to a novel feature in the field of Human Rights jurisprudence, such as, compensatory jurisprudence, judicial law making with a view to secure justice to the down–trodden and also to the oppressed people. Public Interest Litigation is a weapon which has to be used with care and caution. The judiciary has to be extremely careful to see that whether it contains public interest or private vested interest. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The strategy of Public Interest Litigation should not be used for suspicious products of mischief. It should be aimed at the redressal of genuine public wrong or public injury and not publicity–oriented or founded on personal vendetta[361]. There have been in recent times, increasing instances of abuse of Public Interest Litigations. Therefore, there is a need to re–emphasize the parameters within which Public Interest Litigation can be resorted to by a petitioner and entertained by the court. It was essentially meant to protect basic Human Rights of week and disadvantaged. Public Interest Litigation, however, not need been moved under disguise of some ulterior motive or some overt purpose. The courts are now imposing moderate to heavy costs in cases of misuse of Public Interest Litigation which should be an eye opener for non–serious Public Interest Litigation mover.

The greatest contribution of Public Interest Litigation has been to enhance the accountability of the governments towards the Human Rights of the poor. Public Interest Litigation interrogates power and makes the courts as peoples court. The Supreme Court of India in a number of important decisions has significantly expanded the scope and

---

360 (2000) 4 SCJ 261

361 Ashok Kumar Pandey vs. State of West Bengal (2004) 3 SCC 349

frontier of Human Rights. Public interest matters today focus more and more on the interests of the Indian middle classes rather than on the oppressed classes. PIL seeking order to ban Quran[362] transmission of T.V. Serials[363], implementation of Consumer Protection Law,[364] removal of corrupt ministers[365], invalidation of irregular allotment of petrol pumps and government accommodation,[366] prosecution of politicians and bureaucrats for accepting bribes and Kickbacks through Hawala transactions[367], better service conditions of the members of lower judiciary[368] or quashing selection of university teachers[19] are some blatant examples espousing middle class interests. Some initial successes of PIL, however cannot certify that it shall always remain an effective instrument for protection of Human Rights. The future of PIL will depend upon who uses it and for whom

Environmental Protection and Human Rights

The protection and improvement of human environment has become a world wide concern. A clean and healthy environment is the basic need for the existence of life. The ecological imbalance contributes to the environmental hazards like acid rains, noise pollution, air pollution, water pollution. The depletion of ozone layer causes skin cancer, cataracts, damage to body‟s immunity system, mutation, loss of productivity. Environmental law is an instrument to protect and improve the environment and to control or prevent any acts or omissions likely to pollute the environment. There are hundreds of environmental laws in India, directly or indirectly dealing with the subject of environment. In the world, the Constitution of India is the first which made provisions for

362 Chandanmal Chopra VS. State of West Bengal AIR 1986 Cal 104

363 Oddessey Lok Vidyayana Sanghatan vs. Union of India (1988) ISCC 168

364 Common Cause vs. union of India (1996) 2 SCC 752

365 D.Satyanarayana vs. N.T.Rama Rao AIR 1988 AP 144

366 Shiv Sagar Tiwari vs. Union of India (1996) 2 SCC 558

367 Vineet Narayan vs. Union of India (1996) 2 SCC 199

368 All India Judges Association vs. Union of India AIR 1992 SC 165

the protection of environment viz Articles 21, 47, 48-A, 51 (A)(g) along with sections 227 and 278 of Indian Penal Code, sections 133 and 134 of the code of Criminal Procedure. These provisions contain clear mandate for the State as well as, the citizens to protect and improve the environment. Though, India was a party to the Stockholm declaration, had initiated legislative measures for the prevention of the pollution of environment by enacting specific legislation, it incorporated the Stockholm principles by an amendment to the Constitutions of India in 1976[369]. It is to be noted that these provisions though not enforceable in court of law, directs the state to enact legislations and frame policies towards the promotion and protection of Environment. Thus, the state is under a moral duty to take measures to prevent ecological imbalances resulting from modern industrialization. The Constitution has also cast a duty on the citizen to take steps for maintaining ecological balance. In accordance with the mandate of the Stockholm Declaration, the government of India enacted the Water (Prevention and Control of Pollution) Act, 1974 Air (Prevention and Control) Act 1981, and Environmental (Protection) Act, 1986, Public liability Insurance Act, 1991, National Environmental Tribunal Act, 1995 and National Environment Appellate Authority Act, 1997.

Judicial Contribution to Protection of Environment

The Apex judiciary in India has been demonstrating its commitment for the protection of environment from time to time and it has given prime importance to the environmental promotion and protection through a series of trend setting judgments. The Supreme Court is also trying to bring an awareness of the massive problems of pollution and filling the gap between the legislation and its implementation by using its extraordinary powers. The higher Judiciary in India delivered many environmental conscious judgments. By constructive interpretation of various provisions of the law, the Supreme Court in particular has supplemented and strengthened the environmental law. The cases relating to each and every aspect of environment have come up before

[369] It incorporated Art. 48A & 51A (g) in the Constitution by 42nd Constitution (Amendment) Act. 1976.

the Supreme Court of India. The court has relaxed rigid and purely technical rules in admitting many cases involving the protection of the environment. The Supreme Court has played an activist and creative role in protecting the environment. Most of the actions in the environmental cases are brought under Articles 32 and 226 of the Constitution. The environmental litigations are generally based on the notions of violation of Fundamental Rights. The Supreme Court widened the horizons of environmental protection. It is a new innovation of Indian judiciary based on Judicial Activism. The Apex judiciary made it clear that Public Interest Litigation is maintainable for ensuring pollution free water and air which is involved in right to live under Article 21 of the Constitution. The higher judiciary has always endeavoured to strike a balance between conservation of environment on one hand and the economic development on the other hand. The adverse effect of industrialisation on human life has caught the attention of Indian judiciary and it is perhaps with this view, in mind it has shown deep concern for prevention of pollution of environment and asked the authorities concerned to take immediate necessary steps to safeguard the society against the ill-effects of industrialization[370].

The expansive and creative judicial interpretation of the word "life" in Article 21 has lead to the salutary development of an environmental jurisprudence in India. The Right to Life is a Fundamental Right under Article 21 and since the Right to Life connotes "quality of life" a person has a right to the enjoyment of pollution free water and air to enjoy life fully. According to many environmentalists and jurists "The latest and most encouraging of all developments in India is the "Right to a clean and wholesome environment" and the "Right to clean air and water". These rights have been included in the Right to Life under Article 21 of the Constitution. The boundaries of the Fundamental Right to life and Personal Liberty guaranteed in Article 21 were expanded elevating it, to a position of brooding omnipresence and converting it into a sanctuary of human values for more environmental protection.

370 Swamy N. Maheswara, Text book on Environmenta l Law , Asia Law House, Hyderabad.

In *Ratlam Municipality vs. Vardhichand*[371] case, the Supreme Court for the first time treated an environmental problem differently from that of an ordinary Tort or public nuisance. In the instant cases the Apex Court compelled the M.P. Municipality to provide sanitation and drainage despite the budgetary constraints, thereby enabling the "poor to live with dignity". The Supreme Court expanded the principle of "Locus Standi" in environmental cases and observed that environment related issues must be considered in a different perspective. This development in judicial delivery system brought a new dimension and is considered as a silent "legal revolution" and it has cast away all the shackles of technical rules of procedure and encouraged the litigation from public spirited persons. The Court not only complemented petitioners who filed environment protection litigation but also awarded money to the petitioners. This development has paved the way for Social Interest Litigation, Class Action Litigation and Common Cause Litigation and so on. The court made it clear and stated that the dynamics of the judicial process had a new enforcement dimension.

The Supreme Court gave an expansive meaning to right to environment in *Rural Litigation and Entitlement Kendra, Deharadun vs. State of UP*[372]. In the instant case, the representatives of the rural litigation and entitlement Kendra, Dehradun wrote a letter to the Supreme Court alleging that the illegal limestone quarries in the Mussore – Dehraddun region was devastating the fragile ecosystem in the area. The court treated the letter as a writ petition under Article 32 of the Constitution. In the instant case, the court while presupposing the violation of Fundamental Right, ordered the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety and hazards in them. The court stated:

> *The right of the people to live in healthy environment with minimum disturbance of ecological balance and without avoidable hazard to them and to their cattle, house and agriculture, land and pollution of air, water and environment.*

371 AIR 1980 SC 1623

372 (1986) 2 SCC 431

In *Govind Singh vs. Shanthi Swarup*[373] the Supreme Court has taken microscopic view on the contours of the law of public nuisance. In the instant case the Supreme Court held that the effect of running bakery was injurious to the people, as it was polluting the environment by emitting smoke from chimney and ordered the closure of Bakery. The court said that "in a matter of this nature what is involved is not merely the right of a private individual but the health, safety and convenience of the public at large".

In *M.C. Mehta vs. Union of India*[374], the Supreme Court observed "The Precautionary Principle" and "polluter pays Principle" have been accepted as part of the law of the land". In this case, a Public Interest Litigation was filed alleging that due to environmental pollution, there is degradation of the Taj Mahal, a monument of International reputation. According to the opinion of the expert committees, the use of coke/coal by the industries situated within the Taj Trapezium Zone (TTZ) were emitting pollution and causing damage to the Taj Mahal, as also people living in that area. In the instant case the court ordered the re-location of polluting industries.

In *Consumer Education and Research Centre vs. Union of India*[375] the Supreme Court has delivered a historic judgment and held that the right to health and medical care is a Fundamental Right under Article 21 of the Constitution, as it is essential for making the life of the workmen meaningful and purposeful with dignity of persons. In *M.C. Mehta (II) vs. Union of India*[376] the Supreme Court directed all the Municipalities located on the banks of the river Ganga to take preventive measures against water pollution. The Court held that the Municipality was primarily responsible for the pollution in the river and was not only obliged but also bound to take steps to decrease, as well as, control the pollution.

---

373 AIR 1979 SC 143

374 AIR 1997 SC 734

375 1995) 3 SCC 42

376 (1998) 1 SCC 471

The Supreme Court in *M.C. Mehta vs. Union of India* had given direction to the Delhi city authorities to take effective steps for streamlining vehicular pollution in the city. The order of the Supreme Court prohibiting the use of twenty years old vehicles in the city roads of Delhi and its implementation is a welcome step in prevention of the vehicular pollution, avoiding the accident and protecting health of the people of Delhi.

While treading the path of judicial innovation, the Supreme Court has invented an impressive range of concepts and principles. The principles of Strict and Absolute liability, the principle of Sustainable Development, the Polluter Pays principles, the Precautionary principle and the Public Trust doctrine have thus found firm footing in Indian Jurisprudence.

The Supreme Court has firmly held the view that law should not remain static and that it has to evolve to meet the changes arising out of new situations. Law has to grow in order to satisfy the needs of the fast changing society and to keep abreast with the economic development taking place in the country. Finding the rule of strict liability as laid down in *Rylands vs. Fletcher*[377] to be unsuitable for dealing with enterprises engaged in hazardous or inherently dangerous activities in the country, the Supreme Court unanimously held in *M.C Mehta and other vs. Shriram Food and Fertilizers industries and Union of India*[378] case that "where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate to all those who are effected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of Strict Liability under the rule in *Rylands vs. Fletcher".*

Thus, the Apex court, by departing from the rule of strict liability as laid down in *Ryland vs. Fletcher*, took an epoch-making decision having

377 (1886) LR 3 HL 330

378 AIR 1987 SC 965

wide ramifications. It is to be noted that this judgment opened a new frontier in the Indian jurisprudence by a new concept of Absolute liability standard, which is not subject to any exception, for industries engaged in hazard activities.

In series of path-breaking judgements towards the end of 1996, the Supreme Court incorporated some of the important environmental norms notably principle of sustainable development, the polluter-pays principle and the precautionary principle as part of the land. While rejecting the old notion that development and environmental protection cannot go together, the Apex Court held the view that sustainable development has now come to be accepted as "a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems". The pollution has to commensurate with the carrying capacity of our ecosystem. Thus, the court further held that the polluter-pays principle and the pre cautionary principle are essential features of sustainable development[379].

It is to be noted that the practice adopted so far by the Supreme Court and the High Courts in Judicial Review of complex issues relating to the protection of Environment has been conspicuous. Before taking a decision they used to refer the matters to professional and technical bodies or commissions for advice. In *A.P Pollution Control Board vs. Prof M.V. Naidu (Retd.,) and others*[380], the Supreme Court held that monitoring of such investigation process may also be difficult, Formulation of alternative procedure, expeditious, scientific and adequate is necessary and the court thought that "National Environmental Appellate Authority (NEAA) with adequate combination of both Judicial and Technical expertise is the appropriate authority to go into the question in the instant case.

The National Environmental Appellate Authority is the creature of the statute. The question is whether the statutory limitation can tie the hands of the Supreme Court. The jurisdiction is confined to hearing appeals filed by a person aggrieved by an order of environmental

379 Vellore Citizens Welfare Forum vs Union of India (1996) 5 SCC 650

380 AIR 1999 SC 812

clearance. The court relied on *Paramjith Kaur vs. State of Punjab case*[381] wherein though barred by limitation under the law, the National Human Rights Commission could be directed under Article 32 to probe into Human Rights Violations alleged to have occurred long before. The powers of the Supreme Court flow from the concept of Absolute liability standard, which is not subject to any exception, for industries engaged in hazard activities. Thus, the NHRC can act Sui generis, free from, any conditions circumscribed by the statute that created the commission. The emerging environmental Jurisprudence should take all aspects into consideration in order to render Justice and ensure sustainable development. For this purpose, the court can refer to scientific and technical aspects for investigation and opinion by such expert bodies as the National Environmental Appellate Authority whose investigation, analyses of facts and opinion, on objections raised by parties, could give adequate help to the Supreme Court or the High Courts for adjudication.

It is pertinent to mention that the right to access to drinking water is fundamental to life and there is a duty on the State under Article 21 to provide clean Drinking Water to its Citizens. In *APPCB vs. M.V. Naidu*[382], the court ruled that "Drinking water is of Primary importance in any country. In fact India is a partly to the resolution of the UNO passed during the United Nations water conference in 1977 as "All people", whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of quality equal to their basic needs". The court observed that "water is the basic need for the survival of human beings and is part of the Right to Life and Human Rights as enshrined in Article 21 of the Constitution of India.

From the foregoing decisions, it is clear that the Supreme Court has made significant contribution in giving fill up to the rights of the citizen to a hygienic environment but the exercise of their discretionary powers in environmental matters is yet to take a concrete form. The courts have time and again faced the difficulties in respect of investigative

381 AIR 1999 SC 430

382 2001 (2) SCC 62.

machinery required for the citizen‟s suits in environmental matters. To overcome this, the courts have resorted to appointing distinguished persons as experts or commissions to investigate and report to it. It is also suggested that the environmental courts on a regional basis, with one professional judge and two experts drawn from Ecological Sciences Research Group, should be setup.

It is to be noted that the right to environment is a comprehensive right like any other basic right at both National and International levels. The Supreme Court has interpreted the various Constitutional and legal provisions relating to environment in an appropriate direction by promoting ecological balance and sustainable development. The judiciary reasserted the right to pollution free environment as an integral part of the Right to Life under Article 21 asserting that Human Rights are to be respected. The Supreme Court has during the course of various decisions emphasized that the protection of environment is a Constitutional objective. The growing menace of environmental pollution is a formidable challenge to the human race since it affects the lives of billions of people across the world[383].

Conclusion

To conclude, a review of the decisions of the Indian Judiciary regarding the protection of Human Rights indicates that the judiciary has been playing a role of saviour in situations where the executive and legislature have failed to address the problems of the people. The Supreme Court has come forward to take corrective measures and provide necessary directions to the executive and legislature. From the perusal of the above contribution it is evident that the Indian Judiciary has been very sensitive and alive to the protection of the Human Rights of the people. It has, through judicial activism forged new tools and devised new remedies for the purpose of vindicating the most precious of the precious Human Right to Life and Personal Liberty.

Insha Hamid*

383 Dr.SC.Tripathi, Environmental Law ,, Central Law Publications 2008, 3rd Ed.

* Research Scholar, Department of Law University of Delhi.

Shreya Singhal and Ors. v. Union of India (2015): The Breaking of a New Dawn in India's Free Speech History

Abstract

India's free speech law witnessed a sea change when its Supreme Court delivered judgement in the much awaited Shreya Singhal and Ors. v. Union of India (March, 2015) which centred around the challenge to Section 66A of the Information Technology Act, 2000 that criminalised "grossly offensive," "menacing" and "annoying or inconvenient speech" on the internet. Therefore, obviating with the harshness and notoriety of 66A, and, eventually, paving way for online freedom in India. Remember, 66A gave sweeping and unfettered powers to the police and judges of the country, leading to widespread arrests of India's Internet users for even the mildest of speech. The judgement is momentous in that it not only struck down a speech-restricting law as unconstitutional but let's loose a newer jurisprudence of India's free speech law. The judgement creatively breaks open a newer series of grounds for invalidating a speech-restricting law. Justice Rohinton Nariman, who wrote the judgement on behalf of himself and Justice G. Chelameshwar, has done it beautifully and unassumingly. This paper traverses through this wonderfully crafted judgement and discusses its pros and cons in a detailed manner as such to lay the floor for further discussion.

Keywords: *Free speech, Information technology, Internet, grossly offensive, chilling effect, website blocking.*

Introduction

Never before has the Supreme Court of India, in its history, read down a speech-restricting law, in its entirety, as a derogation of the paramount free speech guarantee. However, in *Shreya*

Singhal and Ors. v. Union of India,[384](Shreya Singhal, hereinafter) the Supreme Court of India, on 24 March, 2015, delivered a verdict, striking down, in its entirety, the controversial, speech-curtailing and much abused Section 66A[385] (66A, hereinafter) of the Information Technology Act, 2000 (the Act, hereinafter) that penalised "grossly offensive," "menacing" and "annoying or inconvenient speech" on the internet. Remember, however, the Section was not originally there in the IT Act *but was brought into force by way of an amendment Act in 2009.*[386]The genealogy of this Section may be traced back to Section 10(2)(a) of the U.K. Post Office (Amendment) Act, 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene, or menacing character. Latter, this Section was substantially reproduced by Section 66 of the UK Post Office Act, 1953.

The provision, no sooner, became controversial and earned infamy owing to its abuse and misuse by the Government to curb free speech under the pretext of law. The prime example of the

---

384 Writ Petition (Criminal) No.167 OF 2012, judgement delivered on March 24, 2015.

385 Section 66A of IT Act, 2000. The section reads as: Any person who sends, by means of a computer resource or a communication device,—
a. any information that is grossly offensive or has menacing character; or
b. any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,
c. any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.
Explanation.— For the purpose of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message.

386 Amendment Act, 2008 (effective from *27.10.2009).*

misuse is the arrest, by Mumbai police in November 2012, of two girls who had expressed their displeasure about a bandh (strike) call in Mumbai in wake of the Shiv Sena Chief Bal Thackeray's death. There is a plethora of other instances before us that establish the misuse of 66A. Some of them are – the arrest, in 2014, of DevuChodankar in Goa and Syed Waqar in Karnatakafor making posts about PM Narendra Modi, the arrest of a Puducherry man for criticizing former Indian Finance Minister P. Chidambaram's son. There has been, therefore, a systematic abuse of 66A - mostly by way of arrests by the Police for even the mildest of online speech. Interestingly, a similar pattern of abuse of the provision was at play in the state of Jammu & Kashmir.

It's in this backdrop, in a writ petition filed in 2012, a law student Shreya Singhal took 66A to challenge on grounds that it, inter alia, violates the fundamental right to speech and expression guaranteed under Article 19(1)(a) of the Constitution of India, therefore should be declared unconstitutional. There were more petitions filed before the Court by different petitioners against the same provision on almost the same grounds. Alongside, the petitions also challenged other provisions of the Act including Section 69A (website blocking) and Section 79 (intermediary liability). However, in effect, the challenge centredon 66A. The Court, after clubbing the petitions together, struck down 66A as unconstitutional and violative of free speech. The judgement of the court, which was delivered by Justices Rohinton F. Nariman and G. Chelameshwar, is landmark and path-breaking for it took the time to deal with the issue with an even more academic flavour. The court gave quite newer interpretations to the constitutional free speech guarantee in India and helped usher in a new free speech jurisprudence in India's legal history.

The judgement is significant on two counts. One, as said earlier, it read down a speech-restricting law in its entirety. Second, it lays down a series of new grounds for reading down of 66A like "proximity between restricted speech and reasonability under Article 19 (2)," "vagueness,""over breadth" and "chilling

effect," thereby evolving a new free speech jurisprudence in the Indian constitutional realm. In this purpose, I shall discuss each of these separate grounds in a detailed manner and how they contribute to the evolving of new jurisprudence in India's free speech history.

Metamorphosis of "tendency"into "proximity"

It is well settled that in India, by virtue of Article 19 (2) of the Constitution, the Parliament can make a law imposing "reasonable restrictions" upon the freedom of speech and expression in the interests of eight specifically carved out categories like defamation, incitement to an offence, decency or morality and public order. However, throughout history, the question that what it takes to impose a "reasonable restriction" "in the interests of" "public order" has remained contested before the country's Apex Court. Yet, most of the debate, before the Supreme Court, in this case, has centred around the causal relationship between restricted speech and public disorder. Since, the relationship between the two has been the most contested ever since.

It is significant to mention that, in its formative years, the Supreme Court looked at this relationship in a loose and wider sense believing that even if a speech has a "tendency" to disturb "public order," the law placing restraint can be upheld. For instance, in RamjiLal Modi v. State of U.P.,[387] *it had upheld Section 295A of the Indian Penal Code (insulting religious feelings) on the ground that malicious insult to religious sentiments had a "calculated tendency" to disrupt public order. Again, in KedarNath Singh v. State of Bihar,*[388] *it held that insofar as the law on sedition criminalised speech that had a "tendency" towards public disorder, it was constitutional.*

Almost immediately, however, there was a shift in the Court's approach, which later gained momentum over the years. For

---

387 1957 AIR 620.

388 1962 AIR 955.

instance in Ram Manohar Lohia v. Stateof Bihar and others,[389]*the Court read down a law that penalised instigating people not to pay their taxes, on the ground that there needed to be a close and proximate relationship between the restriction on speech and the goal of public order. This was reinforced, by the Court, in subsequent cases, say, for example, Rangarajan v. P. Jagjivan Ram*[390] in which the Court articulated that the *relationship between speech and public disorder must be like that of a "spark in a powder keg."*

*Coming to Shreya Singhal, the Court precisely followed the same reasoning while striking down 66Aas unconstitutional. The C*ourt unambiguously mandated that were speech be limited on grounds of public order, the law imposing restrictions must withstand a "test of clear and present danger." Which is, the court explained, any information disseminated must be proximately linked to public disorder as such to restrict the speech. It is to be noted here that the analysis of the Court is precisely in tune with what has been applied by the American courts[391] while expounding free speech guarantee there. What's more fascinating, in all of this, is that t*he Court talks about the intimate relationship between "restricted speech" and "public disorder" by drawing a distinction between "advocacy" and "incitement". Justice Nariman emphatically observes:*

"*Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder…"*

---

389 1966 AIR 740.

390 1989 SCC (2) 574.

391 Justice Nariman remarks, in the judgement, that as a matter of interpretation, the American and Indian Constitution are not as dissimilar on the guarantee of free speech rights, as is popularly believed, and, therefore, as a corollary, American judgments on free speech laws have a great persuasive value.

Therefore, according to Justice Nariman, discussing something or even advocating it is absolutely protected by the wording of Article 19 (1) (a). That is, in simpler words, mere communicative content of a message is not enough to criminalise that message. A speech canbe restricted only when such discussion or advocacy turns into incitement, according to the judgement. There is, thus, a requirement of immediacy between speech and action for Article 19 (2) to kick in.

The Court's "tendency test," therefore, stands metamorphosed into the newer "proximity" test; predictably ushering into a modern free speech jurisprudence in India.

Vagueness

One more fascinating thing the Court, for the very first time, did in Shreya Singhal's case is that it read down a speech – restricting law on the ground of "vagueness." However, for knowing when a statute or a part thereof is vague, it is important to quote American Supreme Court, in Grayned v. Rockford,[392] *wherein it defined a* vague statute as "*one which ensured that persons of ordinary intelligence… have no reasonable opportunity to know what is prohibited*." Following this American precedent, the Supreme Court moved a step further, in *Kartar Singh v. State of Punjab*[393]to expound the implications of vagueness in a provision of law with these following words:

"It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values… laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with

---

392 408 U. S. 104, 108–109 (1972).

393 (1994) 3 SCC 569.

the attendant dangers of arbitrary and discriminatory application."

Interestingly, the pattern of abuse in Section 66A was precisely on the lines as drawn in *Kartar Singh's* case. That is, the people didn't have any fair occasion to know what the law actually proscribes. Plus, the provision left too much of the discretion to the state machinery inorder to enforce the vagueness of the law. Now, though, we have instances in the form of *K A Abbas*[394] and *Baldeo Prasad*[395] wherein the Supreme Court could be seen incorporating the principle of "vagueness" for striking down a law as unconstitutional.

However, as pointed out above, it was for the first time that the Court struck down a "speech-restricting law" on the grounds of vagueness. Significantly, in paragraph 55, the Court observes, *"The Constitution doesn't permit a legislature to cast a net large enough to catch all possible offenders and leave it to the Court to step in and say who could be rightfully detained and who should be set at liberty."*Then, in paragraph 69, the Court, while quoting many American and Indian precedents to carve out a case for vagueness, Justice Nariman, emphatically observes, "j*udged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in 66A are completely open-ended and undefined*."

Over-breadth and the Chilling Effect

For the first time, in *Chintaman Rao v. State Madhya Pradesh*,[396] the Supreme Court got an opportunity to strike down a statute for being over-broad. What is "Over-breadth?" In the same case, the Court said, "a statute is over-broad if the language

---

394 *K.A. Abbas v. The Union of India & Another*, 1971 AIR 481**.** In this case, the Supreme Court, though, enunciated that a law could be struck down on the grounds of "vagueness," didn't actually do so.

395 *State of Madhya Pradesh v. Baldeo Prasad,*1961 AIR 293**.** In this case, the law that "criminalised goondas but didn't define who a goonda was" was struck down by the Supreme Court.

396 [1950] S.C.R. 759.

employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. And, so long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void."

Besides, in *State of Madras v. V.G. Row,*[397] the Court stated that if a statute is over-broad,it directly touches upon the requirement of reasonableness under Article 19(2). The Court, in this case, held that a "reasonable restriction" under Article 19(2) to (6) would have to satisfy the requirements of proportionality, that is, in the Court's own words, "*the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict*."

Therefore, it is arguable that if a statute prohibits conduct-much wider than what is permitted - under Article 19(2) on the ground that there is some connection between the two, there is good reason to argue that the restriction is disproportionate. However, despite the invocation of "over-breadth" as a ground for striking down a law in *Chintaman Rao* and *V.G. Row*, over-breadth as a *constitutional concept* had not still acquired a foothold in Indian constitutional jurisprudence. That is, in fact, where again, Justice Nariman's judgment breaks a new ground by *expressly invoking" over-breadth" as a ground for striking down a speech-restricting statute. He observes in*paragraph 83:

"*Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech.*"

And, then, in paragraph 86:

"[66A's restrictions] *fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms."*

---

397 [1952] S.C.R. 597.

The Court's breaking open of the newer grounds for reading down a speech-restricting law as unconstitutional doesn't simply end here. Justice Nariman establishes a crucial link between "over breadth" and the "*chilling effect*." The chilling effect, according to him, refers to "a situation where, faced with uncertain, speech-restricting statutes, which blur the line between what is permitted and what is proscribed, citizens are likely to self-censor, in order to be definitively safe."

In the words of Justice Brennan, in *New York Times v. Sullivan*,[398] citizens will "*tend to make only statements which steer far wider of the unlawful zone… thus dampen*[ing] *the vigour and limit*[ing] *the variety of public debate.*" That is, the self-censorship will extend even to entirely legitimate speech, and will ruin the public discourse,that is at the heart of free speech.

However, it is significant to note that although there have been casual and vague references to the "chilling effect" in the past as well in India'slegal history, the instant judgment is the first that *uses* the concept to arrive at a positive *legal outcome.* In paragraph 90, Justice Nariman observes:

"We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth."

Article 14 vis-a-vis The differences in medium

Other than the grounds discussed above, Section 66A faced the challenge on yet another important ground which surrounded Article 14 of the Constitution. To be precise, the government contended that the internet is a very different medium from print or cinema, and that consequently, the government should be allowed greater leeway to regulate it. In paragraph 27, Justice Nariman lists some of the facets of the government's contention:

---

398 [376 US 254 : 11 L Ed 2d 686 (1964)].

that the internet has a much greater (global) reach, it reaches both literate and illiterate people, even cinema has pre-censorship rules (but the internet doesn't), rumours can spread to "trillions" of people, there is much greater scope for invasion of privacy, the internet provides much greater shelter to anonymity, there are no internal regulatory norms, and that the spread is much more rapid.

The petitioners, however, contended that since S. 66A lacked the kinds of procedural and other safeguards present for the regulation of print media, there was an Article 14 violation of equality. In other words, according to them, a principle of equivalence must apply across media of communication.

After a careful perusal, Justice Nariman rejects both the arguments, holding that the internet is indeed a medium with some unique qualities, and that it is possible that there might be certain offences that can *only* take place online. In paragraph 28, he notes that the government is entitled to draft narrowly-drawn provisions that specifically speak to those offences such as website blocking. Yet, however, at the very same time in the very same paragraph, Justice Nariman cautions:

"[the differential nature of the internet would not] *relax the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a Section creating a new offence, such as Section 69A, relatable only to speech over the internet, yet the validity of such a law will have to be tested on the touchstone of the tests already indicated above."*

Website Blocking and Transparency Concerns

Therefore, as, Justice Nariman said, the government is entitled to draft narrowly-drawn provisions that specifically speak to those offences, it upheld the constitutionality of Section 69A[399] of the IT

[399] Section 69A permits the Central government or any officer authorised in this regard, to direct an intermediary to block access to the public to any website on the ground that it is 'necessary or expedient' to do so in the interest of (i) the sovereignty and integrity of India, (ii) defence of India, (iii) security of the State, (iv) friendly relations with foreign states, (v)

Act that defines the rules and procedure for the government to block websites based on a set of legislatively provided grounds. Flipping the pages of the judgement, it appears that the Court has failed to invoke the principle of transparency in judging Section 69A. How? Section 69A(1) states that "for reasons to be recorded in writing", the government can direct the concerned agency to block a certain website content. However, Rule 16 of the blocking rules of 2009 states that "strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof." Therefore, as of now, it is only the intermediaries, like Google and Facebook (and the content-creator at times) who will be aware of these blocks. To quote the judges themselves in the very instant case that in the marketplace of ideas, the recipients of information have as much of a right to know as the speakers and creators of the content have a right to speak. Section 69A and the rules formulated therein, deny the recipients of information any knowledge of these blocks and hence are prevented from appealing such decisions as well.

Considering the vast and deep analysis of the free speech law in India in the instant case, which also happened for the first time in India's free speech history, the judgement in issue is phenomenal in ushering a newer regime of free speech jurisprudence in India. The notoriety of 66A is no longer there on the statute book. The judgement is a step in the direction toward Justice Oliver Wendell Holmes's conception of "marketplace of ideas" as beautifully expressed in his dissent in *Abrams v. United States*.[400] That is, according to Holmes, "in the marketplace of ideas, good ideas will displace bad ideas. Wrong opinions will yield to more rational and factual ones." However, to avoid the trouble that this idea apparently carries with itself, Justice Nariman makes it emphatically clear that the Internet is a dominant

---

public order or (vi) preventing incitement to a cognizable offence relating to the above.

400 250 U. S. 616 (1919).

platform for the "marketplace of ideas" and the role of free speech laws is to regulate the efficiency of this market.

The judgement is also monumental on several other important counts like - it creates a series of newer grounds of interpretation for invalidating a law as unconstitutional. This becomes more interesting since these pertain to free speech guarantee in India. After the judgement in *Shreya Singhal*, Internet users in India have virtually won freedom of a new kind. They will exercise their freedom of speech on the Internet without any fear of arrests. This freedom will certainly give rise to a liberal and pluralistic society compatible with all the standards of equality and liberty. While the judgement is, by and large, empowering and well founded, some questions still remain there to be asked. One such question is with respect to the transparency issues vis–a–vis the website blocking powers of Government as stated above.

The judgement, therefore, needs to be celebrated with all fervour for it returns back the spirit to India's free speech law.

Unanza Gulzar*

* Unanza Gulzar teaches at Department of Law, School of Legal Studies, Central University of Kashmir, and Srinagar. [unanzagulzar@gmail.com]