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Contents

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Doctrine of Judicial Review and Decisions of Administrative Tribunals

SarbjitKaur[*]

In the post-Independence era, there has been a substantial growth of tribunals not only numerically but also from the point of various specialised areas like industrial disputes, taxation, motor vehicle accidents, customs and excise, consumer protection, environmental matters and, last but not the least, service matter.Section 46 of the Constitution (Forty-second Amendment) Act, 1976 has made major changes in the settlement of disputes relating to service matters, revenue, land reforms,*etc.*, by the introduction of Articles 323A and 323B. The avowed purpose of the amendment was to reduce the mounting arrears in the High Courts and to secure speedy disposal of service and certain other matters of special importance in the context of socio-economic development.

Article 323A (2)(d) of the Constitution empowers Parliament to totally exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints relating to service matters. Article 323B (3)(d) is in *parimateria*with Article 323A (2)(d) with respect to foreign exchange, importation/exportation matters; industrial disputes; land reforms matters; elections to the Legislature; etc. Similarly, Section 28 of the Administrative Tribunals Act, 1985,when originally enacted, provided for exclusion of jurisdiction of all courts except the Supreme Court under Article 136 of the Constitution with respect to service matters. The provision was amended in 1986, to save the jurisdiction of the Supreme Court under Article 32 of the Constitution as well. In India, the doctrine of judicial review is considered to be an important and integral part of the basic structure and framework of the Constitution that cannot be taken away even by the amendment of the Constitution under Article 368. In this light, the present paper is focussed on the validity of exclusion of power of judicial review of the High Courts over decisions of administrative tribunals. An attempt has been made to know the rationale behind exclusion of jurisdiction of the High Courts and to evaluate role of tribunals- whether substitutional or supplemental to the High Courts.

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Meaning and Need of Administrative Tribunals

A significant aspect of the expansion of functions of the administration in the modern era is the conferment of power of adjudication on the administrative authorities. Normally, the function of adjudicating upon disputes between two individuals or between the State and an individual is vested in the courts. Side by side with the courts, innumerable administrative bodies have sprung up to carry on the function of adjudication in a variety of situations. This tendency or practice of vesting adjudicatory functions in persons, bodies or institutions outside the ordinary hierarchy of regular law courts is becoming increasingly pronounced with the passage of time not only in India but also in France, England, United States, and practically in every democratic country.

Need of Administrative Adjudication

The main cause for evolution of the system of adjudication outside the courts is extension in governmental operations, activities and responsibilities, because of the socio-economic changes that are taking place in the country. This has necessitated the development of the techniques of administrative adjudication, which may better respond to social needs and requirements than the elaborate and costly system of decisions through court-litigation.The courts are already faced with a large backlog cases, and further entrusting to them the task of adjudicating upon the many newly arising controversies as a result of the expansion of the operations of the State would have made matters worse. Moreover, the formality of atmosphere in a court is not always conducive to the quick disposal of the innumerable problems, which the modern administration generates. In many cases what is needed is an informality of atmosphere untrammelled by too elaborate and technical rules of procedure or evidence[1] which advantages are offered by the administrative adjudication.

Then, there is also the question of expertise. The individuals possessing special experience and training in particular field man the administrative adjudicatory bodies. A judge is a generalist, while many cases arising out of the modern administrative process need an expert knowledge of particular subjects to which these cases relate. An expert may be in a better position to adjudicate upon such matters than a generalist lawyer-judge in a regular court. Thus, technical problems or questions involving complicated accountancy or economic factors may have to be better left to be determined by specialised adjudicatory bodies than the judges of the courts who, by their training and approach, may not have enough expertise to deal with them.[2]

Another important reason for the new development is that while the courts are accustomed to deal with cases primarily according to law, exigencies of modern

[1] M.P. Jain & S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW180(4th ed. 1993).
[2] *Id.* at 181.

administration often make it incumbent that some types of controversies to be disposed of by applying law, not pure and simple, but considerations of policy as well, for example, what is in the "public interest", what is "expedient", or what is "reasonable". Such questions often arise and these have to be answered not only on the basis of law and fact but also by applying policy considerations - such factors as position of finance, position of foreign exchange, priorities and allocations between competing claims and the like. It is only adjudication outside the ordinary judicial system, which can take care of such matters.[3] The judges of the ordinary courts often tend to be too literal or technical in their interpretation of legislation and such an approach may not be suitable to most of the modern socio-economic legislation. All this leads to entrusting the function of adjudication of disputes under such legislation to bodies other than ordinary courts, which can have flexibility of approach.

These adjudicatory bodies have therefore, grown because of practical necessity to cope with certain problems of public concern.But at the same time while sponsoring the cause of administrative adjudication it is necessary to add a word of caution that administrative adjudicatory bodies must be kept within their legal bounds so as not to violate the principles of natural justice.[4] This will supply the essential minimum of fairness in administration and adjudication alike.

There are different types of adjudicatory bodies, which have multiplied in a piecemeal and haphazard manner, without any consistent pattern and system, in consequence of demands of the situations calling for solution of urgent and pressing problems. Various appellations are used to designate the adjudicatory bodies, *e.g.*, authority, commission, tribunal, court, *etc.* However, the most popular mode of adjudication is through tribunals. Intensive form of government is responsible for entrusting the administration with adjudicatory powers. For the exercise of this power, a tribunal is a very efficacious instrumentality, which from a functional point of view is somewhere between a court and the government department exercising adjudicatory power.

Meaning of the Word 'Tribunal'

The word 'Tribunal' has not been defined in the Constitution of India or in any other law. The dictionary meaning of the word 'tribunal' is 'seat of a judge' and if used in this sense, it is a wide expression, which includes within it 'court' also. But in administrative law, the term 'tribunal' is used in a special sense and refers to adjudicatory bodies outside the sphere of ordinary courts of the land with administrative or judicial functions. Under the Constitution, in Articles 136, 226

[3] *See* E.C.S. Wade & G. Godfrey Phillips, CONSTITUTIONAL LAW699 (1965). (Observing that modern government gives rise to many disputes which cannot appropriately be solved by applying objective legal principles or standards and depend ultimately on what is desirable in the public interest as a matter of social policy).
[4] V.G. Ramachandran, ADMINISTRATIVE LAW 632(2nd ed. 1984).

and 227, the terms 'court' and 'tribunal' have been used to mean two different things. A body in order to be designated as a 'tribunal' must be one which is administrative in character but is invested with judicial powers to adjudicate on questions of law or fact affecting the rights of citizens in a judicial manner. It may possess some but not all trappings of a court.

'Courts' and 'Tribunals'

Tribunals and courts have the following common features:

(a) In both tribunals as well as courts, there is *lis inter partes*, *i.e.*, there is dispute between the parties, which is to be presented before them. Both tribunals and courts have a formal structure independent of the department whose matters they adjudicate upon.
(b) Both are required to follow the minimum norms of procedural fairness known as the principles of natural justice.
(c) Both perform judicial function. Tribunals, like courts, have to hear both the parties, have to give findings of facts, ruling on law and decide the dispute according to law.

The main differences between tribunals and courts are as follows:

(a) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general.Tribunals areestablishedunder a statute to adjudicate upon the disputes arising under the said statute. It is a part of the executive branch of the State.
(b) A court is bound by the procedures prescribed by the Indian Evidence Act; the Code of Civil Procedure and Code of Criminal Procedure but a tribunal may not be so bound unless the relevant statute imposes such an obligation. Tribunals may be able to design and regulate their own procedures.
(c) Tribunals are expected to possess or are expected to acquire expertise in a field of adjudication. The courts on the other hand are generalists and deal with variety of matters.
(d) The courts are exclusively manned by judges. Unlike the courts, the tribunals consist of persons with judicial experience and those without such experience but who are experts in various spheres of life.

Salient Features of an Administrative Tribunal

Generally an administrative tribunal shall have the following characteristics:[5]

(1) An administrative tribunal is the creation of a statute and thus has statutory origin.
(2) It is established outside the court hierarchy by the executive in exercise, and in accordance with the statutory provisions. Thus it has statutory origin.

[5] *SeeReport of Frank Committee on Administrative Tribunals and Inquiries*, Cmnd. 218 (1957) (UK).

(3) It is an independent forum set up to adjudicate upon a given type of controversies between two adversaries: administration and citizen.
(4) It has some trappings of a court but not all.
(5) An administrative tribunal is entrusted with the judicial power of the State and thus, performs judicial and quasi-judicial functions, as distinguished from pure administrative or executive functions and is bound to act judicially.
(6) Even with regard to procedural matters, an administrative tribunal possesses powers of a civil court, *e.g.* to summon witnesses, to administer oath, to compel production of documents, to receive evidence on affidavits, *etc.*
(7) It acts with quick dispatch and drive exhibiting fresh initiative being free from technical rules of procedure and evidence.
(8) The decisions of most of the tribunals are in fact judicial rather than administrative inasmuch as they have to record findings of facts objectively and then to apply the law to them without regard to executive policy. Though the discretion is conferred on them, it is to be exercised objectively and judicially.
(9) It has been given power to punish for its contempt.
(10) It does not satisfy the institutional conditions of a law court, although it has the trappings of a court.
(11) It is an essential feature of an administrative tribunal that it makes its own decisions independently and is free from political influence. It is not subject to any administrative interference in discharge of its judicial or quasi-judicial functions. A decision taken under any sort of external influence would be invalid.[6]

Development of Administrative Tribunals in India

With the acceptance of welfare ideology, there was mushroom growth of public services and public servants. The need to have an independent machinery to try and adjudicate the complaints and grievances of civil servants expeditiously and without much expense to boost up their moral and also to stop their internal bickerings and fights was felt for long. The need of special service tribunals was also felt to relieve the courts, including High Courts and the Supreme Court from the burden of service litigation, which formed a substantial portion of pending litigation. Over time, several expert Committees and Commissions have analysed the intricacies involved and have made suggestions. As early as in 1958 this problem engaged the attention of the Law Commission of India which recommended for the establishment of tribunals consisting of Judicial and Administrative Members to decide service matters.[7] In 1969 Administrative Reform Commission also recommended for the establishment of Civil Service

[6] *Supra* note. 4 at 784.
[7] The Law Commission of India, *14th Report on Reform of Judicial Administration* (1958).

Tribunals both for the Central and State Civil Servants.[8] Central Government appointed a Committee[9] under the Chairmanship of Justice J.C. Shah of the Supreme Court in 1969, which also made similar recommendation. In 1975 Swaran Singh Committee again recommended for the setting up of service tribunals.[10] It recommended curtailment of certain powers of the High Courts and the Supreme Court in respect of administrative tribunals. The idea of setting up service tribunals also found favour with the Supreme Court in *Kamal KantiDutta and others* v. *Union of India*[11].

After analysing the situation existing in the High Courts at length, the Law Commission of India in its 124th Report[12] made specific recommendations towards the establishment of specialist tribunals. The Law commission noted the erstwhile international judicial trend, which pointed towards generalist courts yielding their place to specialist tribunals. Describing the pendency in the High Courts as "catastrophic, crises ridden, almost unmanageable, imposing... an immeasurable burden on the system", it recommended the trimming of the jurisdiction of the High Courts by setting up socialist courts/tribunals while simultaneously eliminating the jurisdiction of the High Courts.

The Constitution (Forty-second Amendment) Act, 1976, is the foundation stone of administrative tribunals for service matters, which inserted Part XIV-A in the Constitution. It comprises of two provisions, Article 323A and Article 323B empowering the Legislature to set up administrative tribunals. The object of this new part is to create a system of tribunals outside the system of courts. It provides for establishment of tribunals for adjudication or trial of disputes and complaints with respect toservice matters;foreign exchange, importation/exportation matters; industrial disputes; land reforms matters; elections to the Legislature; etc.

The Forty-second amendment also empowers the Legislature to exclude the jurisdiction of all courts with respect to all or any of the matters falling within the jurisdiction of these tribunals (including the supervisory jurisdiction of the High Courts under Article 227), except that of the Supreme Court under Article 136. Parliament, in pursuance of Article 323A enacted the Administrative Tribunals Act, 1985 for establishment of administrative service tribunals for deciding service disputes of civil servants of the Centre as well as the States.

To give practical shape to the provisions of the Act, the Central Administrative Tribunal (CAT), with its Principal Bench at New Delhi and Additional Benches at Allahabad, Bombay, Calcutta, Madras was established on November 1, 1985.

[8] *Report of Personnel Administration* (1969).
[9] High courts Arrears Committee of 1969 (Shah Committee).
[10] *See* P.G. Lele,*Central Administrative Tribunal- A Historical Perspective*, 1 SLJ (JOURNAL SECTION)1(1986).
[11] (1980) 4 S.C.C. 38: 1980 S.C.C. (L&S) 485: A.I.R. 1980 S.C. 2056.
[12] *Report on the High Court Arrears - A Fresh Look* (1988).

Subsequently, the Benches of the Central Administrative Tribunal were established at Jabalpur, Jodhpur, Cuttack, Ahmedabad, Bangalore, Patna Chandigarh, Guwahati, Hyderabad, Lucknow, Ernakulam and Jaipur. Apart from Central Administrative Tribunal, State Administrative Tribunals have also been established.

However, even before the tribunals had been established, several writ petitions had been filed in various High Courts as well as the Supreme Court challenging the constitutional validity of Article 323A of the Constitution and also the provisions of the 1985 Act. The principal violation complained of, was the exclusion of the jurisdiction of the Supreme Court under Article 32 and of that of the High Courts under Article 226 of the Constitution. Through its interim order dated October 31, 1985, reported as *S.P. Sampath Kumar & others* v. *Union of India*[13], the Supreme Court directed the carrying out of certain measures with a view to ensuring the functioning of the tribunal along constitutionally sound principles. Consequently, Section 28 was amended so as not to exclude the jurisdiction of the Supreme Court, the Industrial Tribunal or Labour Court under the Industrial Disputes Act, 1947, to take cognizance of the matters to be dealt with by the tribunal.

Scope and Extent of the Doctrine of Judicial Review

Judicial review implies a comprehensive judicial scrutiny into the actions of the legislative and the executive branches of the government, with the specific purpose of ensuring their conformity to the specified constitutional provisions. It is an important tool in the hands of the judiciary to keep control over functioning of other two branches of the government and ensure observance of rule of law by them. The concept of judicial review has different meanings and connotations under different democratic Constitutions. While its origin can be traced to UK which has no written Constitution, it has become firmly established in USA with a written Constitution and a federal polity. Judicial review under the Constitution of India is considered to be the very soul of the Constitution and the very heart of it without which the Constitution would be a nullity. It forms the basic structure and framework of the Constitution that cannot be taken away even by the amendment of the Constitution under Article 368.[14]

The power of judicial review of the Supreme Court in India is traceable to Article 13(1)[15] and 13(2)[16] and Article 32(1)[17] and of the High Court to Article 226[18] of the

[13] (1985) 4 S.C.C. 458.
[14] *SeeIndira Nehru Gandhi* v. *Raj Narain*, (1975) Supp S.C.C. 1; *Minerva Mills* v. *Union of India*, (1980) 3 S.C.C. 625; *Fertiliser Corporation Kamgar Union* v. *Union of India*, (1981) 1 S.C.C. 568; *KihotoHollohanv.Zachillhu and others*, (1992) Supp (2) S.C.C. 651.
[15] Art. 13(1) provides: All laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

Constitution.It is inferred from these provisions that the judicial review of the Supreme Court is confined to declaring unconstitutional and null and void the laws made by Parliament and State Legislatures if they take away or abridge any of the fundamental rights conferred by Part III. On the other hand, Article 226 confers on the High Courts the power to strike down laws contravening not only fundamental rights conferred by Part III but also "for any other purpose". Thus, the power of judicial review of the High Courtextends not only to Part III but also to the rest of the Constitution.

Article 32(3) provides:

> Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may be law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

It is clear from the opening words of Article 32(3) that while Parliament is competent to confer the power exercisable by the Supreme Court under Article 32(1) and (2) on "other courts", such conferment should be without prejudice to the power of the Supreme Court under these provisions. Hence, the power of the Supreme Court under Article 32(1) and (2) is sacrosanct and is indisputably an important part of basic structure of the Constitution, and therefore, cannot be excluded. The expression "the court" in Article 32(3) refers to a court other than the High Courts because the High Courts are expressly vested with this power under Article 226 of the Constitution. Hence, the expression "other courts" in Article 32(3) naturally refers to courts other than the High Courts. The expression might include the district courts or any other courts that might be established by the Parliament in the exercise of its power under Article 247[19]. It is to be noted here that the *"without prejudice"* clause is not contained in Article 226.

The basic principle is that the courts, while exercising power of judicial review, are concerned with the legality rather than the merits of an administrative order. The court would not interfere with, or probe into the merits of, the exercise of

[16] Art. 13(2) provides: The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void.

[17] Art. 32(1) provides: The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

[18] Art. 226 provides: Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto and certiorari*, or any one of them, for the enforcement of any of the rights conferred by Part III or for any other purpose.

[19] Under Article 247 of the Constitution, Parliament may by law provide for the establishment of any additional courts for better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in Union List.

discretion by an authority. The court would not go into the question whether the opinion formed by the concerned authority is right or wrong. The court does not substitute its own views for that of the concerned authority. *Judicial review is different from appeal*. In appeal, the court can go into the merits of the decision of the authority appealed against. The appellate authority can substitute its own decision on merits of the case for that of the administrative officer.

The grounds on which administrative action is subject to control by judicial review are as follows:

(1) **Abuse or misuse of power by the authority:** This includes exercise of power *mala fides* or in bad faith, for an improper purpose, after taking into account irrelevant or extraneous considerations, after leaving out of account relevant considerations, in a colourable manner, and unreasonably.

(2) **Non-application of mind by the authority:** This includes surrender or sub-delegation of power, abdication, acting under dictation, acting mechanically, and fettering discretion.

(3) **Non-compliance with the principles of natural justice:** This includes *nemojudex in causasua*or rule against bias, *audialterampartem*or right of hearing, and *reasoned decision* or speaking order.

Lord Diplock in *Council of Civil Services Union* v. *Minister for Civil Services*40 (*CCSU* case) stated that the grounds on which administrative action is subject to control by judicial review may be conveniently classified under three heads namely, *illegality, irrationality* and *procedural impropriety*. These grounds have been consistently followed in India as well to judge the validity of an administrative action along with the principle of proportionality.

Exclusion of power of Judicial Review of the High Courts over Decisions of Administrative Tribunals

As the power of judicial review is necessary concomitant of the independence of judiciary, it is an integral and essential feature of the Constitution constituting part of its basic structure; the question therefore arises- whether clause (2)(d) of Article 323A and clause (3)(d) of Article 323B excluding the power of judicial review of High Court under Articles 226 and 227 of the Constitution and of the Supreme Court under Article 32 are constitutional and valid.

Section 28 of the Administrative Tribunals Act, 1985[20]when originally enacted, was in the express terms of clause (2)(d) of Article 323A of the Constitution. The

[20] Section 28 provides: On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a tribunal in relation to recruitment and matters concerning recruitment to any service or post or service matters concerning members of any service or persons appointed to any service or post, [no court except-
(a) Supreme Court; or

contd...

only exception made in it was in respect of the jurisdiction of the Supreme Court under Article 136 of the Constitution. The provision was amended in 1986. Accordingly, Section 28 provides that no court (except the Supreme Court or Industrial Tribunal/Labour Court *etc.*) shall have, or be entitled to exercise, any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment on such service matters.

Section 9 of the Code of Civil Procedure, 1908 provides that the civil court may entertain a suit for enforcement of any civil rights unless its jurisdiction is barred by some express provision or by necessary implication. Section 28 is clearly an express provision for exclusion of the jurisdiction of the civil courts and, accordingly, a civil suit in respect of matters entrusted to the tribunal would be barred.It wasconsidered appropriate to provide a special forum for adjudication of disputes relating to servicematters and to confer on them exclusive jurisdiction to fulfil properly the primary objectives of their establishment.

Legislative Competency for Exclusion of the jurisdiction of the High Courts

Section 28 of 1985 Act also excludes the jurisdiction of the High Courts under Articles 226 and 227. This legislation is competent because of the express provision in Article 323A (2)(d) conferring competency in that behalf on Parliament. Thus exclusion of jurisdiction of the High Court under Articles 226 and 227 of the Constitution in respect of matters specified in this section cannot be said to be *ultravires* the legislative powers of Parliament. However, the essence of the power of judicial review is that it must always remain with the judiciary and must not be surrendered to the Executive or the Legislature. So, the main controversy is whether the power conferred upon Parliament and State Legislatures by Article 323A (2)(d) and Article 323B (3)(d) of the Constitution to totally exclude the jurisdiction of 'all courts' except the Supreme Court under Article 136, runs counter to the power of judicial review conferred on the High Courts under Articles 226 and 227 and on the Supreme Court under Article 32 of the Constitution?

Judicial Decisions on Exclusion of Judicial Review

The Supreme Court in *Sampath Kumar& others*v. *Union of India*[21] held that though judicial review was a basic feature of the Constitution, the vesting of power of judicial review in an alternative institutional mechanism, after taking it away from the High Courts, could not do violence to the basic structure so long as it

(b)any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947,or any other corresponding law for the time being in force,

Shall have] or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters.

[21] (1987) 1 S.C.C. 124: A.I.R. 1987 S.C. 386.

was ensured that the alternative mechanism was an effective and real substitute for High Courts. Using this theory of effective institutional mechanisms as its foundation, the Supreme Court proceeded to analyse the provisions of the Act in order to ascertain whether they passed constitutional muster to be accepted as satisfactory. The Supreme Court came to the conclusion that the Act, as it stood at that time, did not measure up to the requirements of an effective substitute and to that end, suggested several amendments to the provisions governing the form and content of the tribunals established under the Act. The suggested amendments to make administrative tribunals, effective and real substitutes for the High Court, were given the force of law by an Amending Act of 1987 after the conclusion of the case.

In *J.B. Chopra* v. *Union of India*[22],the Supreme Court had the occasion to consider the question whether the Central Administrative Tribunal created under Article 323A of the Constitution had the authority and jurisdiction to strike down a rule framed by President of India under the proviso to Article 309 of the Constitution as being violative of Articles 14 and 16(1) of the Constitution? The broad issue involved herein was- whether the tribunals constituted either under Article 323A or under Article 323B of the Constitution possess the competence to test the constitutional validity of a statutory provision/rule? The Supreme Court analysed and followed the decision in *Sampath Kumar* case to arrive at the conclusion that the administrative tribunal being a substitute for the High Court had the necessary jurisdiction, power, authority to adjudicate upon all disputes relating to service matters including the power to deal with all questions pertaining to the constitutional validity or otherwise of such laws as offending Articles 14 and 16(1) of the Constitution.Though the Supreme Court in *Sampath Kumar* case had not specifically addressed the issue, however, in *J.B. Chopra* case the Supreme Court felt that this proposition would follow as a direct and logical consequence of the reasoning employed in *Sampath Kumar* case.

In *M.B. Majumdar*v. *Union of India*[23],it was contended that the Members of Central Administrative Tribunal must be paid the same salaries as were payable to Judges of the High Courts. The contention was based on the premise that in *Sampath Kumar* case, the Supreme Court had equated the tribunals established under the Administrative Tribunals Act, 1985 with the High Courts. The Supreme Court, after analysing the text of Article 323A of the Constitution, the provisions of the Act and the decision in *Sampath Kumar* case, rejected the contention that the tribunals were the equals of the High Court in respect of their service conditions. The Supreme Court clarified that in *Sampath Kumar* case,the tribunal under the Act had been equated with the High Court only to the extent that the former were to act as substitute for the letter in adjudicating service matters; the tribunals could not, therefore, seek parity for all other purposes.

[22] (1987) 1 S.C.C. 422.

[23] (1990) 4 S.C.C. 501.

In *R.K. Jain* v. *Union of India*[24], the Supreme Court dealt with the complaints regarding malfunctioning of the Custom, Excise and Gold Control Appellate Tribunal (CEGAT), which was set up by exercising the power conferred by Article 323B. Ramaswamy, J. analysed the relevant constitutional provisions and judicial decisions and concluded that the tribunals created under Articles 323A and 323B could not be held to be substitutes of the High Courts for the purpose of exercising jurisdiction under Articles 226 and 227 of the Constitution. It was held that judicial review was the basic and essential feature of the Indian Constitutional Scheme entrusted to the judiciary, therefore, it could not be dispensed with by creating a tribunal under Article 323A or 323B of the Constitution. According to the Supreme Court, so long as the alternative institutional mechanisms or authority set up by an Act is not less effective than the High Court, it is consistent with the constitutional scheme. The alternative institutional arrangements must, therefore, be effective and efficient.

In *SakinalaHarinath and others* v. *State of Andhra Pradesh*[25], the Andhra Pradesh High Court had declared article 323A (2)(d) of the Constitution to be unconstitutional to the extent it empowered Parliament to exclude the jurisdiction of the High Court under Article 226 of the Constitution. Section 28 of the 1985 Act has also been held to be unconstitutional to the extent it divested the High Court of jurisdiction under Article 226 in relation to service matters. The decision of the High Court was challenged before the Supreme Court in *L. Chandra Kumar* v. *Union of India and others*[26]. In this landmark judgment, the constitutionality of the Act and the ouster clauses contained in Articles 323A and 323B of the Constitution read with Section 28 of the Act came under scrutiny of the Supreme Court.

L. Chandra Judgment on validity of Ouster Clauses

After exhaustively discussing the relevant constitutional and legislative provisions and decisions of the Supreme Court and High Courts with regard to the nature, scope and extent of the power of judicial review of the Supreme Court and the High Courts, the Supreme Court held:

(1) The tribunals constituted under Part XIV-A of the Constitution are possessed of the competence to examine the constitutional validity of statutory legislations and rules. However, this power of the tribunals is subject to one important exception. The tribunals shall not entertain any question regarding the *vires* of their parent statutes. In such cases alone, the concerned High Courts may be approached directly by overlooking the jurisdiction of the concerned tribunal.

[24] (1993) 4 S.C.C. 120.
[25] (1993) 2 An WR 484.
[26] 1997 (3) S.C.A.L.E. 10: (1997) 3 S.C.C. 261: J.T. 1997 (3) S.C. 589: A.I.R. 1997 S.C. 1125.

(2) In exercising their power of judicial review, the tribunals cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all decisions of tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular tribunal falls.

(3) No appeal by special leave petition under Article 136 will lie to the Supreme Court directly from the decisions of these tribunals as it is too costly and inaccessible to be real and effective. Special leave petition will be from the decision of the High Court.

(4) Articles 323A and Article 323B are unconstitutional to the extent they exclude jurisdiction of the High Courts under Articles 226/227 and of the Supreme Court under Article 32 of the Constitution as the power of judicial review of the High Courts under Article 226 and of the Supreme Court under Article 32 of the Constitution form an integral and essential feature of the Constitution constituting part of its basic structure.

(5) The power vested in the High Courts to exercise judicial superintendence over decisions taken by courts and tribunals within the respective jurisdiction is also a part of the basic structure of the Constitution.

(6) Since service law matters often involve the interpretation of Articles 14, 15 and 16 of the Constitution, to hold that tribunals have no power to handle matters involving constitutional issues will not serve the purpose for which they were constituted.

(7) As the manner in which justice is dispensed by the tribunals leaves much to be desired and since the remedy provided in the parent statutes by way of an appeal by special leave petition under Article 136 of the Constitution is too costly and inaccessible to be real and effective, it has been held that all decisions of tribunals, whether created pursuant to Article 323A or 323B of the Constitution, will be subject to High Court's writ jurisdiction under Articles 226 and 227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the particular tribunal falls.

According to the Supreme Court, the above approach will, while protecting the power of judicial review of the High Courts under Articles 226 and 227, also preserve jurisdiction of the tribunals not only to decide the service matters before them, but also their power of judicial review in striking down *ultra vires* subordinate legislation and unconstitutional legislative enactments.

Implications of L. Chandra Judgment

In *L. Chandra Kumar*, the Supreme Court, contrary to*Sampath Kumar*, held that these tribunals are not equal to the High Courts. It further held that the decisions of such tribunals shall be appealable before a Bench of two Judges in the High

Court under whose jurisdiction the tribunal falls. However, most importantly, these tribunals have been given the quasi-equal status of High Courts in restricted areas. Thus, the tribunals established under Article 323A can still examine the constitutionality of an enactment or rule concerning matters on the anvil of Articles 14, 15 and 16 of the Constitution.[27]

The decision of the Supreme Court is based on the assumption that the reach and range of the power of judicial review of the Supreme Court and that of the High Courts are identical. While under Article 32 of the Constitution, a person has a right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part III of the Constitution, no fundamental right can be claimed by any person to move before the High Court by appropriate proceedings under Article 226 for enforcement of the rights conferred by the Constitution or statute. Moreover, as suggested by V. Nageswara Rao[28], the Supreme Court ought not to assimilate the judicial review of the High Courts to that of the Supreme Court with regard to the basic structure doctrine as propounded in *KesavanandaBharti*case. The Supreme Court should exclusively reserve to itself the power to strike down constitutional amendments for violating the basic structure of the Constitution. Bestowing this power on the High Courts would create terrible constitutional confusion and this confusion would be worse confounded if it were further extended to all manners of tribunals. It should be remembered that While Article 32(3) expressly provides that the power of the Supreme Court under Article 32(1) and (2) can be conferred by Parliament on other courts *without prejudice* to the power of the Supreme Court under Article 32(1) and (2), the saving clause is not present with respect to the jurisdiction of the High Courts under Article 226. Hence, Parliament can confer the writ jurisdiction on "other Courts" under Article 32(3) without prejudice to the power of the Supreme Court under Article 32(1) and (2) but can oust the jurisdiction of the High Courts under Article 226. Thus, Parliament can establish alternative dispute settlement machinery which will be a substitute to the High Courts but not to the Supreme Court.[29]

It is for these reasons, in his minority judgment in *Minerva Millsv. Union of India*[30]Bhagwati, J. held that the power of judicial review was an integral part of our constitutional system, the power of judicial review was unquestionably be a part of basic structure of the Constitution. However, he made it clear that, while saying so, he should not be taken to suggest that the effective alternative institutional mechanisms or arrangements for judicial review could not be made by Parliament. Such a theory of alternative institutional mechanisms enunciated

[27] K.C. Joshi, *Constitutional Status of Tribunals*, 41 JILI 116 (1999).
[28] V. Nageswara Rao & G.B. Reddy,*Doctrine of Judicial Review and Tribunals: Speed Breakers Ahead*, 39 JILI 411 at 421, 422(1997).
[29] *Id.* at 417.
[30] *Supra* note 14.

by Bhagwati, J. finds no prior mention in the earlier decisions of the Supreme Court. This point was further elaborated by the learned judge in *Sampath Kumar*case.Ranganath Mishra, J. who wrote the majority judgment in *Sampath Kumar* case held:

> Thus exclusion of jurisdiction of the High Court does not totally bar judicial review. This court in *Minerva Mills* case, (AIR 1980 SC 1789) did point out that 'effective alternative institutional mechanisms or arrangements for judicial review' can be made by Parliament. Thus it is possible to set up an alternative institution in place of the High Court for providing judicial review... . The tribunal has been contemplated as a substitute and not as supplemental to the High Court in the scheme of administration of justice... [T]hus barring of the jurisdiction of the High Court can indeed not be a valid ground of attack.[31]

The Law Commission of India took up the study on the subject *suomotu*.[32] It opines that the judgment of the Supreme Court in *L Chandra Kumar* is likely to lead to consequences, which are undesirable. Reiterating the same view, the Commission said that the Supreme Court is not correct in its assumption that the reach and range of the power of judicial review of the Supreme Court and that of the High Court are identical.[33] The power of judicial review of the High Courts under Article 226 is not as inviolable as that of the Supreme Court under Articles 32. While Article 32(3) preserves the supremacy of judicial review of the Supreme Court, there is no saving provision under Article 226. Establishment of tribunals as substitutes and not supplements to the High Courts as held by the Supreme Court in *Sampath Kumar* case is perfectly in tune and spirit of the Constitution.[34]

Working of the Service Tribunals

The aim of the Legislature in setting up the Administrative Tribunals to provide a speedy and cheap remedy to the employees who feel aggrieved has been fulfilled by the Central Administrative Tribunal. The institution of cases in the tribunal has increased tremendously but the rate of disposal of cases has also quantitatively increased. The statement showing number of cases transferred from various courts (TA) and fresh cases filed, disposed and pendency of cases in various Benches of the Central Administrative Tribunal is shown in Table given below:

[31] *Supra* note 21 at 395.
[32] The Law Commission of India,*215th Report onL. Chandra Kumar be revisited by Larger Bench of Supreme Court* (December 2008).
[33] *Id.*, para 5.19.
[34] *Supra* note 28 at 422.

Institution, Disposal and Pendency of Cases in Various Benches of The Central Administrative Tribunal[35]

Year	*(Institution) Cases Transferred From Various Courts (TA)and Fresh Cases Filed*	*Total Institution at the End of the Year*	*Disposal During the Year*	*Total Disposal at the End of the Year*	*Pendency at the End of the Year*	*Pendency Ratio (%)*
1985	2963	2963	30	30	2933	98.99
1986	23177	26140	8934	8964	17176	65.71
1987	19410	45550	15084	24048	21502	47.21
1988	19425	64975	13769	37817	27158	41.80
1989	18602	83577	13986	51803	31774	38.02
1990	19283	102860	15495	67298	35562	34.57
1991	21623	124483	17552	84850	39633	31.84
1992	25184	149667	23782	108632	41035	27.42
1993	27067	176734	28074	136706	40028	22.65
1994	26230	202964	26409	163115	39849	19.63
1995	25789	228753	23668	186783	41970	18.35
1996	23584	252337	20667	207450	44887	17.79
1997	23098	275435	21981	229431	46004	16.70
1998	21911	297346	18394	247825	49521	16.65
1999	22944	320290	24566	272391	47899	14.95
2000	25146	345436	31398	303789	41647	12.06
2001	25977	371413	31953	335742	35671	9.60
2002	25398	396811	29514	365256	31555	7.95
2003	25089	421900	28076	393332	28568	6.77
2004	23825	445725	27735	421067	24658	5.53
2005	21528	467253	22408	443475	23778	5.09
2006	18722	485975	17774	461249	24726	5.09
2007	17725	503700	18674	479923	23777	4.72
2008	18287	521987	20352	500275	21712	4.16
2009	24496	546483	23681	523956	22527	4.12
2010	26620	573103	25477	549433	23670	4.13
2011	25869	598972	24750	574183	24789	4.14
2012	27733	626705	24206	598389	28316	4.52
Up to June, 2013	12780	639485	10032	608421	31064	4.86
Total	639485		608421			

The tribunal can be moved by filing an application before the Registrar of the tribunal along with the prescribed fees of Rs 50 and relevant documents. The

[35] Source: Official Record available at http://cgat.gov.in/statement_2.pdf last visitedSept. 21, 2015.

number of organisations coming within the purview of the Central Administrative Tribunal was 45 in the year 2002. Now the number is increased to 205. In future we hope inclusion of many more organisations (including Public Sector Undertakings) within its purview so that many more government employees would be in a position to get cheap, effective and speedy disposal of their grievances.

To find out the efficacy of judicial system, one of the tests is the number of appeals filed against the decisions of particular court or tribunal and the number of appeals dismissed and admitted by the higher court. No separate records are available with the Central administrative Tribunal office regarding the decisions of various Benches of the Tribunal being challenged before the High Courts. However, the Chairman of the Central Administrative Tribunal, Mr. Justice V.K. dali informed in a Conference that 91% cases of the Principal Bench have been upheld in the High Court and position with regard to other Benches is not much different.[36]Dr. M. VerappaMoily, the Union Minister of Law and Justice, in the same Conference commended the Central Administrative Tribunal for the fact that most of its judgments have been upheld by the higher courts. All this shows that the functioning of the Central Administrative Tribunal by and large has been satisfactory.

Recent Decisions on Administrative Tribunals

In *Union of India* v. *R. Gandhi, President, Madras Bar Association*,[37] while discussing the constitutional validity of Chapters 1B and 1C of the Companies Act, 1956 inserted by Companies (Second Amendment) Act, 2002 providing for the constitution of National Company Law Tribunal and National Company Law Appellate Tribunal, the Supreme Court observed:

(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal

(b) All Courts are tribunals. Any tribunal to which existing jurisdiction of court is transferred should also be a judicial tribunal. This means that such tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the tribunal should have the independence and security of the tenure associated with judicial tribunal.

(c) Whenever there is need for 'Tribunal', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in

[36] All India Conference of the Central Administrative Tribunal (CAT) held on December 13, 2010. Its Report is *available at* runningstaff.wordpress.com/2010/12/13/all-india-conference-of (last visited Apr. 28, 2015).

[37] 2010 (5) S.C.A.L.E. 514, para 44.

courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals should have technical members.

Regarding the constitutionality of administrative tribunals, the doubts have been removed by the Court by holding that the Constitution contemplates judicial power being exercised both by courts and tribunals and therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by the courts to tribunals. The Court held that while constituting tribunals; the Legislature can prescribe the qualifications/eligibility criteria of the members. The Legislature while enacting the Administrative Tribunals Act, 1985 thought it necessary to include judicial members as well as administrative members in the service tribunals. The presence of judicial member was required to provide legal output and administrative member was required to provide an input of practical experience in the functioning of the services and add to the efficiency of administrative tribunal.Bhagwati, C.J. in *Sampath Kumar* case observed:

> It is necessary to bear in mind that service matters which are removed from the jurisdiction of the High Court under Articles 226 and 227 of the Constitution and entrusted to the Administrative Tribunal set up under the impugned Act for adjudication involve questions of interpretation and applicability of Articles 14, 15, 16 and 311 in quite a large number of cases. These questions require for their determination not only judicial approach but also knowledge and expertise in this particular branch of constitutional law... we find that some of these questions are so difficult and complex that they baffle the minds of even trained Judges in the High Courts and the Supreme Court.[38]

It is submitted that to hold that the tribunal should consist only of one member, Judicial or Administrative would attack the primary basis of the theory pursuant to which they have been constituted. Every Bench of the administrative tribunal should consist of one Judicial Member and one Administrative Member.

In *Union of India* v. *Major General Shri Kant Sharma*[39], the question before the Supreme Court in appeals was- whether the right to appeal under Section 30 of the Armed Forces Tribunals Act, 2007 against an order of Armed Forces Tribunal with the leave of the Tribunal under Section 31 of the Act or the leave granted by the Supreme Court, or bar of leave to appeal before the Supreme Court under Article 136(2) of the Constitution, will bar the jurisdiction of the High Court

[38] *Supra*note. 21 at 390.
[39] Civil Appeal No. 7400 of 2013.

under Article 226 of the Constitution regarding matters relating to Armed Forces. The Army personnel, who moved the Armed Forces Tribunal for adjudication or trial of disputes and complaints with respect to condition of service, having not granted relief, challenged the order passed bythe Tribunal before the respective High Courts under Article 226 of the Constitution. The Andhra Pradesh High Court and the Allahabad High Court refuse to entertain the petition under Article 226 and directed the writ petitioners to seek remedy under Sections 30 and 31 of the Act. In C.A. No. 7399 of 2013, the Delhi High Court entertained the writ and granted relief after reversing the order of the Tribunal.

The Supreme Court after discussing the relevant provisions of the Armed Forces Tribunals Act, 2007, the power of the High Court under Article 226 and of the SupremeCourt under Articles 32 and 136 of the Constitution and judicial pronouncements on scope and extent of judicial review came to the conclusion that the Delhi High Court while entertaining the writ petition under Article 226 bypassed the machinery created under Section 30 and 31 of the Act. Setting aside the impugned judgments passed by the Delhi High Court, the Court held that the High Court of Delhi was not justified in entertaining the petition under Article 226. The Court referred to the decision in *Nivedita Sharma* v. *Cellular Operators Association of India and Others*[40]. In this case the Court opined that the High Court should not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken, itself contains a mechanism for redressal of grievance.

In *CicilyKallarackal* v. *Vehicle Factory*[41], the Supreme Court issued a direction of caution that it would not be proper exercise of jurisdiction by the High Court to entertain a writ petition against such orders against which statutory appeals lies before this Court.

Conclusion and Suggestions

In the present day era, adjudication through administrative tribunals is a worldwide phenomenon. It is an indispensable instrumentality in judicial machinery of the contemporary States. Articles 323A and 323B of the Constitution indicate that we are at the threshold of a new era of tribunals. To entertain and adjudicate complaints and disputes concerning service matters of civil servants and specified categories of employees, service tribunals were established with very high hopes of reducing the burden of ordinary courts without sacrificing the quality of justice.

The primary objective behind the establishment of service tribunals to provide a cheep and expeditious remedy to the civil servants, which was not available

[40] 2011 (14) S.C.C. 337.
[41] 2012 (8) S.C.C. 524.

through the traditional system, has been fulfilled by the Central Administrative Tribunal. There is no doubt that many reformatory measures are required to be taken to systematize the working of the tribunals so that real gains of tribunalization become available. As the Supreme Court did in *Sampath Kumar* case, it could have proposed in *L. Chandra* case various legislative measures to improve the tribunal justice system. Instead of this, the Court by its judgment has made all decisions of tribunals, whether created under Article 323A or 323B of the Constitution, subject to the jurisdiction of the High Courts under Articles 226 and 227 of the Constitution. The judgment seems to be a retrograde step in the sense it tries to erode the theory of alternative institutional mechanism and reverts back the burden of litigation to the High Courts.As a result of *L. Chandra* judgment, orders of the Central administrative Tribunal have now routinely been appealed against in High Courts whereas this was not the position earlier.[42] The very purpose and rationale of these tribunals is defeated by *L. Chandra* judgment. The role of the tribunals is confined to 'judicial review' only. *L. Chandra* judgment has survived the power of judicial review of the High Courts over decisions of these tribunals. This is mere repetition of power of judicial review and is undesirable.

It is suggested that a thorough examination of the tribunals is to be made to discover the handicaps and difficulties in the working system of the tribunals and to make the tribunals, effective and efficient instrument for making judicial review efficacious, inexpensive and satisfactory. In the light of developments which have taken place in other countries as well in accordance with the developed notions of administrative law, appropriate reforms are to be made in administrative justice system in India.

[42] *Supra* note 32, para 5.13.

A Critical Appraisal of Legal Regime Governing Formation of Cyber Contracts in E-commerce

Poonam Dass[*]

I. Introduction

'Cyber Contract' refer to various stages in the formation and conclusion of contract between the parties through computer network or Internet in contradistinction to the traditional or conventional contracts concluded orally, by post, by telephone or by any other mode of instantaneous communication (like telex, tele printer etc.) to which our courts have applied the provisions of the Contract Act, 1872. The legal issues and problems arising from cyber contracts have not so far been addressed despite passing of the Information Technology Act 2000(IT Act) and its amendments in 2002 and 2008. TheIT Act is supplemental to the existing provisions of Contract Act, 1872. The amendment in 2008 only provided thatin formation of contractif the proposal, acceptance, revocation, are made in electronic form or by means of electronic record it shall not to be deemed to be unenforceable solely on the ground that electronic form or means were used.

There are many unresolved legal issues concerning formation of contract electronically. The aim of the paper is to study whether the present legal regimeis sufficient to resolve these issues. The signature requirement for authentication of the electronic records by use of electronic signatures/digital signatures is out of the scope of this paper.

II.Legal Issues Involved in Formation of Cyber Contracts

The basic issues involved in formation of any contract are intention to enter into legal relations, proposal, acceptance; communication of proposal and acceptances, consideration and competency of parties.Each of these basic issues have unresolved legal issues associated in formation of cyber contracts.

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A. Intention to Create Legal Relations

A contract is normally formed when the parties have an intention to create legal relations but there can be informal agreements also.In commercial contracts, the requisite intent is normally presumed to exist and this presumption may equally apply tocontracts formed electronically. However, there is a possibility that consumer may be deceived bymaking an unwanted contract.

Anexample is the website offering a service may construct a website, which merely displays the product and 'Save' or 'Download Now' button. No other information is given. The consumermay assume that the service being offered is free and as such, he/she has no intention of entering into a contract when he/she clicks the button.It is doubtfulthat the court will make such contract enforceable and allow payment to be made by the consumer.To avoid such situationswebsites should explicitly state the prices and terms of theirservices.

B. Communication of Proposal & Acceptancein Cyberspace

Proposal

The proposal[1] means:

(1) Promiser's willingness to do or abstain from doing something and
(2) It should be made with the view to obtaining the assent of the promisee to the proposed act or abstinence.

promisor is the person who makes a proposal and a promisee is the person who accepts the proposal.

The Information Technology Act, 2000 has brought inaconcept of originator[2] and addressee[3] which has been given recognition.The originator is a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person. Addressee is the person who is intended by the originator to receive the message.However, the intermediary[4] like ISP, who receives/stores/transmit message on behalf of others is neither an originator nor an addressee.

[1] S.2(a), Indian Contract Act, 1872– when one person signifies to another his willingness to do or abstain from doing anything with a viewto obtaining assent of that other to such act or abstinence he is said to make a proposal.

[2] S. 2(za), Information Technology Act, 2000 – originator means a person who sends, generates; stores or transmits any electronicmessages or causes any electronic message to be sent,generated, stored or transmitted to any other person but does not include anintermediary.

[3] *Id.*s. 2(b), 'addressee' means a person who is intended by the originator to receive theelectronic record but does not include any intermediary.

[4] *Id.*s. 2(w),Intermediary with respect to any particular electronicmessage means any person who on behalf of another person receives or stores or transmits that message or provides any service with respect to thatmessage.

It may be noted here that the expressions'originator' and 'addressee' are not equivalent to 'promisor' and 'promisee' respectively but they are simply the persons who transmit or receive electronic records. So the analogy drawn on these lines by some persons is fallacious. An electronic record can be transmitted by the promiseeor the promisor and both can receive it.This interpretation is in consonance with the object of the IT Act, which recognizes electronic records to eliminate traditional paper based transactions and purpose being to supplement the Indian Contract Act and not to substitute or amend it. Further Section 10A of the IT Actwhich permits enforceability of contracts formed through electronic means uses the term proposal and not originator. This shows that the meanings of all terms are different.

If a person signifies his willingness to do or abstain from doing something through the electronic record sent, to the addressee, who is a person intended by him to receive the record, who then accepts it. The person who sends the electronic record (proposal) will become promisor and who receives the same will be the promisee.If the person simply transmits any information without any willingness to do or not to dosomethinghe can be simply an originator of electronic record but not promisor and even if he has willingness to negotiate through electronic message, in that case such person transmits an invitation to offer to the addressee and will not be a promisor.

An electronic record is attributable to the originator if the same is sent by the originator himself; or by a person who had authority to act on behalf of the originator in respect of the electronic record; or by an information system programmed by or on behalf of the originator to operate automatically.[5]Hence the proposal or acceptance made by use of electronic record will be attributed to the proposer or the acceptor, even if the automated system is used by them.

Communication of Proposal when Complete

In case of physical contract (i.e. contracts under the Indian Contract Act 1872), communication of proposal is complete when it comes to the knowledge of person to whom it is made.[6]But in cyber contracts one does not know whether the other party has received the electronic recordor not due to transmission problems such as incompatible formats, changes in languages or keyboard sets, or even firewalls[7] removing attachments.[8]Hence the receipt by addressee of acknowledgementthat the record has been received without any error becomes mandatory.

[5] *Id.*s. 11.

[6] S. 4, the Indian Contract Act, 1872.

[7] Firewalls are dedicated computers which guard the entrance to a network (usually belonging to a particularcompany or organisation).Their job is to block any potentially malicious files (such as e-mail and their attachments) and to prevent intrusion by hackers.

[8] Attachments are formatted documents that areappended to e-mail message.

Section 12 of the Information Technology Act provides the manner in which acknowledgement of receipt[9] is to be given. It provides that if originator has not agreed with addressee to give electronic record in a particular form it can be communicated in any form, automated or by conduct, which indicates that the record has been received.The electronic record is binding on the originator on receipt of acknowledgement if stipulated expressly. If not stipulated in electronic record and acknowledgement has not been received by the originator within reasonable time, he should give notice to the addressee regarding non-receipt and giving reasonable time to send the acknowledgement. If no acknowledgement is received then a further notice is given that addressee should treat electronic record as though it has never been sent. Therefore proposals made through electronic meansthe communication can be complete when the proposer receives the acknowledgement of receipt.

Invitation to Treat

There is a fine distinction between a proposal and an invitation to treat.Advertisements which promote sale of products, shop displays; price lists etc. are not proposals in themselves but mere invitation to treat (*Pharmaceuticals society of Great Britain* v. *Boots Cash Chemists (Southern Ltd.)*[10]

A similar principle is likely to apply to e-mail price lists and websites.Websites are electronic analogue of shop windows and catalogues, advertising the descriptions of products and their prices.However there is no Indian case law in this respect which declares these price lists of products on email and web sites are invitation to treatand not a proposal. Furthermore,order forms containing terms and conditions stated by the e-businessescould be construed as proposals; since they are designed and written by e-businesses themselves.To avoid dispute the websites and e-mail solicitations should have disclaimers stating unambiguously to be invitations to treat, and not proposal.

The United Nations Convention on the use ofElectronic Communications in International Contracts (2005 Convention) signed 23rdNovember2005 and effective 1st March, 2013 provided that if proposal made throughuse of electronic communications not addressed to specific parties and is generally accessible to parties making use of information systems is to be considered as invitation to offer unless there is clear intention of parties to make it a proposal being bound by acceptance.[11]

[9] S.12,the Information TechnologyAct, 2000.

[10] [1919] 2 KB571.

[11] Art. 11, available atwww.uncitral.org (last visited Dec 20, 2014).

Acceptance

After the proposal has been made, the promisee accepts it and thus creates contract.In cyber contracts, acceptance is a contentious issue because the promisor and promisee are distanced in time and space. On line acceptance can be made by e-mail or proposal can be accepted by "click wrap" method.In this method, the contract is presented on the window online, and the consumer is asked to click on 'I Agree' or 'I Accept' button. Software downloaded from the Internet is commonly sold with the click wrap license.Such a license appears on the screenwhenthe software is being installed and the purchaser is asked to accept the terms of the license before installing the software.

The validity of click wrap license was examined in *Caspiv. The Microsoft Network, L.L.C.*[12]andthe contract was made enforceable by the court. In *Gross* v. *America Online Inc*[13]the court upheld the validity of click wrap agreements.

In case of websites having no 'I Agree'button, a New York federal judge has ruled[14] that Internet users who downloaded free software from a Web site were not bound by a license agreement that appeared on the site.The U.S. District Judge Alvin K. Hellerstein found that because the users did not have to agree to or even review the license agreement before downloading the software, the requisite assent was missing, and thus no agreement was reached.In so holding, the court distinguished the license from so-called click-wrap licenses commonly used on the Internet. Such licenses, which courts in Illinois and California have found to be valid, require the user to click "yes," indicating assent to the license agreement, in order to obtain the software. The court found the license at issue to be more like a "browse-wrap" license, in which a notice in the form of an icon appears on the Web site, but the user is not required to click on the icon or view the license to proceed. The court expressed doubt that such browse-wrap licenses were enforceable.The matter went to United States Court of Appeal 2nd Circuit on 14th March 2002 in and the appellate court affirmedthe finding ofdistrict court and decided in favour of defendants.[15]

[12] Supreme Court of New Jersey Appellate Division323 N.J. Super. 118; 732 A. 2d 528: 1999 N.J. Super. LEXIS 254 (July 2, 1999)*available at*http://www.internetlibrary.com/pdf/Caspi-Microsoft.pdf (lastvisitedDec. 2, 2014).

[13] File No. C.A. No. PC 97-0331, 1998 W L 307001 (R.I. Superior Ct., May 27, 1998) available at http://www.internetlibrary.com/cases/lib_case20.cfm (last visitedNov. 30, 2014); *Also seeHotmail Corporation* v. *Van Money Pie Inc., I Lan SystemsInc.* v.*Netscout Service Level CorpCiv.* Act.No. 00-11489-WGY, 2002 US Dist. Lexis 209 (D. Mass., January 2, 2002), where click wrap agreements were held valid*available at* http://www.internetlibrary.com/cases/lib_case21.cfm (lastvisitedDec 21, 2014).

[14] *Infra*note15.

[15] *Specht* v. *Netscape Communications*306 F.3d 17decided on Oct 1, 2002*available at*http://cyber.law.harvard.edu/stjohns/Specht_v_Netscape.pdf(last visited Sep. 30,2014); In *Register.com* v. *Vario Inc.*126 F. Supp. 2d 238 (S.D.N.Y., December 12, 2000) the court held that Register.com's Terms of Use are likely to create a contract between Register.com and the users

contd...

In *Ticketmaster Corp., et al.* v.*Tickets.Com, Inc.*[16]U.S. District Court, Central District of California held,"It cannot be said that merely putting the terms and conditionswithout requiring visitors to click an 'agree' button before using a site necessarily creates a contract with anyone using the web site."

Communication of acceptance when complete

The Indian Contract Act provides that communication of acceptance is complete as against the proposer when it is put in course of transmission and as against acceptor when it comes to the knowledge of the proposer.However as discussed above with respect to communication of proposal section12 of IT Act is equally applicable in case of acceptance if the acceptance is made through electronic record. Hence the communication of acceptance willbe completeonly after the receipt of acknowledgement byacceptor from the proposer.

Time and place of dispatch and receipt of electronic record

Section 13 of the IT Actprovides that the dispatch occurs at the time when the electronic record enters the computer resource outside the control of the originator and receipt occurs at the time when the electronic record enters the designated computer resource of addressee. If not sent on designatedresource than receipt occurs at the time at which it is retrieved by the addressee. Ifthe addressee has not designated the computer resource and timings, the receipt occurs when the electronic record enters the computer resource of addressee.The place of dispatch of the record is the place of business of the originator or addressee and in case of two or more places of business, principal place of business;or usual place of residence of originator or addressee respectively.[17]

Article 10(1) of the 2005 Convention further provides that electronic communication has not left the information system under the control of originator or the party who has sent on his behalf the time of dispatch is when electronic communication is received. Further regarding the receipt it provides that in case of designated address receipt occurs at the time when it becomescapable of being retrieved by the addressee on it. If the receipt is at another address than, when it becomes capable of being retrieved by the addressee at that addressand the addressee becomes aware that the electronic communication has been sent. It is presumed to be retrieved when it reaches the addresses' electronic address (Article 10(2)).

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of its Whois database, notwithstanding the fact that these users are not required to click an "I Agree" button indicating their agreement to be so bound*available at* http://www.duanemorris.com/site/static/356_F_3d_393.pdf (last visited Nov. 29, 2014).

[16] 2000 WL 525390 (C.D.Cal.) decided on March 27, 2000*available at* http://www.internetlibrary.com/pdf/Ticketmaster-Tickets.com-CD-Ca-Mtn-Dismiss.pdf (last visited Dec. 20, 2014).

[17] Ss.13 (3) to 13(5), theInformation Technology Act, 2000.

In *Schelde Delta Shipping BV* v. *Astarte Shipping Ltd.*(The Pamela)[18] a case relating to telex message; it was held that if an acceptance is not received during usual business hours, the receipt is not effective until the opening of business, the next day or on Monday morning after the week end. In e-mail acceptance the receipt will usually occur when the promisor receives the proposal on his e-mail address and it is immaterial whether or not the receiver has read the message. If the promisor refuses to read e-mail acceptance, the promisor will probably still be held liable.While the e-mail is on the ISP mail server, it is still technically in transit and responsibility of sender.However, if the promisor operates his or her own server then acceptance would be affected when e-mail arrives there, transit being complete.

Therefore, the time of dispatch of proposal communicated through electronic record will bewhen electronic record is no more in control of promisor and the time when the record reaches the promisee is when it enters the designated resource; or in case no resource is designated when it is capable of being retrieved by the promisee. The same rule applies when promisee sends the acceptance by use ofelectronic record.

C.Place where the Contract is Concluded

The Contract Act contemplates two set of rules for ascertaining the place where the contract is concluded when the parties are separated by distance and place.The first is general rule which envisages that the contract is concluded at the place where the acceptance is received by the promisor.[19]The second, or exceptional rule, which was evolved on the grounds of commercial expediency, is the postal rule where in the promisor becomes bound when the promisee puts the acceptance in the course of transmission i.e. when acceptance is posted[20] or sent by telegram.[21] Under the later rule, post office is considered as an agent of the promisor. In *Bhagwan Das Goverdhan Das Kediav.Girdhari Lal & Company*[22]the Supreme Court has held that the general rule of acceptance to contracts by telephone and other mode of instantaneous communication and the contract will be concluded at the end where the acceptance is heard. In *Entoresv. Miles Far East Corp.*[23]Lord Justice Denningconsidered that:

> For telephones, "because people usually say something to signify the end of the conversation", a line going deadmid – reply warrants a re-

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[18] (1995) 2 Lloyd,s Rep. 249 *available at*http://legalmax.info/conbook/index.htm#t=schelde_.htm (last visited Oct. 20, 2014)20/10/2014.

[19] *Entores* v. *Miles Far East Corp*[1955] 2 QB 327: appvd*Brinkibon Ltd.* v. *StahlyStahl and Stahlwarenhandelsgesellschaftmbh*[1983] 2 AC 34.

[20] *Household Fire Insurance* v. *Grant* (1879)4Ex D 216 (CA).

[21] *Finnish Marine Insurance Co Ltd* v. *Protective National Insurance Co*[1990]1 QB 1078.

[22] *Bhagwan Das Goverdhan Das Kediav. G Parshottamdas& Co.* A.I.R. 1966 SC 543, *Entroesv. Miles Far east Corp.* (1955) 2 Q .B. 327.

[23] [1955] 2 QB 327 at 333-334.

establishment of communications, or that "[if] I do not catch what he says ...I ask him to repeat it" then the contract is made"only the second time when I do hear". But the estopple arose (against the offeree) where a "listener [on the telephone] ... does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated"; and

For telexes, if the teleprintercuts out mid-acceptance owing to connection-breakage, the message (or sentence) must be resent, but, again an estopple arises if, in the case of telex recipient, "the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated.

As regard**acceptance by e-mail** it can be assumed that our courts will be obliged to apply the general rule of acceptance and contract would be deemed to conclude at the place where it is received. However, such a place may be different from the place of business of promisorbut as per IT Act it is deemed to be received at principal place of business of promisor, being the addressee of the electronic communication, irrespective of where the computer resource is located. TheIT Actresolves the problem ofcontract being formed at temporary business place which can be many, as the web-mails can be accessed from any place in the world connected with internet.The post office rule can be applied only if the court concludesthat the Internet Service providers act as agents ofpromisor.

Web Site Contractsare more straightforward.The World Wide Web exhibits the features of the method of instantaneous mode of communication,the sender has almost immediate feedback, and errors or faults are readily apparent.As a result, the general rule will probably apply to web contracts and it will be concluded at the principal place of the business of promisor.

When a contract is made by delivery of printed form of contract by one party to the other which other is supposed to accept it is called **Standard Form Contract.** The terms and conditions in a standard form contract will have no effect unless the customer is given **reasonablenotice** of those terms and conditions before the contract is formed.Notice should be contemporaneous with contract and party imposing the conditions cannot rely on them if he has committed breach of contract which may be defined as fundamental.

World Wide Web complicates the compliance of these notification requirements. On line merchants have various means by which they can inform the customer of their standard terms and conditions. One of the ways to give notice is at the bottom of the order form, e.g. "This contract is subject to company's standard terms and conditions"without any further information. This will not amount to reasonable notice.

Thenotice may be hyperlinked to another page on terms and condition. This may satisfy the reasonable notice requirement.Article 5(bis) of the UNCITRAL Model

provides that if the information is not contained in the data message but merely referred in that data message, the information shall not be denied validity or enforceability. [24] Therefore the model law does not deny validity and enforceability of the hyperlinks of terms and conditionson the web page.

In*Specht* v. *Netscape Communications* [25] thequestion involved was whether plaintiffs-appellants, by acting upon defendants' invitation to download free software made available on defendants' web page, agreed to be bound by the software's license terms (which included the arbitration clause at issue), even though plaintiffs could not have learned of the existence of those terms unless, prior to executing the download, they had scrolled down the web page to a screen located below the download button. Affirming the decision of the court below, the Second Circuit Court of Appeals held that plaintiffs are not bound by the terms of a license agreement purporting to govern the use of a software product they downloaded because plaintiffs neither had reasonable notice thereof, nor adequately manifested their assent to be bound thereby.The software in question could be downloaded from a page on defendant Netscape's web site by clicking on a button, which said "download".The terms of the license agreement in question were not contained on this web page, and the only notice the user received of the license agreement was found on a portion of the web page below the download button.To locate the notice, the user had to scroll down the page.Once there, he found the following language:

The use of each Netscape software product is governed by a license agreement.You must read and agree to the license agreement terms before acquiring a product.Please click on the appropriate link below to review the current license agreement for the product of interest to you before acquisition.For products available for download, you must read and agree to the license agreement terms before you install the software.If you do not agree to the license terms, do not download, install or use the software (p.9).

Below this notice appeared a list of license agreements, the first of which was a "License Agreement for Netscape Navigator and Netscape Communicator Product Family." Clicking on this link took the user to the terms of a license agreement which informed the user that by installing or using Netscape Smart Download software, he consented to be bound by the terms of the license agreement, which contained an arbitration provision.This notice informed the user that his use of the software would be governed by the terms of a license agreement, which terms could be seen by clicking on a link provided on the web

[24] Art. 5 (bis), UNCITRAL Model of e-commerce,1996, Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.

[25] *Supra* note15.

page.Once the program was downloaded, the user received no further notice of either the license agreement or its terms.When users went to install this software, they came across with a scrollable screen containing the terms of a license agreement governing use of Communicator.The user was not permitted to complete his installation of the browser software without clicking on an "I agree" button, indicating assent to be bound by the license agreement.

The Court held that this procedure did not create a binding contract between the parties. A consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms."We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms. ...[T]here is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there. ...Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.We hold that a reasonably prudent offeree in plaintiffs' position would not have known or learned, prior to acting on the invitation to download, of the reference to SmartDownload's license terms hidden below the "Download" button on the next screen"(pp. 23-28). Hence the court held that the plaintiffs are not bound to arbitrate the dispute as per terms of licence.

The websitecould display standard terms and at the bottom of the order form or web page. Since the terms are conspicuously displayed, the method has greater legal weight in terms of notice.Another way is to use dialogue boxthat forces the user to scroll through the terms and conditions before clicking 'Iagree'button.The consumeris forced to review the terms and conditionsbefore clicking. The customer has a clear notice thatthe contract is subject to certain terms and conditions.

In*Caspi* v. *The Microsoft Network, L.L.C*[26] the validity and enforceability of forum selection clause was challenged by the defendants. This clause provided

> "This agreement is governed by the laws of the State of Washington, USA, and you consent to the exclusive jurisdiction and venue of courts in King County, Washington in all disputes arising out of or relating to your use of MSN or your MSN membership."

Plaintiffs argued that they did not receive adequate notice of the forum selection clause. The facts were, before becoming an MSN member, a prospective subscriber is prompted by MSN software to view multiple computer screens of

[26] *Supra* note 12.

information, including a membership agreement, which contains the above clause. MSN's membership agreement appears on the computer screen in a scrollable window next to blocks providing the choices "I Agree" and "I Don't Agree." Prospective members assent to the terms of the agreement by clicking on "I Agree". Prospective members have the option to click "I Agree" or "I Don't Agree" at any point while scrolling through the agreement. Registration may proceed only after the potential subscriber has had the opportunity to view and has assented to the membership agreement, including MSN's forum selection clause. No charges are incurred until after the membership agreement review is completed and a subscriber has clicked on "I Agree."The court held that the plaintiffs in this case were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement and hence bound by it.

In *Groff* v. *America Online Inc*[27]the court stated the general rule that a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents. Here, plaintiff effectively "signed" the agreement by clicking "I agree" not once but twice. Under these circumstances, he should not be heard to complain that he did not see, read, etc. and is bound to the terms of his agreement.

Standard terms and conditions in attachments or hyperlinks embedded in the e-mail will meet similar, if not more substantial objections to the ones explained above for web contracts.

Automated information systems, sometimes called "electronic agents", are being used increasingly in electronic commerce. The Article 12 of the 2005 Convention provides that contract formed by interaction ofautomated message system and natural person; or interaction betweenautomated message systemsthe validity or enforceability of contract cannot be denied solely on the ground that no natural person intervened or reviewed the individual actions carried out by automated systems.However there can be errors made by communication through automated system.The Article 14 further provides that if the natural person has made an error in the communication system and the automated system does not give opportunity to correct the error the person or the party on whose behalf the person is acting has the right to withdraw the portion of communication having error provided the other party is notified about the error as soon as possible after knowing about the error, and he has not used or received any material benefit or value from the goods or services..

The Indian Contract Act,section.20 providesthat: where both the parties to an agreement are under a mistake as to matter of fact essential to the agreement, the agreement is void. Section.22 providesthat a contract is not voidable because it was caused by one of the parties to it being under a mistake as to a matter of

[27] *Supra* note13.

fact.Hence as per Indian law whether the error relates to essential fact or not depends on the facts of the case.Since error is done by the natural person in automated computer system andboth parties were unaware, the contractwill become void if it relates to essentials of contract and not when the one of the party is at mistake. Though, the Contract Act deal with natural and legal personsand notautomated system communication, the IT Act provides that automated record shall be attributed to originator by an information system programmed by or on behalf oforiginator to operate automatically.[28]Combined reading of both sectionsone can conclude the errors by automated information systems should be attributed to the party committing the mistake.

Revocation

The Indian Contract Act provides that a proposal may be revoked any time before the communication of acceptance is complete.[29] Further it provides that communication of revocation is complete as against the person who made it when it is put in course of transmission as against the person to whom it is made when it comes to his knowledge.[30]

Under the receipt rule, online businesses will be in the position of promisee (as they have right to accept and the revocation is of no concern. However,if they are the promisors, than they can be affected by revocation under the law.Thepromisee/customer may revoke the acceptance at any time before it is complete.

On the Internet promisee can revoke an offer using e-mailThe I T Act provides thatthe electronic record is not binding till the acknowledgement is received by the addressee.The question arises whether the promisee can revoke the acceptance till he receives acknowledgement.This may lead to conflict with the Indian Contract Act, 1872 which disallows the promisee to revoke acceptance when it is received by the promisor (S.5).Another problem relating to revocation is, when acceptance is made on website, being an instantaneous mode; revocation will not be practically possible.

D. Consideration

Lawful consideration is requirement in physical contracts.In online contracts,thepayment given by the customer fully satisfy the requirement of the consideration.Traditionally payment is made through money. But certain cash alternatives developed later on. These are Cheque (including electronic cheque and electronic image of truncated cheque); credit cards, electronic fund transfer,direct entry payments, Stored Value Card Systems (Mondex™, VisaCash™)anddigital cash which include network money, digital currency, cyber money/CyberCash and electronic money/e-cash. The other examples are Airtel Money, PayTM, etc.

In case of free downloads, thewebsite requiresto agree to certain terms and conditions.One concern is whether such click wrap agreements are unenforceable due to lack of consideration.

[28] S.11(c), the Information Technology Act, 2000.
[29] S. 5, the Indian Contract Act,1872.
[30] *Id.*, S. 4para 3.

E. Capacity

Persons entering into contracts must be *suijuris*.Someone who does not understand the consequences of what he or she is promising to do lacks contractual capacity. Thus minors, persons of unsound minds, and those suffering from legal disability are incompetent to contract. In India Law relating to minor is well developed. Such an agreement is void *ab initio*. A minor can be a beneficiary; transferee; liable to the suppliers of necessaries for reimbursement out of his property, and, may ratify an agreement after attaining majority.

Many online sites rely on circumstantial criteria for determining whether a customer is adult. Normally they require a customer to provide an employment address, a credit card number and a declaration of adulthood.The problem in online contracting will be rules of evidence to prove the majority of the customer or his capacity to enter into contract. As cyber contracts transcend geographical barriers, model uniform rules at the international level need to be evolved to clear the grey areas.

III. Conclusion

The development of e-commerce required some legal regime to protect the e-businesses.The United Nations made the first effort internationally and adopted UNCITRAL Model on e-commerce, 1996. Based on that, the I T Actwas enacted to facilitate e-commerce which was last amended in 2008. Anothereffort wasmade internationally to bring uniformity in legal regime relating to international contracts throughthe United Nations Convention on the use ofElectronic Communications in International Contracts,2005, which clarified some of the issues. India has not signed the Convention yet. The IT Act legalized the contracts made through electronic means. Still there are ambiguities in basic issues involving formation of cyber contracts. The I T Act has to be read with Indian Contract Act, 1872, to settle the issues relating to formation of contract.

The IT Act does not define the promisor and promisee but came up with the definitions of originator and addressee. The definition of promisor and promisee as provided in the Indian Contract Act is differentfrom originator and addressee Both promisor and promisee while sending or receiving the information concerning proposal and acceptance by use of electronic record have to act as originator or addressee. Further, there is deviation in IT Act from contract law regarding the completionof communication of proposals and acceptances.The IT

Act insists on sending acknowledgement of electronic record to be bound by that. Hence, communication of proposal and acceptance will be complete only after receipt of acknowledgement by the concerned parties.

In respect of conclusion of contract through e-mail or website the applicationof general rule 'communication complete when the acceptance reaches the proposer' will be applicable. The postal rule can be applied if the Internet Service Providers are treated as agents of the parties concerned. The postal rule can subject e-businesses to litigation in various jurisdictions.The display of price and articles on e-mail and website are generally treated as 'invitation to treat' and not 'proposal'.However itdepends on intention of the e-businesses whether it is general proposalor not as the terms and conditions are generally provided on the website. If it is invitation to treat than the e-business becomes the acceptor and contract will conclude at the place of consumer as per the general rule. If read with IT Act,the place of conclusion of contract will be, where acknowledgement is received by the acceptor. Since the e-mails or websites could be accessedanywhere, the IT Act has resolved this issue by providing that the place of receipt of electronic record is the principal place of business of the addressee.

With regard to the time of dispatch and receipt the IT Act has to some extent resolved the issue. Another area of conflict is the revocation of acceptance by the acceptor or promisee. The Contract Actprovides that revocation should reach before the acceptance. However since the addressee will be bound by the record on receipt of acknowledgement, the question arises, has the IT Act extended the right of revocation beforethe time of the receipt of acknowledgement by the acceptor from the proposer.These issues need to be resolved by the courts to avoid any conflict between the Contract Act and IT Act.

Regarding enforceability of Standard form contracts and automated contracts, the e-businesses are required to give reasonable notice of the terms and conditions to avoid such contracts being declared unenforceable by courts. What is reasonable notice will depend on case to case. Regarding automated contracts the IT Act attributes such electronic records to the sender of the records and the errors if made can be attributed to the originator.The errors as to essentials ofcontract will make contract void if read as perContract Act.However the law does not provide whether the person will be bound by term if he gives notice to other person of error committing by him. To some extent efforts has been made at International level to resolve this controversy but stillambiguityis existing.

The above discussion makes it clear that the present legal regime is unable to answer many aspects of formation of cyber contracts andto resolve these issues and bring uniformity; efforts need to be made at international level by bringing a treaty or a model law which should be incorporated in the national legislations.

An Inquiryinto the Biological Diversity Act, 2002in the Light of the Nagoya Protocol on Access and Benefit Sharing

*L. Pushpa Kumar**

1. Introduction

The Convention on Biological Diversity (CBD)[1] mandated conservation of biodiversity; utilization of biological resources in a sustainable manner; and fair and equitable sharing of benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources.[2] The CBD also recognised sovereign rights of the States over their natural resources and their authority to determine the access to genetic resources through their domestic legislation.[3] Access to genetic resources should be based on mutually agreed terms and prior informed consent of the member country providing genetic resources.[4] The CBD also obligated the States to take appropriate legislative, administrative or policy measures for sharing the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the with the member country providing genetic resources in a fair and equitable manner on mutually agreed terms.[5]India ratified the CBD on 18 February 1994.Since then, India has been a leading country in implementing the provisions of the CBD.

India has a well-established access and benefit sharing mechanisms under the Biological Diversity Act, 2002 and the Protection of Plant Varieties and Farmers' Rights Act, 2001. This article looks into the implementation of the Biological

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1 The Convention on Biological Diversity (CBD)adopted at Rio de Janeiro on June 5, 1992, entered into force on Dec. 29, 1993. All countries in the world (196 State) are Party to the CBD except only Holy See (Vatican City) and the United States.

2 Art. 1, CBD.

3 Art. 15(1), CBD.

4 Arts. 15(4) and (5), CBD.

5 Art. 15(7) of the CBD. This has to be done in accordance with Arts. 16, 19, 20 and 21 of the CBD. Art. 16 deals with transfer of technology, Article 19 pertains to handling of biotechnology and distribution of its benefits. Arts. 20 and 21 focuses on financial resources and financial mechanisms respectively.

Diversity Act.in the light of . The Biological Diversity Act (BD Act) was enacted in 2002 to meet the requirements of the CBD. The Biodiversity Rules were promulgated in 2004. The BD Act aims to conserve biological diversity present in the country, sustainable use of its components and fair and equitable sharing of benefits arising out of use of biological resources and the associated knowledge. The Act was enacted in the background when the world was witnessing numerous biopiracy cases. The Neem case,[6] Turmeric case[7] and Basmati cases[8] are the classic examples in which India's biological resources as well as the traditional knowledge of local communities have been found to be misappropriated and patented in foreign countries without any permission from Indian authorities or local communities.The parties who have misappropriated and sought patent protection in other countries have neither accessed the resources or knowledge legally nor shared any benefit with the relevant stake-holders. The Government of India had to launch legal proceedings in foreign patent offices such as the US Patent and Trademarks Office and the European Patent Office to vindicate India's claims. The BD Act was enacted against this

[6] A patent was granted (Patent No. No 436257 September 14, 1994) to W. R. Grace of New York and the U S Department of Agriculture in the European patent Office (EPO) for a method of controlling Fungi on plants by the aid of a hydrophobic extracted Neem Oil. Fungicidal effect of hydrophobic extract of Neem Seeds was known and used in India for centauries in Ayurvedic Medicine to cure skin diseases and in agriculture for controlling fungal infections in plants. When the patent was challenged by the activists based on adequate evidences of traditional use of the fungicide, the EPO revoked the patent on May 10 2000 on the grounds there was no inventive step. But the assignees preferred an appeal against the revocation. It was finally on March 8, 2005 the EPO finally revoked the patent rights stating that there existed traditional knowledge in India relating to the use of the neem plant and there was no novelty and invention.

[7] Two USA based Indian nationals were granted US Patent (Patent No. 5, 401,504 March 28, 1995) on the use of turmeric in wound healing which was assigned to the University of Mississippi Medical Center, USA. Government of India challenged it through CSIR. About 32 references relating to the traditional knowledge and use of Turmeric powder for healing wounds were presented before the USPTO. The USPTO revoked the patent on April 21, 1998 rejecting all the claims as being anticipated and obvious.

[8] Basmati, a traditional rice verity of the India sub-continent, cultivated in northwestern part of India and Pakistan for thousands of years was granted patent by USPTO (Patent No.5, 663,484 September 2, 1997) in favour of Rice Tec Inc., an American company for development of basmati rice lines and grains (i) BAS 867, (ii) RT 1117 and (iii) RT 1121 derived from Indian basmati crossed with long grain and semi-dwarf varieties. The patent was for 20 far reaching claims that included planting, harvesting, collecting and cooking of basmati grain. Research Foundation for Science Technology and Ecology (RFSTE) filed a PIL in the Supreme Court of India on March 4, 1998 for appropriate directions to urge the Government of India to challenge the patent at the USPTO. With the efforts of RFSTE and Government of India, the USPTO was forced to reexamine and narrow down the patent on August 14, 2001. Out of 20 claims 15 claims have been withdrawn and struck down and the USPTO confirmed the patentability of three claims of the original patent relating to specific varieties bred by RiceTec. Other two claims have been amended for a narrow scope. Basmati was not the only case. There are countless ethnic products based on biological resources face threats of misappropriation and intellectual property protection in other countries.

backdrop to prevent misappropriation of genetic resources and the traditional knowledge of local communities in India and to end biopiracy. The BD Act has become model legislation for most of the developing countries to fight against biopiracy and to regulate access and benefit sharing relating to genetic resources and traditional knowledge.

2. Institutional Mechanism under the BD Act

The regulatory system under the BD Act is built on three-tier system that will take care of access to genetic resources and the associated knowledge at the national level, state level and local level.

The National Biodiversity Authority

The National Biodiversity Authority (NBA) is the apex body in the system constituted by the Government of India in October 2003 at Chennai, Tamil Nadu[9]. NBA is an advisor to the Central Government on matters relating to conservation of biological diversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources. NBA grants approval to the biological resources and knowledge as per sections 3, 4 and 6 of the BD Act for persons who are non-Indians. It also grants approvals to applications pertaining to intellectual property rights involving biological resources or traditional knowledge. It advises the state government in the selection of areas of biodiversity importance to be notified as heritage sites and devising strategies for their management. It coordinates with the State Biodiversity Boards (SBBs) and Biodiversity Management Committees (BMCs) in the process of approving access and determining benefit sharing terms. NBA is also empowered to take necessary measures to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with biological resource derived from India.

State Biodiversity Boards

The SBBs are the state level bodies established by state government as per section 22 of the BD Act. SBBs advise the state government on matters relating to conservation of biodiversity, its sustainable use and benefit sharing aspects. It grants approvals to the request for commercial utilization or bio survey or bio utilization of any biological resource by Indian applicants.

Biodiversity Management Committees

In every state the local bodies constitute the BMCs as per section 41 of BD Act for the purpose of promoting conservation, sustainable use and documentation of biological diversity. The BMCs also engage in preservation of natural habitat,

[9] S. 8, BD Act.

conservation of land races, folk varieties and cultivators, domesticated stock and breeds of animals, microorganisms and documenting of knowledge relating to biodiversity. The BMCs prepare, maintain and validate Peoples Biodiversity Registers (PBR) in consultation with the local people. The BMC maintains a Register giving information about the details of access to biological resources and traditional knowledge and the details of the collection fee imposed by the BMC and the details of benefits derived from each case and the mode of sharing. The BMCs also advise on any matter referred to it by the SBB or NBA. It maintains the data about local vaids and practitioners using biological resources.

3. Regulating access to Biological Resources and Traditional Knowledge

As per the BD Act, any person who is not a citizen of India or a citizen of India but who is a non-resident as defined in clause (30) of section 2 of the Income-tax Act, 1961; or a body corporate, association or organization which is not incorporated or registered in India; or not incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management should not obtain any biological resource occurring in India or associated knowledge for research or for commercial utilization or for bio-survey and bio-utilization without previous approval of the NBA.[10] The NBA may impose any charge or fix royalty against any person mentioned in section 3(2) who intends to access any biological resource available in India or any associated knowledge for research or commercial utilization or for bio-survey and bio-utilization or transferring the results of any research pertaining to biological research from India.

An Indian citizen or any body corporate, association or organization which is registered in India should give prior intimation to the State Biodiversity Board (SBB) concerned before obtaining any biological resource for commercial utilization, or bio-survey and bio-utilization for commercial utilization.[11] This provision will not apply to local people and communities of the area, including growers and cultivators of biodiversity, and *vaids*and *hakims*, who have been practicing indigenous medicine.

Transfer of Research Results

Without previous approval of the NBA, no person shall transfer the results of any research relating to any biological resources occurring in, or obtained from India for monetary consideration or otherwise to any person who is not a citizen of India or a citizen of India who is non-resident as defined in clause (30) of section 2 of the Income-tax Act, 1961 or a body corporate or organization which is not

[10] S. 3, BD Act.
[11] S.7, BD Act.

registered or incorporated in India or which has any non-Indian participation in its share capital or management. According to the explanation to this section, the term "transfer" does not include publication of research papers or dissemination of knowledge in any seminar or workshop, if such publication is as per the guidelines issued by the Central Government.[12]

Collaborative Research Projects

The provisions of sections 3 and 4 will not apply to collaborative research projects involving transfer or exchange of biological resources or information relating thereto between institutions, including Government sponsored institutions of India, and such institutions in other countries, if such collaborative research projects conform to the policy guidelines issued by the Central Government in this behalf or approved by the Central Government.

Application for Intellectual Property Rights

No person shall apply for any intellectual property right within or outside India for any invention based on any research or information on a biological resource obtained from India without obtaining the previous approval of the NBA before making such application.[13] However, if a person applies for a patent, permission of the NBA may be obtained after the acceptance of the patent but before the sealing of the patent by the patent authority concerned. The Biological Diversity Act provides that the NBA should dispose of any such application within ninety days from the date of receipt of the application.While granting the approval under this section for IPR based applications, the NBA may, impose benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilization of such rights.

For any person, whether Indian or non-Indian, prior approval of NBA is necessary to apply for a patent or any other form of IPR within India or outside India; or for transfer of any biological resource or associated knowledge. As per the provisions of sections 19 and 20 of the Biological Diversity Act, the NBA may grant approval subject to any conditions that may include imposition of any charge or royalty.

Application under Protection of Plant Varieties Farmers' Rights Act

Section 6(3) of the Biological Diversity Act states that prior approval is not required for any person making an application for any right under the Protection of Plant Varieties and Farmers' Rights Act, 2001 because benefit sharing will be fixed by the Plant Varieties and Farmers' Rights Authority while deciding such cases. Whenever, any such right is granted by the Plant Varieties and Farmers'

[12] S. 4, BD Act.
[13] S. 6, BD Act.

Rights Authority, the Authority has to endorse a copy of such document granting the right to the NBA.

NBA can Oppose IPR Cases Involving Indian Biological Resources or TK in any Country

On behalf of the Central Government, NBA can take any measures to oppose the grant of IPR in any country outside India on any biological resource obtained from India or knowledge associated with such biological resource which is derived in India.

Determination of Benefit Sharing

NBA determines equitable benefit sharing arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating to them in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers.[14] NBA is the apex body that has the power to formulate guidelines for access to biological resources and for fair and equitable benefit sharing. NBA determines benefit sharing subject to any regulations made under the BD Act.

Benefit sharing will determined by the NBA by applying all or any of the parameters provided in Section 21 of the BD Act. These include, (a) grant of joint ownership of intellectual property rights to the National Biodiversity Authority, or where benefit claimers are identified, to such benefit claimers; (b) transfer of technology; (c) location of production, research and development units in such areas which will facilitate better living standards to the benefit claimers; (d) association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio-utilization; (e) setting up of venture capital fund for aiding the cause of benefit claimers; (f) payment of monetary compensation and non-monetary benefits to the benefit claimers as the NBA may deem fit.

If any amount of money is ordered by way of benefit sharing, the NBA may direct the amount to be deposited in the National Biodiversity Fund. In case the biological resource or knowledge was a result of access from specific individual or group of individuals or organizations, NBA may direct that the amount to be paid directly to such individual or group of individuals or organizations in accordance with the terms of any agreement and in such manner as it deems fit. For the purposes of this section, the NBA shall frame guidelines in consultation with the Central Government. Detailed guidelines are currently being developed by the NBA for this purpose.

[14] S. 21, BD Act.

Rules 14 to 20 of the Biological Diversity Rules, 2004 prescribe the procedure for access to biological resources and associated traditional knowledge, transfer of results of research, for seeing prior approval before applying for IPR protection, third party transfer of accessed biological resources, and criteria for equitable benefit sharing.

Guidelines on ABS regulations 2014

Even though Section 21 BD Act and Rule 20 of Biological Diversity Rules (BD Rules) provide broad parameters for determining benefit sharing, they have not given any specific guidelines to assist and finalize the quantum of benefit sharing in different situations. There has been a long felt need for a detailed guideline to determine benefit sharing. This was fulfilled by the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014. It was issued by NBA on 21 November 2014. As per these guidelines, the NBA enters into benefit sharing agreements with the applicants which is deemed as the grant of approval for access to biological resources for research.

Upfront Payment for Biological Resource of High Economic Value

If the biological resource has high economic value, the agreement may contain a clause to the effect that benefit sharing shall include upfront payment of an identified amount, as agreed between the NBA and the applicant. In cases of biological resources having high economic value such as sandal wood, red sanders etc. and their derivatives, the benefit sharing may include an upfront payment of not less than 5% on the proceeds of the auction or sale amount as decided by the NBA or SBB.

Benefit Sharing for Accessing Biological Resources

Where an applicant or trader or manufactures has not entered into any prior benefit sharing negotiations with the joint forest management committee or a forest dweller, tribal cultivator or the Gram Shaba for the purchase of any biological resource directly from these persons, the *traders* shall share the benefit in range of 1.0 to 3.0% of the purchase price of biological resources. The benefit sharing obligations on the *manufactures* shall be in the range of 3.0 to 5.0% of the purchase price of the biological resources.

Benefit Sharing for Accessing Biological Resources for Bio-survey and Bio-Utilization that Leads to Commercial Utilization

When the biological resources are accessed for commercial utilization the bio-survey and bio-utilization that lead to commercial utilization, the applicant shall have an option to pay the benefit sharing ranging from 0.1 to 0.5% based on the annual gross ex-factory sale of the product. If the ex- factory sale is up to Rupees

one crore the applicant has to pay 0.1% of the annual gross ex-factory sale amount as benefit sharing component. If the sale is more than one Crore and less than 3 Crore the benefit sharing component is 0.2%. If the sale amount exceeds 3 crore the benefit sharing component is 0.5%.[15] The collection fees levied by BMC , if any , for accessing or collecting any biological resources for commercial purpose from areas falling within the jurisdiction of BMC , such collection fees shall be in addition to benefit sharing payable to NBA or SBBCs.[16]

Benefit Sharing for Transfer of Research Results

In the case of transfer of results of research, the applicant shall pay to the NBA such monetary and /or non-monetary benefits, as agreed to between the applicant and the NBA. If the applicant receives any monetary benefit on such transfer, he shall pay to NBA 3.0 to 5.0% of monetary considerations.

Benefit Sharing in Case of IPR Applications

If anyone intends to obtain any intellectual property rights in or outside India for any invention based on research or information on any biological resources obtained from India. While commercialization of IPR obtains he has to pay the NBA such monetary or non-monetary benefits as agreed between applicant and NBA. If the applicant himself commercializes the process or product or innovation , the monetary sharing shall be in the range of 0.2 to 1% based on sectoral approach, which shall be worked out on the basis of annual gross ex-factory sale minus government taxes . When the applicant assigns or licenses the process or product or innovation to third party for commercialization, the applicant shall pay to NBA 3.0 to 5.0% of the fee received and 2.0 to 5.0% of royalty amount received annually from assignee or licensee based on sectoral approach[17].

Benefit Sharing in case of Third Party Transfer

In case of transfer of accessed biological resource and / or associated knowledge to a third party for research or commercial utilization , the applicant shall pay to the NBA 2.0 to 5.0% of any amount or royalty received from the transfer as benefit sharing throughout the term of the agreement.

Mode of Utilization of Benefit Sharing

Where the benefit sharing has been determined by NBA while according approvals of any type5.0% of the accruedbenefits will go to NBA , out of which half of the amount shall be retained by NBA and the other half may be passed on

[15] Rule 4, ABS Guidelines, 2014.
[16] Rule 5, ABS Guidelines, 2014.
[17] Rules 8 and 9, ABS Guidelines, 2014.

to their concerned SBBs for administrating charges. The rest of 95% of the accrued benefits shall go to concerned BMCs and /or benefit climbers. If the biological esource and knowledge is sourced from individual or group or organization, the amount received will directly go to such individual or group of individuals or organizations. If the benefit climbers are not identified, such fund shall be used to support conservation and sustainable use of biological resources and to promote the livelihood of local people from where biological resources are accessed.

4. Working of the BD Act

This study has identified that so far 34,135 BMCs have been constituted in 28 states. About 1900 People's Biodiversity Registers (PBRs) have been prepared to document the biodiversity and traditional knowledge in 14 states.[18] Since the coming into force the BD Act, the NBA has given 172 approvals in all as on 29 April 2015. This includes 95 approvals for obtaining IPR, 39 approvals for access to biological resources for research and commercial purpose, 24 approvals for third party transfer, and 12 approvals for transfer of research results. These 172 approvals have been granted out of 1002 applications.Furthermore, about 260 applications are under process at different levels.

The NBA has received benefit sharing in the form of royalty to the tune of Rs. 44.48 lakhs. Out of which, NBA has shared the royalty amount of Rs. 20,000 to Amarchinta BMC in Andra Pradesh for export of neem.[19] At present the NBA is working out the modalities for distributing the royalties to the benefit claimers. This benefit sharing amount is a very meagre amount compared to the number of approvals given and the biological resources utilized in the country.

Benefit Shairng for Access to Seaweed

In one of the benefit sharing cases, about 2000 metric tones of seaweeds collected through self help groups of coastal districts of Tamil Nadu (Ramanathapuram, Tuticorin, Pudukottai and Tanjore) by M/s. Pepsico India Holdings Pvt. Ltd. and M/s. Ganesan& Sons and exported to Malaysia, Philippines and Indonesia for commercial purpose. The NBA fixe a royalty @ 5% of FoB (Free on Board) amounting approximately Rs.39.09 Lakhs from the exporter.

Access to Neem Leaves

In another case of access to biological resources, the NBA approved an export of about 2000 Kilograms of Neem to Japan by Bio India Biologicals and determined a royalty @5% of FOB amounting to Rs. 55,035.00 from the exporter as benefit sharing. A part of the royalty amount was transferred to Amarchinta BMC for

[18] Government of India, Annual *Report, Ministry of Environment, Forests and Climate Change*29 (2014-2015).
[19] *Id.* at 30.

their contributions in planting more neem saplings in that area and for creating of awareness about biodiversity conservation. In this case, the Amarchinta BMC in Mahboobnager District, Andra Pradesh collected the neem leaves from Amarchinta village and dried them through special method by the villagers of Amrchinta before supplying to the exporter.

Case involving Intellectual Property Rights

An ayurvedic doctor from Pune, India, Dr. GeetaPandurangPawar has applied for prior approval seeking 'No objection Certificate' for obtaining a patent for preparation of an ayurvedic anti snake venom comprising four medicinal plants. It is stated that in the treatment of victims of snake bite, this anti venom tablet 'pinak' will as a temporary relief instantly before victim is taken to the hospital. In this case, NBA has fixed the benefit sharing as "2% of the Gross sales or Gross revenue of the product derived from the use of biological resources accessed." On commercialization of the patent product and as per the conditions of the agreement with the NBA, the applicant has paid two installments towards royalty as benefit sharing to the NBA. It is pertinent to note that this is the first case of its kind in India under the BD Act involving intellectual property that shared the benefit.

Case involving Third Party Transfer

In this case, The Energy and Resources Institute (TERI) has sent dried root powder and extracts of Chlorophytum species for isolation and characterization of Biologically Active Saponins from Chlorophytum species to UFR des Sciences Pharmacequtiques et Biologiiques, Dijon, France. The material transfer agreement has also been developed between TERI, India and University of de Burgundy, France. The material transferred under the project will be utilized for identification of saponin molecules and study of cytotoxicity of saponins. The cytotoxic saponins identified in the project may further be worked on to develop anti-cancer drug while the insecticidal saponins may be developed into suitable formulation for utilization as environment friendly integrated pest management programmes.

5. The Nagoya Protocol on Access and Benefit Sharing

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity (hereinafter Nagoya Protocol) was adopted on 29 October 2010 in Nagoya, Japan under the Convention on Biological Diversity. Adoption of the Nagoya Protocol is undoubtedly a much awaited milestone achievement of the international community, particularly the Contracting Parties of the CBD.

The Nagoya Protocol on ABS is the instrument for the implementation of the access and benefit sharing provisions of the CBD. The Nagoya Protocol applies to

genetic resources within the scope of Article 15 of the CBD and to the benefits arising from the utilization of such resources. The Protocol also applies to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge.

The Contracting Parties are obligated to take appropriate national legislative, administrative or policy measures for access and benefit sharing for genetic resources and the associated traditional knowledge. In order to ensure proper compliance with the domestic legislation on ABS, the Protocol obligates the Parties to designate National Focal Points, Competent National Authorities and Check Points. The Protocol also suggests the establishment of the ABS Clearing House and information sharing mechanism. It also provides for special considerations for certain research activities and global multilateral benefit sharing mechanism.

Article 5 and 6 of the Protocol reflects the CBD's approach to access and benefit sharing based on the principles of prior informed consent (PIC) and mutually agreed terms (MAT). According to Article 6, access to genetic resources for their utilization shall be subject to the PIC of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the CBD, unless otherwise determined by that Party. This will be done according to the domestic access and benefit-sharing legislation or regulatory requirements of the Party.

According to Article 7 of the Protocol, each Party shall take national measures *in accordance with domestic law, as appropriate,* with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the PIC or approval and involvement of these indigenous and local communities, and that MAT have been established. The terms, national measures *"in accordance with domestic law" and "as appropriate"* provide sufficient leeway to the Parties to choose the level of PIC and MAT as per their convenience.

Under the Nagoya Protocol, PIC is not mandatory to regulate access to genetic resources. It is up to the Party, whether or not, to provide for PIC procedure through domestic legislation. If a Party decides to regulate access to genetic resources for their utilization subject to the PIC of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention, it has to provide for necessary legislative, administrative or policy measures, as appropriate.If a Party does not want to regulate access to genetic resources based on PIC, it need not enact such legislation.

If a Party chooses to regulate access to genetic resources thorough PIC, it must enact a domestic law and such law must provide for a mechanism for PIC or approval system with the help of a Competent National Authority and it should provide for a mechanism that ensures legal certainty, clarity and transparency of

the domestic access and benefit-sharing legislation or regulatory requirements. The domestic measures should also provide for fair and non-arbitrary rules and procedures on accessing genetic resources. The procedures should apply for prior informed consent, criteria and processes for obtaining prior informed consent or approval, and clear rules for establishing MAT The terms should set out a dispute settlement clause, terms on benefit-sharing, including in relation to IPR, terms on subsequent third-party use, if any; and the terms on changes of intent, if applicable.

Where the indigenous and local communities have established right to grant access to genetic resources, their involvement is required for access to genetic resources. The law should provide for the criteria and/or processes for involvement of indigenous and local communities for access to genetic resources.The domestic law should provide for a written decision or certificationby a competent national authority, in a cost-effective manner and within a reasonable period of time. All details of PIC and MAT should be notified by the Competent National Authority to the Access and Benefit-sharing Clearing-House.

Annex to the Protocol lists ten monetary benefits and seventeen forms of non-monetary benefits, but does not limit the scope of benefits with those mentioned in the Annex. The Parties are at liberty to apply any other form of benefit sharing.The Protocol has given life to the provisions of the CBD pertaining to ABS through an internationally legally binding instrument. The success of this Protocol will depend on how the State Parties and different stakeholders give life to its provisions by effective compliance and implementation.

6. Fulfilling the LegalObligations of the Nagoya Protocol under the Biological Diversity Act

Having established a well regarded legislative framework, India stands on a strong footing to implement the Nagoya Protocol. India plans to implement the Nagoya Protocol through the Biological Diversity Act. However, India needs to make some necessary changes in the BD Act.

Article 6, 7 and 12 of the Protocol stipulates that accesses to genetic resources and traditional knowledge should be based on prior informed consent (PIC) or with the approval and involvement of indigenous and local communities.

The provisions in the Biological Diversity Act to ensure benefit sharing satisfy the requirements of the Protocol. Section 21(2) of the Biological Diversity Act gives power to the NBA to determine benefit sharing based on six broad ways, namely, (a) grant of joint ownership of intellectual property rights to the National Biodiversity Authority, or where benefit claimers are identified, to such benefit claimers; (b) transfer of technology; (c) location of production, research and development units in such areas which will facilitate better living standards to

the benefit claimers; (d) association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio-utilization; (e) setting up of venture capital fund for aiding the cause of benefit claimers; and (f) payment of monetary compensation and non-monetary benefits to the benefit claimers.

Annex to the Nagoya Protocol lists ten monetary benefits and seventeen forms of non-monetary benefits, but does not limit the scope of benefits with those mentioned in the Annex. The Biological Diversity Act or the Rules may be amended to include those forms of monetary and non-monetary benefits provided in the Annex to the Protocol that will broaden the scope of determination of benefit sharing by the NBA. Alternatively, the NBA may elaborate the monetary and non-monetary benefits in the benefit sharing guidelines.

Prior Informed Consent

Articles 6, 7 and 12 of the Nagoya Protocol stipulate that accesses to genetic resources and traditional knowledge should be based on prior informed consent (PIC) or with the approval and involvement of indigenous and local communities.

The existing PIC mechanism under the Biological Diversity Act may not meet the requirements of the Nagoya Protocol as it does not involve local communities directly.At present access to genetic material is given by the NBA in consultation with the SBBs and BMCs. The participation or involvement of local communities is not ensured appropriately, though one can argue that the involvement or voices of the local communities are expressed through the BMCs. To be specific, access to genetic resources held by the local communities, where they have the established right to grant access to such resources, PIC or approval and involvement of indigenous and local communities is to be obtained as per Article 6.2 of the Protocol. In India, the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 protects the rights of scheduled tribes and traditional forest dwellers in the community right to intellectual property and traditional knowledge related to biodiversity and also empowers the holders of forest right to regulate access to community forest resources through Gram Sabha. In such a case, PIC or approval and involvement of the scheduled tribes and other traditional forest dwellers has to be obtained.

Likewise, Article 7 of the Protocol mandates that access to traditional knowledge associated with genetic resources that is held by indigenous and local communities is to be obtained with PIC or approval and involvement of these indigenous and local communities. This provision will apply to all local communities who possess traditional knowledge at their disposal whether they live in forest land or not; and also to forest dwellers as protected under the

Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

The Biological Diversity Act of India does not mention PIC explicitly in the Act or the Rules though the approval system does the similar function. Under the Biological Diversity Act, access to genetic material is given by the NBA *inconsultation with* the SBBs and BMCs. The participation or involvement of localcommunities is not ensured appropriately, though one may argue that the involvement or voices of the local communities are expressed through the BMCs. However, the provisions of Nagoya Protocol are very clear and categorical that each Party requiring prior informed consent shall establish necessary legislative, administrative or policy measures, as appropriate, to set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources.[3] Thus, the existing PIC mechanism under the Biological Diversity Act does not meet the requirements of the Nagoya Protocol as it does not involve local communities directly in cases (i) where they have established rights to grant access to genetic resources and (ii) where the local communities have traditional knowledge associated with genetic resources that is sought to be accessed. This aspect requires suitable changes in the Biological Diversity Act.

As far as the mutually agreed terms (MATs), the NBA has already developed model ABS agreements for the purpose of fixing benefit sharing under the Biological Diversity Act. These are the MATs as contemplated under the CBD.The Protocol also prescribes MATs for the purpose of access to genetic resources and benefit sharing.These aspects are already in place in India under the Biological Diversity Act. The MATS under the agreements may require modifications for strengthening them.

Check Points

India needs to designate check points for the purpose of monitoring the utilization of genetic resources and to increase transparency as provided in Article 17 of the Protocol. In a country like India with vast genetic resources a single check point will not be able to check the movement of genetic resources. It is also not feasible for the Ministry of Environment and Forests to function as a Check point as it requires a great number of administrative staff with technical skills. The viable option is to designate the NBA as the Apex Check Point with other designated check points in different departments/offices such as the Patent Office, Customs office in Ports in Airports, GEAC, and the Chief Wildlife Warden in the Forest Department. If required, the NBPGR and ICMR may also be designated as Check points if there is a need to monitor the utilization of genetic resources through their approvals.

All the approvals from the Patent Office involving genetic resources or materials have to be intimated to the NBA before the granting of patent or ceiling of patent

Customs department at very port/harbour or airport in the country should be equipped with two technical experts from the NBA to monitor the movement of biological materials and to collect or receive the information related to the utilization of genetic resources. In the same manner the NBPGR and the ICMR should be posted with two technical experts each to monitor the export/import of genetic materials or utilization of genetic materials for any research or development purposes.

Given the fact that India is a biodiversity rich country and also a technologically progressive state, it is amongst those few countries which are capable of both, acting as a user as well as a provider nation in the ABS process. Therefore, it is required that Indian laws should have provisions for fulfilling its international obligations both as a user and a provider.

With regard to the benefits arising out of utilization of genetic resources the Indian BD Act contains sufficient provisions to meet the requirements under the Nagoya Protocol. As a provider country, the first and foremost thing that India needs to set out is to clarify the criteria for PIC in relation to TK associated with the biological resources. Accordingly, The Rules to the Biological Diversity Act should also be amended to include the procedure for PIC mechanisms in clear terms in relation to the TK associated with genetic resources.

The Nagoya Protocol also demands that the user state should honour and comply with the legal and regulatory requirements of the provider country.To be in conformity with the above requirements, India needs to amend its BD Act to incorporate adequate provisions to ensure that the genetic resources and TK obtained from other countries into India for research or commercial purpose shall comply with regulatory requirements of provider countries.

In order to broaden the scope of the forms of benefit sharing provided under the BD Act, it along with it corresponding rule should be amended to include the additional forms of monetary and non-monetary benefits provided under the annex to the Nagoya Protocol. As an alternative, the NBA may also elaborate the monetary and non monetary benefits in the benefit sharing guidelines.

Legislative changes, by themselves, will not be sufficient to implement the Protocol. A well designed website with interactive information retrieval system is required for providing all the information required to be provided by the National Focal Point and Competent National Authority. Initiatives need to be taken to involve the participation of relevant stakeholders for successful realization of the objectives of the Nagoya Protocol.

Also, depending upon its current economic, social and political capabilities India might consider strengthening its institutional capacities with regard to ABS, focus on capacity building, training, conduct awareness programs of the stakeholders including indigenous communities and develop education materials like pamphlets, training manuals for ensuring better implementation of the ABS laws

in the country. Doing this would be in line with its commitments under the Protocol.

The Protocol also mandates the user countries to ensure that the benefits arising from the utilization of genetic resources obtained from other Parties as well as the subsequent applications and commercialization of such resources are shared in fair and equitable manner as per the domestic laws of the providing Party and based on MAT. Articles 15.2 and 16.2 of the Protocol specifically urge the Parties to enact adequate measures to the address cases of non-compliance.

In the light of these provisions, the Biological Diversity Act needs to be amended to incorporate adequate provisions to ensure that the genetic resources and traditional knowledge obtained from other countries into India for research or commercial utilization shall comply with the regulatory requirements of provider countries. Suitable penal provisions should also be introduced in the Biological Diversity Act for any such violations. Section 60 of the Norwegian Nature Diversity Act, 2009[20] provides an example of user country law which can be considered in the Indian context.

Special Considerations

Article 8 of the Protocol deals with three special considerations, rather in a loose language, and expects the Parties to make suitable legislative, administrative and policy measures at their discretion.

[20] S. 60, the Norwegian Nature Diversity Act, 2009 reads as follows:
"Genetic material from other countries"
"The import for utilisation in Norway of genetic material from a state that requires consent for collection or export of such material may only take place in accordance with such consent. The person that has control of the material is bound by the conditions that have been set for consent. The state may enforce the conditions by bringing legal action on behalf of the person that set them.
"When genetic material from another country is utilised in Norway for research or commercial purposes, it shall be accompanied by information regarding the country from which the genetic material has been received (provider country). If national law in the provider country requires consent for the collection of biological material, it shall be accompanied by information to the effect that such consent has been obtained.
"If the provider country is a country other than the country of origin of the genetic material, the country of origin shall also be stated. The country of origin means the country in which the material was collected from in situ sources. If national law in the country of origin requires consent for the collection of genetic material, information as to whether such consent has been obtained shall be provided. If the information under this paragraph is not known, this shall be stated.
"The King may make regulations prescribing that if utilisation involves use of the traditional knowledge of local communities or indigenous peoples, the genetic material shall be accompanied by information to that effect.
"When genetic material covered by the International Treaty on Plant Genetic Resources for Food and Agriculture of 3 November 2001 is utilised in Norway for research or commercial purposes, it shall be accompanied by information to the effect that the material has been acquired in accordance with the Standard Material Transfer Agreement established under the treaty."

Simplified Measures for Non-commercial Research Activities

Article 8(a) of the Protocol makes a provision for simplified measures for access to genetic resources for research activities meant for non-commercial purposes that contribute to conservation and sustainable use of biological diversity. The regulatory mechanisms of a Party that provide for simplified measures may take into account the subsequent change of intent of such research and may apply the normal regulatory procedures if the research activity does not fall under Article 8(a) of the Protocol.

The Biological Diversity Act of India does not have any different provision for access to genetic resources for research activities meant for non-commercial purposes that may contribute to conservation and sustainable use of biological diversity. But Article 8(a) of the Protocol brings in a very important point that requires favourable consideration of the Parties. Any non-commercial research that contributes to conservation and sustainable use of biological diversity needs special treatment. It is recommended that India may consider introducing a provision in the Biological Diversity Act to provide for simplified measures for such research activities.

Expeditious ABS to Meet Imminent Emergencies

In order to meet imminent emergency situations at the national or international level that may threaten or damage human, animal or plant health, Article 8(b) insists on expeditions access to genetic resources and fair and equitable benefit sharing mechanism including access to affordable treatments by those in need, especially in developing countries. This will mean access to pathogens and other microorganisms that can be used to prevent or cure the epidemic spread of diseases among the human beings, animals or plants. This provision argues for a very genuine situation that requires prompt action by the Parties. Indian interests will not be affected in any manner by honouring this provision.

It is suggested that suitable provisions may be introduced in the Biological Diversity Act to facilitate expeditious access to genetic resources and expeditious fair and equitable sharing of benefits arising out of the use of such genetic resources, including access to affordable treatment by those in need, especially in developing countries as dealt with by Article 8 (b) of the Protocol..

Genetic Resources for Food and Agriculture and Food Security

Article 8(c) of the Protocol invites the Parties to consider the importance of genetic resources for food and agriculture and their special role for food security. Even though it is a persuasive provision and there is no compulsion for the Parties to make provision to implement it, taking into consideration the increasing demand for food and agricultural production and the stable increase of population in our country. It is suggested that India needs to incorporate some safeguard provisions in the Biological Diversity Act while providing access to–

genetic resources for different purposes of research and utilization. This can be incorporated as one of the grounds in Section 34 of the BD Act for refusal/restriction of access to biological resources in the Biological Diversity Act.

7. Conclusion

The Biological Diversity Act is the key legislation in India that was enacted to implement the provisions of CBD for the purposes of conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources and traditional knowledge. In the past thirteen years of its working, the BD Act has indeed significantly established the system of access and benefit sharing in India. However, the current system of actualizing ABS in India suffers from many procedural hurdles. This is prominently observable in some stages of implementation of the Act, such as, obtaining PIC, determining the quantum of benefit sharing, deciding monetary and non-monetary benefits and post-access motoring. A trend has also been seen in the current ABS procedure in the country that the benefit that is being agreed in various ABS agreements is largely monetary in nature. This undermines the potential of non-monetary benefits in national capacity building. Therefore, certain changes are required in the current ABS legal framework especially in the manner in which it is being implemented in the country to maximize the utility of biological resources and traditional knowledge of people for the development of the country.

The BD Act has indeed lost the golden opportunity to incorporate some robust provisions for biodiversity conservation when it was enacted. Its primary focus is to regulate utilization of biological resources and traditional knowledge through access and benefit sharing process. Taking cue from the Nagoya Protocol, the NBA has to set a trend to realize the goal of conservation of biodiversity through a part of benefits accruing out of benefit sharing and engaging the local people and the users in biodiversity conservation.

Another important agenda for the NBA should be to convert the ABS mechanism as a tool of transforming the lives of local people with monetary and monetary benefits. Instead of giving more emphasis on monetary benefits, efforts should be taken to apply non monetary benefits to transform the lives of the people. Again, the benefits should reach the local communities and the benefits have to benefit conservation of biological diversity. Conservation needs to pick up in all areas where biological resources are exploited.

Adoption of Nagoya Protocol on Access and Benefit Sharing marks a landmark development in ensuring equity with the conservers and traditional knowledge holders while utilizing biological resources and the associated knowledge.

The Protocol thoughtfully provides for flexible mechanisms for access to genetic resources and fair and equitable sharing of benefits through PIC and MAT. The

Protocol bestows sufficient leeway to the provider and user countries to fix their own terms in access and utilization of genetic resources and traditional knowledge and hence national sovereignty of Parties over biological resources are effectively respected. The Protocol also contains provisions to encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation of biological diversity and the sustainable use of its components.

The Protocol contains provisions that will immensely benefit our national interests. It protects the interests of conservers of biological resources and traditional knowledge holders on the one hand, and provides for conservation of biological diversity and the sustainable use of its components on the other hand. With the legal mechanisms already in place like the Biological Diversity Act, India is truly in an advantageous position to implement the Nagoya Protocol.

The BD Act of India meets with most of the international legal obligations created by the Nagoya Protocol. Nevertheless, involvement of local and indigenous peoples in the access and benefit sharing process needs to be strengthened in a more viable and effective manner. Compliance of user country measures need to be taken into account seriously and legal provisions need to be introduced to reflect this aspect.

Keeping in mind the national interests and the legal requirements of the Nagoya Protocol, the following changes in the Biological Diversity Act will go a long way to strengthen the biodiversity conservation efforts and access and benefit sharing mechanism in India.

1. *Explicit mention of PIC in the Biological Diversity Act and Involvement of Local Communities:* An amendment is suggested in the Biological DiversityAct to explicitly provide for PIC and to involve the local communities in ABS measures as required under the Protocol. Rules to the Biological Diversity Act should also be amended to include procedure for PIC mechanism in clear terms and involvement of local communities wherever they have recognized rights to provide for access to biological resources and traditional knowledge.
2. *Broadening the Scope of Benefit Sharing:* The Biological Diversity Act andRules may be amended to include those forms of monetary and non-monetary benefits as provided in the Annex to the Protocol that will broaden the scope of benefit sharing. As an alternative measure, the NBA may also elaborate the monetary and non-monetary benefits in the benefit sharing guidelines.
3. *Simplified Measures for Non-Commercial Research:* India needs to introducea new provision in the Biological Diversity Act to provide for simplified measures for non-commercial research that has potential to contribute to conservation and sustainable use of biological diversity as provided in Article 8 (a) of the Protocol. The new provision should take into consideration the change of intent of research at a subsequent stage.

4. *Expeditious Access and Benefits Sharing to meet Imminent Emergency Situations:* Suitable provisions may be introduced in the Biological DiversityAct to facilitate expeditious access to genetic resources and expeditious fair and equitable sharing of benefits arising out of the use of such genetic resources, including access to affordable treatment by those in need, especially in developing countries as dealt with by Article 8(b) of the Protocol.
5. *Genetic Resources for Food and Agriculture and Food Security:* Article 8(c)of the Protocol urges the Parties to consider the importance of genetic resources for food and agriculture and their special role for food security. Even though it is a persuasive provision and there is no compulsion for the Parties to make provision to implement it, taking into consideration the increasing demand for food and agricultural production and the stable increase of population in our country, it is strongly advised that India needs to incorporate some safeguard provisions in the Biological Diversity Act while providing access to genetic resources for different purposes of research and utilization. This can be incorporated as one of the grounds for refusal/restriction of access to biological resources in the Biological Diversity Act.
6. *Ensuring compliance with the Provider Country Regulations:* Adequateprovisions should be introduced into the Biological Diversity Act to ensure that the genetic resources and traditional knowledge obtained from other countries into India for research or commercial utilization shall comply with the regulatory requirements of provider countries.
7. *Linkages with other Laws and Agencies:* As observed in chapter 3, thePPVFR Act, the Patents Act, the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, and the Wildlife (Protection) Act, require some amendments that will create linkages with the Biological Diversity Act and these laws.

Legislative changes, by themselves, will not be sufficient to implement the Protocol. Initiatives have to be taken to involve the participation of relevant stakeholders for successful realization of the objectives of the Protocol. For this to happen, officials of the concerned departments involved in implementation of laws need to be trained by experts and the different stakeholders should also be made aware of the provisions of the Protocol and the domestic legal, administrative and policy frameworks.A well designed website with interactive information retrieval system is required for providing all the information required to be provided by the National Focal Point.

Considering the huge repository ofbiological resources and traditional knowledge in India available in our country, and the large potential of bioprospecting opportunities, a mammoth task lies before NBA, SBBs and BMCs in regulating access to biological/genetic resources and the related traditional knowledge and ensuring fair and equitable sharing of benefits. The divisions of NBA need to be enlarged with the induction of legal, technical and scientific experts to effectively deal with the challenges involved in addressing techno-legal

issues of ABS. Likewise, the SBBs in the States need to enlarge their size and capacities to meet the demand of task before them. The technical, legal and scientific skills of the staff of NBA, SBBs and BMCs need to be regularly strengthened.

Capacity Buildingand training for institutions, officials and relevant stakeholders involved in negotiations and implementation of ABS provisions should be given top priority. Article 22 of the Protocol supports this view and advocates involvement of local communities and relevant stakeholders, including non-governmental organizations and the private sector. Capacity building for officials and training and awareness programmes for local communities and other stakeholders to negotiate mutually agreed terms and to promote equity and fairness in ABS negotiations will be the challenging task to be addressed.

In this context, issues such as monitoring and enforcement of compliance; development and use of viable valuation methods; bioprospecting, associated research and taxonomic studies; technology transfer, and infrastructure and technical capacity to make such technology transfer sustainable; channelizing ABS activities towards conservation of biological diversity and the sustainable use of its components; increasing the capacity of local communities and other relevant stakeholders with emphasis on enhancing the capacity of women within those communities in relation to access to genetic resources and/or traditional knowledge associated with genetic resources need special attention.

RESERVE BANK OF INDIA AND RIGHT TO INFORMATION ACT: An Interface

SumitiAhuja[*]

Introduction

Traditionally, banks have been subject to few requirements of public disclosure of financial records due to a perceived sensitivity of financial institutions to the loss of confidence by depositors, investors or the public. Banks have usually echoed the concept of confidentiality for ensuring safety and soundness in the banking system by preventing the disclosure of information which could weaken the public confidence in banks.[1] The view has been that these disclosures of financial records by the banks can lead to fluctuations in the market; the fluctuations in the market cannot let the banking system to be stable enough. At the same time there are several instances[2] wherein, certain institutions have been in constant support of giving more weightage to public disclosure by banks, which they advocate would be more of an effective tool than confidentiality in maintaining public confidence in banking system. If the latter view is implemented, then consideration has to be given as to what all information the banks can disclose and what they should remain privy to. Here comes the need for the regulators to establish a policy of public disclosure of bank information.

The public interest in disclosure of bank records derives validity from the principle of the public's right to information, public's right to know, public's right to be aware. The Supreme Court of India has recognized that the Right to Information is part of the fundamental right of citizens under Article 19 of the Constitution of the India. Any constraint on the fundamental rights of citizens has to be done with great care even by Parliament. The Indian Parliament came up with a central legislation, the Right to Information Act, 2005, which has come into effect from October 12, 2005. The Right to Information under this Act is

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1 Laurie Durcan and Brace K. Riordan, *Banking Disclosures, Financial Privacy, and the Public Interest*, 6 ANN. REV. BANKING L. 391, 392 (1987).

2 *Id.* at 392.

meant to give to the citizens of India access to information under control of public authorities to promote transparency and accountability in these organisations.[3]

India, we all are aware of is the largest democracy in the world. In a democracy, there is an increased demand of public accountability. Democratic governments are more open about their affairs, in order to provide accountability to its constituents. Transparency is one way in which such public accountability can be brought about. In words of Justice Mathew in *State of Uttar Pradesh* v. *Raj Narain*[4]- "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. Their right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can at any rate have no repercussion on public security". The Supreme Court of India in *S. P. Gupta* v. *President of India &Ors.*[5],observed: "...if secrecy were to be observed in the functioning of government and the processes of government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open government with means, of information available to the public there would be greater exposure of the functioning of government and it would help to assure the people a better and more efficient administration."

But, as it is believed that there needs to be a limit to everything, likewise, in case of disclosing information to public, certain amount of secrecy has to be maintained. The fundamental right under Article 19, of the Constitution of the India, given to us also comes attached with certain reasonable restrictions.

Reserve Bank of India, being the central bank to India, plays following roles:

- Monetary Authority
- Issuer of Currency
- Banker and Debt Manager to Government
- Banker to Banks
- Regulator of the Banking System
- Manager of Foreign Exchange
- Regulator and Supervisor of the Payment and Settlement Systems

3 *See* the Preamble of the Right to Information Act, 2005.

4 (1975) 4 S.C.C. 428.

5 A.I.R. 1982 S.C. 149.

- It also plays developmental role including ensuring that creditis available to the productive sectors of the economy, establishing institutions designed to build the country's financial infrastructure, etc.

While playing all these roles, RBI comes across certain information which if disclosed to general public, can go against economic interest of the State.

In fact, the RTI Act also under Section 8[6] and 9 provides for certain exemptions; the RBI has formed its disclosure policy in compliance with these exemptions. It

[6] Exemption from disclosure of Information (S. 8 of the RTI Act)

1. Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen:
   a. information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence:
   b. information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
   c. information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
   d. information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
   e. information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
   f. information received in confidence from foreign government;
   g. information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
   h. information which would impede the process of investigation or apprehension or prosecution of offenders;
   i. cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;

   Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over;

   Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

   j. information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information;

   Provided that the information, which cannot be denied to the Parliament or a State Legislature, shall not be denied to any person

2. Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests

contd...

cannot always be good to improve people's knowledge on certain things, when such information will not serve any public interest. There is a need to differentiate between 'public interest' and 'what is interesting to the public'.

RTI'sApplicabilitytoRBI

In democratic societies, political pressures are intense (the author mentions that in a sense, this is the very definition of democracy), and there are a variety of arguments for why central banks, when deciding on their tactics, should be sheltered from those pressures via independence.[7] As I mentioned above in my paper, with independence come demands for adequate accountability. In such situations, central banks are asked to provide more information about their operations to enable citizens and their representatives to evaluate the central bank's actions, praise it for its achievements, and take it to task for its failures. In addition, independence may render the central bank more willing to volunteer information about its operations.[8] Certain economists have been of the view that a central bank more fully communicating its objectives, its assessment of the effects of policy actions, and information about economic conditions will enhance social welfare.[9]

The Reserve Bank of India is a public authority[10] as defined in the Right to Information Act, 2005 (formed under the law made by Parliament, i.e., the RBI Act, 1934). In compliance with Section 4(1)(b)[11] of the RTI Act, the RBI has

3. Subject to the provisions of clauses (a), (c) and (I) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section;

   Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act.

[7] N. NergizDincer and Barry Eichengreen, *Central Bank Transparency: Where, Why, And With What Effects?available at*: http://www.nber.org/papers/w13003 (last visited June 14, 2015).

[8] *Id.* at 5.

[9] *Id.* at 6.

[10] Section 2(h) of the Right to Information Act, 2005 defines "public authority" as- "....any authority or body or institution of self- government established or constituted— *(a)* by or under the Constitution; *(b)* by any other law made by Parliament; *(c)* by any other law made by State Legislature; *(d)* by notification issued or order made by the appropriate Government, and includes any—

   (i) body owned, controlled or substantially financed;

   (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government.

[11] According to Section 4(1)(b) of the RTI Act, every public authority shall disclose within 120 days from the enactment of the Act, the following information:*(i)* the particulars of its organisation, functions and duties;*(ii)* the powers and duties of its officers and employees;*(iii)* the procedure followed in the decision making process, including channels of supervision and accountability;*(iv)* the norms set by it for the discharge of its functions; *(v)* the rules, regulations, instructions, manuals and records, held by it or under its control or used by its

contd...

provided information on its website under the various heads therein. Apart from placing the information, as required under Section 4(1)(b) of the RTI Act on its website, the RBI has also placed information disclosed under the Act, if it is of general interest, on its website in a Disclosure Log.

When the law was enacted in 2005, it was new therefore, it was necessary that it was properly implemented (which was required to keep up with the Bank's reputation); there was a need to maintain consistency in the responses to RTI applications and ensure that the exemptions available in the Act were applied correctly.[12] Initially, the Bank began with a centralized model (with one Central Public Information Officer who was an Executive Director and the senior most Deputy Governor as Appellate Authority) for dissemination of information under RTI application. Then after about four years, on gaining sufficient experience, coupled with the fact that increased awareness of the Act had resulted in a significant rise in the number of applications, a partially decentralised approach in the implementation of RTI was put in place with effect from November, 2009.[13] Currently its' being done in a decentralized manner (by the Central Office Departments with the Heads of various Central Office Departments and the Banking Ombudsmen designated as Central Public Information Officers and an Executive Director as the Appellate Authority). Further, senior officers have been designated as Central Assistant Public Information Officers at each of the RBI's 27 Regional Offices and Central Office departments.[14]

employees for discharging its functions;*(vi)* a statement of the categories of documents that are held by it or under its control;*(vii)* the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;*(viii)* a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;*(ix)* a directory of its officers and employees;*(x)* the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;*(xi)* the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;*(xii)* the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes(this is not applicable in case of RBI);*(xiii)* particulars of recipients of concessions, permits or authorisations granted by it;*(xiv)* details in respect of the information, available to or held by it, reduced in an electronic form;*(xv)* the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;*(xvi)* the names, designations and other particulars of the Public Information Officers;*(xvii)* such other information as may be prescribed; and thereafter update these publications every year.

[12] V.S. Das, *Towards Making Right to Information Act More Meaningful*available *at*: www.rbi.org.in/scripts/BS_SpeechesView.aspx?Id=597 (*last visited* May 25, 2015).

[13] *Id.*

[14] *Id.*

The number of RTI applications received by RBI has been on a constant rise, from 796 in 2005-06 (October-June) to 5,087 in (2010-11). "Our disclosure record has been good, with 78 percent of the requests being met in full and 5 percent in part. Only 6 percent requests were declined fully and remaining 11 percent were disposed of in other manner. During the six years of implementation of the RTI Act in RBI, we received over 18,000 requests. Only about 16 % of the requestors went in for first appeal."[15]

The RBI website provides an easy access to information on bulk of topics. The RBI circulars, master circulars, publications and press releases, as also a database on Indian economy, all are available on RBI's website (www.rbi.org.in). The Bank has also recently started the process of digitization of records with suitable software solution with scanning, storing indexing and retrieval features.

The information that is otherwise available by RBI, its' details are as follows[16]:

Policy Statements of the Governor, RBI- The policy Statements of the Governor, RBI, provide a framework for the monetary, structural and prudential measures that are taken from time to time against the background of an assessment of macroeconomic and monetary developments.

RBI releases the information and data at regular periodicity – daily, weekly, monthly, quarterly, six monthly and annually. In addition, it also releases information, as and when required, through occasional publications, such as, studies and reports. The RBI site is updated several times a day.

Annual Publications- The annual publications of the RBI consist of: Annual Report, Report on Trend and Progress of Banking in India, Report on Currency and Finance, Handbook of Statistics on the Indian Economy, Database on Indian Economy, State Finances, Statistical Tables relating to Banks in India, and Basic Statistical Returns.

- Annual Report (statutory document) of the RBI is released every year in late August. It is the statement of the Board of Directors on the state of the economy, the working of the Reserve Bank and on the balance sheet of the Reserve Bank. It also presents an assessment and prospects of the Indian economy.
- Report on Trend and Progress of Banking in India is generally released around November/ December and is also a statutory publication of RBI. It consists of the review of policies for and performance of the financial sector for the preceding year.

[15] *Id.*

[16] Right to Information Act, 2005 *available at*: http://www.rbi.org.in/scripts/righttoinfoact.aspx (*last visited* May 25, 2015).

- Report on Currency and Finance (released around December) is document presented by the staff of the Bank. The Report dwelling on a particular theme presents a detailed economic analysis of the issues related to the theme.
- Handbook of Statistics on the Indian Economy is available both in hard copy as well as in CD-ROM format. This publication aims at improving data dissemination by providing a useful storehouse of statistical information at one place. The publication provides time-series data (annual/quarterly/monthly/fortnightly/daily) pertaining to a broad spectrum of economic variables, including data on national income, output, prices, money, banking, financial markets, public finance, trade and balance of payments.
- Database on Indian Economy gives time series data on wide range of subjects relating to India's economy, banking and finance. This database is of immense help to the visitor as it helps him to gather the data and use it for research.
- State Finances provides a comprehensive analytical assessment of the finances of the State Governments.
- Statistical Tables relating to Banks in India provides complete data relating to the commercial banking sector, covering balance sheet information as well as performance indicators of each commercial bank in India inclusive of those registered abroad.
- Basic Statistical Returns presents comprehensive data on number of offices, employees, deposits and credit as per occupation of scheduled commercial banks.It provides region-wise, state-wise and district-wise information to the public.

Quarterly Publications- This includes: Macroeconomic and Monetary Developments, and Quarterly Statistics on Deposits and Credit of Scheduled Commercial Banks.

- Macroeconomic and Monetary Developments is Issued a day before the Annual Policy Statement of the Governor, Reserve Bank of India and Mid-Term/Quarterly Reviews. It provides an analytical review of macroeconomic and monetary developments during the period under review providing the necessary information and technical analysis.
- Quarterly Statistics on Deposits and Credit of Scheduled Commercial Banks gives data on deposits and credit of scheduled commercial banks for each quarter. It provides center-wise, state-wise, population-wise and bank group-wise data to the public.

Monthly Publications- RBI Bulletin and, Monetary and Credit Information Review are the monthly publications released by RBI.

- RBI Bulletin is released in first week of every month. It publishes analytical articles based on data collected by the Reserve Bank often specifically for the purpose. It carries speeches of the Governor, Deputy Governors and Executive Directors. The speeches are useful in improving the understanding of the central bank's policies. Other useful inclusions are important press releases and circulars issued by different departments of the Reserve Bank and data relating to economy, finance and banking.
- Monetary and Credit Information Review (four pages periodical) aimed at operational level bankers. Summarising important circulars issued by RBI during the month, it is released between 1st and 5th of every month.

Weekly Publication of RBI is weekly statistical supplement to the RBI Bulletin; presenting the weekly balance sheet of the Reserve Bank and other developments relating to financial, commodity and bullion markets.

Daily- RBI through its daily press releases, releases data on money market operations and reference rates for four major currencies, namely, the US Dollar, Euro, Pound Sterling and the Japanese Yen. The press releases are also made on other issues that may be of general public interest such as important banking regulations, new currency notes, rejection or cancellation of certificate of registration of non-banking finance companies, status of urban cooperative banks, etc.

Occasional Publications include various reports (prepared by Committees, if any, appointed for some issue), occasional papers by professional staff, certain studies done by experts, lectures etc.

The Reserve Bank of India also maintains a disclosure log where it places all the information it releases in response to the requests received under the Right to information Act, 2005 on its website, if, in its view, the information could be of general public interest.

RBI has suffered certain uneasiness also at times in relation to RTI. The number of queries that are generally asked by public in a single RTI application are minimum twenty and at times reach till hundred.[17] Sometimes just one individual repeatedly sends applications even after his queries are answered, just by reframing the queries again and again. Even the staff of RBI at times just to settle scores and in effort to disturb the functioning of the Bank, send frivolous applications. This shows that apart from the genuine response seekers there are some elements who just believe in disturbing the functioning of the system, by misusing the tool in their hands (RTI).

Also, the issue that causes worry is that the number of RTI applications received from the North-east region is miniscule in comparison to the other parts of India. This shows that there is lack of knowledge in the people therein; they need to be educated on the usage of the RTI.

[17] *Supra* note 11.

The former Executive Director of the RBI, Mr. V.S. Das[18] (who was alsothe first appellate authority in relation to RTI queries), had tried to invite attention to certain issues[19], which are as follows:

- At times there is a conflict in decisions of Appellate authority of RBI and the CIC on the same point. He wants the Commission to address the same and resolve it as it would be a great help to the public authorities and the information seekers alike, as both would know what to expect.
- Central Information Commission can consider bringing Guidance Notes on particular issues or disclosure principles, where there is unanimity among the Information Commissioners. This can be of immense help to the public in assessing the likely approach of the Central Information Commission, in the event of a second appeal.
- Usage of video conferencing by the CIC in hearing the appeals and arguments can be extended to (if technology and infrastructure permits) or be linked with those of public authorities directly.

Till What Extent is the Disclosure by RBI Justified

Central Bank: Accountability and Transparency: Transparency, in this case, means absence of asymmetric dissemination of information between monetary policy makers and other economic agents. It is a necessary corollary of independent central bank insofar as it reflects the accountability of the central bank to the democratic electoral at large, and from that angle it is also a logical extension of the freedom of information legislation, which is a growing feature of functioning liberal democracies.[20]

Central banks are public institutions, which, although having varying degrees of independence, are ultimately accountable to government and to the public. The demand of good governance is that central banks provide their stakeholders with sufficient information to assess their performance[21]; central banks are accountable to their stakeholders for the powers and resources entrusted to them[22]. A positive

[18] He retired on July 31, 2012.

[19] *Id.*

[20] AnandChandavarkar, *Towards an Independent Federal Reserve bank of India: A Political Economy Agenda for Reconstitution*, 40 (35) *EPW* 3842 (August 27, 2005).

[21] Central bank accountability and transparency may be considered to include: informing the public about what the central bank is aiming to achieve in the future and then later reporting whether those goals were in fact achieved. Such information would form a significant basis for interested parties to assess the performance of the central bank. See *Infra* note 21.

[22] Central bank is accountable to the government and to the public for their administrative costs incurred, i.e., for staff, buildings, etc. As these administrative expenses incurred by central bank are deductions from its profit, and thus represent an opportunity cost for the taxpayer. A part of central bank accountability and transparency on performance may be considered to be: informing the public about what amounts are budgeted for administrative costs, and what actual cost amounts were incurred. See *Infra* note 21.

policy of transparency and disclosure would be of assistance to central bank in maintaining and increasing independence.[23]

One more important point is that there regarding the issue of economic case for transparency. *Geraats* says that central bank transparency has been adopted for economic reasons; its' not just that transparency derives from accountability of central banks. There are five aspects of transparency when it comes to transparency in relation to policy formulation. These are as follows:

1. Political transparency. Referring to clarity of objectives of monetary policy like explicit inflation targets, it means openness about the objectives;
2. Economic transparency. Highlighting the information used for monetary policy, including data, policy models, forecasts and anticipated disturbances;
3. Operational transparency. Concerning the execution of monetary policy actions including a discussion of control errors for operating instruments, macroeconomic transmission disturbances and pertains to unanticipated shocks;
4. Procedural transparency, Describing the mode of policy strategy and an account of policy deliberations typically through minutes and voting records of monetary policy committees.
5. Organizational transparency. In selection of top management.

The RBI has been called to be opaque in all these aspects. Also, if we distinguish between the information that is made available by RBI, in terms of *ex ante* and *ex post* transparency, then it can be judged that in terms of *ex post* disclosure (prompt disclosure of policy decisions, together with an explanation of the decision, and an explicit policy inclination or indication of likely future policy actions). The RBI is still better, but it again is virtually opaque in case of the former. RBI makes available on its website information in terms of reports, accounts, etc. (as mentioned above), through that it can be made out that India is now presumably compliant with the IMF's (International Monetary Fund) SDDS measures (Special Data Dissemination Standards); these SDDS measures however, are in the nature of interim standards for central bank reporting which require a uniform accountancy standard for the presentation of on and off balance sheet items including derivatives defined as forward looking information.[24]

Disclosure Policy of RBI- The Reserve Bank of India creates and holds a lot of information in electronic form. Under various laws, rules and regulations applicable to banks the RBI can authoritatively requisition a lot of information from the banks under its control for the purpose of creating and adding to its own database and files. A large portion of such information may be held in electronic form by such banks. Should the RBI display all such information

[23] *See Central Bank Accountability and Transparency: A comparative study of financial reporting practises available at*: http://www.kpmg.com/IN/en/WhatWeDo/BTC/BTC_TL/Central-bank-accountability-transparency.pdf (*last visited* June 04, 2015).

[24] *Id.*

categories held by the banks because they are "available to it" under some legal instrument?

The answer I think is certainly no, as some information would sure shot be exempted from disclosure under Section 8 of the RTI Act. But, there has been an evident clash between, what RBI provides to be exempted under the RTI Act in its Disclosure Policy, and the interpretation by the Appellate Authority (CIC) of the exemptions under RTI Act.

In an order passed by the then Chief Information Commissioner, Satyananda Mishra, in October, 2010, it was mandatory for the Reserve Bank of India to disclose pre-board meeting agenda notes and minutes. RBI was told to draft a "disclosure policy" by February 2011 to bring about greater transparency in the bank's functioning. The Commission said such a move "will also set the trend for other banks to follow"[25]. The decision came on an application filed by one KishanLal Mittal, a resident of Mumbai, who had asked from RBI the copies of the minutes of the meetings of governing board, board of directors, committee of directors of the central bank from April 2007 and information regarding the complaint handling procedures followed by it against banking/non-banking companies.

RBI's Public Information Officer had said that the information was "voluminous" and would take a long time to furnish, which would result in wasting public money, also that it was covered under Section 8(1)(a) of the RTI Act and was exempted from disclosure.

In the same case, the CIC observed that "once RBI makes it clear which information it would not disclose under the exemption provisions of the RTI Act, it would be clear to everyone what all information can be expected to be disclosed" and that such clear enunciation of the negative list of items of information in conformity with the exemption provisions of the RTI Act would remove all doubts in the minds of the officers of the bank about what they must disclose and which they must not. Even the people would be aware of what information they could ask for, which would lead to minimal use of the appellate mechanism and bring in much greater transparency in the functioning of the apex bank[26].

Thereafter, the RBI has come up with its Disclosure Policy under the RTI Act (the list of items of information is available on RBI's website). It states *inter alia* that RBI has been very proactively disseminating information not only in compliance with the RTI Act but also with the objective of achieving better corporate governance through greater transparency and accountability.But, as the Bank

[25] *KishanLal Mittal* v. *Reserve Bank of India*,File No. CIC/SM/A/2010/000148 (Order dated Oct. 28, 2010).

[26] *Id.*

holds the position of Banker to the Government, Bankers' Bank, the RBI receives and holds a lot of sensitive information, the disclosure of which may not, at all times, be in the interest of the nation or serve public interest. Similarly, the RBI is also privy to personal information pertaining to its employees as well as other stake holders such as whistleblowers, complainants, etc., and disclosure of such personal information would not only compromise the privacy of the concerned individuals, but also, in some extreme cases may endanger their life/security. Such information is considered as exempt from disclosure under the provisions of RTI Act.[27] It provides Department wise list of information, which cannot be disclosed by RBI in compliance with the exemptions under the RTI Act.[28]

Even though the RBI has framed this policy but still in the case of *Jayantilal M Mistry*v. *Reserve Bank of India*[29], it was held that "the Commission cannot abdicate its responsibilities under the RTI Act to RBI on the ground that the latter is an expert body. The Commission cannot rely solely on the decision of the public authority and must look into the merits of the case itself. It must determine, on its own, whether the denial of information by the PIO was justified as per Sections 8 and 9 of the RTI Act." In this case one Mr.JayantilalMistry had sought the copies of audit reports of co-operative banks from the RBI, which were denied to him as it was held, exempted as per the policy of RBI. Then in second appeal to the CIC, RBI was asked to disclose the audit reports. The RBI's contention was that the information sought was exempted on two grounds- (i) it could affect economic interests of the state (Section 8(1) (a) of the RTI Act) and, (ii) information is held in fiduciary capacity (Section 8(1)(e) of the RTI Act). Information Commissioner, Shailesh Gandhi said, even if the information comes under the exempted category cited by the RBI, there was a larger public interest in its disclosure. He also said, "needless to state significant amounts of public funds are kept with such banks and institutions. Therefore, it is only logical that the public has a right to know about the functioning and working of such entities including any lapses in regulatory compliances. Merely because disclosure of such information may adversely affect public confidence in defaulting institutions, cannot be a reason for denial of information under the RTI Act."[30][31] Here it would be interesting to

[27] See *The Disclosure Policy of The Reserve Bank of India under The Right to Information Act*, 2005, *available at*: http://www.rbi.org.in/Scripts/bs_viewcontent.aspx?Id=2347 (last visited May 25, 2015).

[28] It is not an exhaustive list and is subject to review/ revision. There are certain departments functioning under RBI which do not have any negative list of information that cannot be divulged by RBI. These are Department of Communication, Human Resources Development Department, Rajbhasha Department and Rural Planning and Credit Department.

[29] Decision No. CIC/SM/A/2011/001487/SG/15434 (judgement delivered on Nov. 01, 2011).

[30] *CIC directs RBI to disclose audit reports of cooperative banksavailable at*: http://www.thehindu.com/news/national/article2594554.ece?css=print (*last visited* June 14, 2015).

[31] *MukeshAgarwal* v. *Reserve Bank of India*, Decision No. CIC/SG/A/2012/000857/19484 (judgement delivered on July 06, 2012).

note, in earlier cases (decided somewhere in 2009) the CIC had refused the disclosure of such audit reports, agreeing with the contentions of the RBI that it would be against the economic security of the State and hence exempted under Section 8 (1)(a) of the RTI Act.[32]

In a decision[33], which came on November 15, 2011, the CIC asked the RBI to make public, names and other details of top 100 industrialists who defaulted on loans from public sector banks. It turned down the bank's plea of holding this information in 'fiduciary capacity' in the light of large public interest. The Commission also directed the central bank to post on its website complete information on all such industrialists as part of *suomotu* disclosure mandated under section four of the RTI Act before December 31 and asked it to update it every year. The CIC was of the view that "this disclosure could lead to safeguarding the economic and moral interests of the nation. The Commission is convinced that the benefits accruing to the economic and moral fibre of the country far outweigh any damage to the fiduciary relationship of bankers and their customers if the details of the top defaulters are disclosed." He also said the Commission was aware that information on defaulters is being shared by Reserve Bank with an organisation called CIBIL adding that "it is difficult to understand the reluctance to share this information with citizens using RTI"[34].

This brings us to a point that, if this is the case, that one by one the CIC would pass an order that would go against the RBI's disclosure policy, its' best that some kind of consensus should be reached among both.

Conclusion

There has been a persistent emphasis in recent years on good governance in relation to general business practices and, on independence of central banks which till now has, and which in future will probably lead to increased demands for transparency of central bank performance and accountability to stakeholders. Increased public scrutiny can be expected of central bank activities in the wake of the current financial markets crisis.[35] Full transparency in the policy conduct of a politically independent bank is an imperative in a democracy, which in the Indian context would be fully congruent with the RTI Act.

Yes, its' true when information is equated to commodity, an excess of which may possibly reduce its scarcity and hence its economic value. But it is also true to say that RBI is still far from reaching the optimal threshold level of transparency in all

[32] *Kiritkumar J. Mehta* v. *Reserve Bank Of India*, Appeal No. CIC/PB/A/2008/1027-SM (judgement delivered on July 31, 2009).

[33] *Sh. P.P. Kapoor* v. *Reserve Bank of India*, Decision No. CIC/SM/A/2011/001376/SG/15684 (judgement delivered on Nov. 15, 2011).

[34] *Id.*

[35] *Supra* note 18.

its aspects (special emphasis supplied to *ex ante* transparency).[36] Although RBI has tried to reach up to some of our expectations by providing for information on its website, but, it still needs to cover miles to provide *ex ante* transparency in its policy issues.

At the same time, if we talk about the RTI Act (meant to be a powerful tool but, made to be a weapon by some for various cynical reasons), certain people have tried their best to misuse it or abuse it (as I have earlier mentioned in my paper). This can be overcome by firstly, providing proper knowledge to people on how to use the power of RTI more effectively and, secondly, as I had earlier mentioned some kind of consensus has to be reached between RBI and the CIC regarding RBI's disclosure policy.

It has also been a proven fact that more open public disclosure of central bank policies may enhance the efficiency of markets.[37]

[36] Transparency is greater in countries with more stable and developed political systems and deeper and more developed financial markets. See *Supra* note 6.

[37] Matthew Rafferty and Marc Tomljanovich, *Central Bank Transparency and Market Efficiency: An Econometric Analysis* 26 (2) JOUR. ECO. FIN. 150-161 (Summer, 2002).

Development of Publicity Rights in India

KimmiSingla[*]

Introduction

Publicity Rightsare essentially those rights that celebrities require, in order to sustain their celebrity status and reputation, prevent unauthorized commercial misappropriation and also prevent dilution of their status. This can be achieved through the right to protect against commercial misappropriation of one's name, likeness, or identity. In other words, they are the rights of the celebrity to restrain advertisers, commercial entities or any other person from using a celebrity's image to gain a commercial advantage, through either misappropriating any aspect of their identity or diluting their identity or affecting their reputation or status.

The significance of protecting publicity rights in the context of India arises from the unique situation in India with regard to the reverence of celebrities like gods and goddesses, the widespread piracy of goods and also copyrighted works, the proliferation of fake profiles and images on the internet, the political associations of the celebrities, the imitation of celebrities by the public from fashion styles to physical features etc. Therefore, the conferring of exclusive publicity rights becomes important in the context of India.

The whole world is waking up to the violations of publicity rights and different countries have devised different mechanisms to resolve this emerging issue. In US, publicity rights are exclusive rights to prevent misappropriation of one's identity for commercial gain. On the other hand in UK, celebrities have not been accorded any special rights; rather the law of passing off has been used to address their grievances. In India, there is no exclusive statutory law, but the courts have begun to recognize publicity rights. Interestingly, in US, UK and India, the publicity rights evolve in some way from the privacy laws. Therefore, indicating a strong connection with privacy laws but at the same time highlighting the inadequacy of privacy laws in protecting these rights.This paperdistinguishes publicity rights from privacy right and passing off, and also traces the development of publicity rights in India, wherein protection againstcommercial misappropriation of the celebrities' persona was initially accorded

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throughprivacy rights and later through passing off and finallypublicity rights have been recognized as exclusive rights.

Distinguishing Publicity Rights from Privacy Right

The right of publicity is a property-based doctrine whereas invasion of privacy is a tort. Though causes of action under publicity and privacy may have very similar facts and circumstances but are dealt with differently by the court.[1] Whereas, privacy claims, focus on the injury to the plaintiff's psyche, the right of publicity claims focus on the injury to the plaintiff's pocket.[2]On similar lines, damages in privacy cases tend to be measured by the harm felt by the plaintiff,[3] whereas damages in publicity cases are usually measured by the unjust enrichment enjoyed by the defendant.[4]

Thus, on the one hand, the right of publicity recognizes commodification of the persona as an effectual measure for each individual to control the public use of his image, whereas on the other hand the right of privacy regards such commodification as a peril which undermines every individual's control over his or her own identity.[5] This apparent inconsistency between the two doctrines has persisted for over a century, and is present even today.[6] The very fact that courts regularly award high pecuniary damages for privacy violations in US, shows a readiness on the part of courts and juries to place a monetary value on the privacy (or invasion thereof) of non-celebrities.[7] This is, in itself, a way of commodifying that privacy.[8] So, on the one hand the courts in US are of the view that non-celebrity identities do not possess enough commercial value to support a claim under the right of publicity, but on the other hand, they have also perpetuated the practice of valuing the publication of non-celebrity identities through the awarding of damages or compensation in appropriation tort cases.[9]Therefore, right to privacy is more protective of the non-celebrities than celebrities, whereas publicity rights are protective exclusively of celebrities.

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[1] Jennifer L. Carpenter,*The Case for an Expanded Right of Publicity for Non-Celebrities*,6 VA. J.L. & TECH. 3 (2001)at para 26.

[2] *See*MCCarthy, THE RIGHTS OF PRIVACY AND PUBLICITY (2008).

[3] Harry Kalven, Jr., *Privacy in Tort Law Were Warren and Brandeis Wrong?*,31 LAW & CONTEMP. PROBS. (1966) 326, 331.

[4] *See Lugosi* v. *Universal Pictures*, 25 Cal. 3d 813, 835-836 (1979) (dissent) (explaining that "the gravamen of the harm flowing from an unauthorized commercial use of a prominent individual's likeness in most cases is the loss of potential financial gain, not mental anguish").

[5] *Supra* note 1 at para 29.

[6] *Id.*

[7] *Id*, at para 30.

[8] *Id.*

[9] *Id.*

Differentiating Publicity Rights from Passing off

Passing off is a common law tort and its ingredients have been set out in*ErvenWarnink* v. *Townend& Sons Ltd.*[10] as: (i) a misrepresentation, (ii) made by a trader in the course of trade, (iii) to prospective customers of his or ultimate consumers of goods or services supplied by him, (iv) which is calculated to injure the business or goodwill of another trader and (v) which causes actual damage to a business or goodwill of the trader by whom the action is brought or will probably do so.According to David Tan, the right of publicity applicable in the United States and the tort of passing off in the United Kingdom are similar to the extent that both actions recognize that the law should protect the commercial interests of celebrities and prevent unlawful profiting.[11] As regards celebrities, while the right of publicity protects the proprietary interest in the identity of the celebrity, the tort of passing off seeks to protect the proprietary interest in the goodwill or reputation of the celebrity.[12] However, he asserts that unlike the tort of passing off, the right of publicity does not require evidence of the misrepresentation or likelihood of confusion by consumers as to the celebrity's association with, or endorsement of, the defendant's use.[13]In not regarding identity to be a property right, the passing off action enforces one's interest against unauthorized commercial exploitation of identity only under the conditions where the *associative* value of identity has been misappropriated.[14] Rather than relying on a presumption, the passing off action requires courts to examine the impact and reaction of audiences to the unauthorized use of identity in their determination of liability.[15]In US, the First Amendment i.e. the right to freedom of speech and expression is a defense to Publicity rights, however such a defense cannot be taken in the case of passing off.[16]

Therefore, publicity rights can be said to be more expansive in their protection against an unauthorized use of identity compared to a common law passing off remedy.

Protection in India through Privacy Laws

The initial attempts in India at protecting rights in the nature of publicity rights were done through the privacy law.The Constitution of India does not expressly

[10] 1979 (2) All.E.R. 927.
[11] David Tan, *The Fame Monster Reloaded: The Contemporary Celebrity, Cultural Studies and Passing Off*, 32SYDNEY L. REV.(2010) 291, 292.
[12] *Id.* at 292.
[13] *Id.*
[14] *Id.* at 297.
[15] *Id.*
[16] Emmanuel KolawoleOke, *Image Rights of Celebrities in the Digital Era: Is there a Need for the Right of Publicity in Ireland?*,4(1) IRISH J. OF LEGAL STUDIES (2014) 94.

recognize the right to privacy. However, in 1964, in the case of *Kharak Singh* v. *State of UP*[17], the Supreme Court recognized that right to privacy is implicit in Article 21 of the Constitution of India. Subsequently, in *R. Rajagopal*v. *State of Tamil Nadu*[18],the apex court discussing the right of privacy observed that:

> The right to privacy has two aspects which are but two faces of the same coin (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion.The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising or non-advertising purposes or for that matter, his life story is written whether laudatory or otherwise and published without his consent as explained hereinafter.In recent times, however, this right has acquired a constitutional status.[19]

The Supreme Court while considering the right of privacy in the aforesaid judgment opined that the freedom of press stirred the debate about the involvement of public figures in public issues and comments.[20]It has laid down that nobody can publish anything regarding the private matters of a citizen including his/her family, marriage, procreation, motherhood, child-bearing and education without his/her consent.[21] The publication of private information without the consent of the person to whom it pertains would amount to a violation of person's right to privacy, and would lead to liability in an action for damages.[22] However, the Supreme Court has opined that the threshold at which privacy is considered to have been violated is much lower in the cases of persons who either voluntarily thrust themselves into the controversies or who are public figuresas the public gaze cannot be avoided by them which is necessary corollary of their holding public offices, but such intrusion into their private lives should not extend to such a level that it amounts to harassment.

The case of*Khushwant Singh* v.*Maneka Gandhi*[23], delves with both defamation and privacy, and asserts that writings and comments by authors, publishers cannot be restricted to public interest as defined to include what is good for the public.[24] It

[17] 1 S.C.R. 332 (1964).
[18] (1994) 6 S.C.C. 632.
[19] *Id.* at 639
[20] *Id.* at 646.
[21] *Id.* at 634.
[22] *Id.*
[23] A.I.R. 2002 Del. 58.The issue in this case, was with respect to Khuswant Singh's autobiography, which had mentions of the strained relationship between Maneka Gandhi and her mother-i n-law Indira Gandhi.
[24] *Id.* at 80.

must be used in the connotation of what is of interest to the public.[25] People have a right to hold a particular view and express freely on the matter of public interest.[26] There is no doubt that even what may be the private lives of public figures become matter of public interest as it is difficult to segregate the private life of the public figures from their public life. It is the burden of holding a public office.[27]

Protecting the publicity rights entirely through the privacy and human dignity aspect encounters certain problems. Firstly in India privacy is carved out of a fundamental right and fundamental rights can be enforced only against the state. In spite of a liberal approach followed by the courts in this regard, still it would be difficult to enforce publicity/privacy rights against private individuals.Further, there exists a hierarchy in the level of privacy available to different people: the general public has the 'greatest' right to privacy, public figures and those who force themselves into the public eye do not enjoy as 'strong' a right, and public officials can claim almost no right to privacy as far as their public acts are concerned. Moreover, Fundamental rights cannot be waived[28] so an individual would find it difficult to engage in commercial transactions which involve waiving of the privacy rights to some extent. Finally, rights under Art 19 and Art 21 of the Constitution extinguish after the death of a person, so the valuable persona of a celebrity would not be transferable to heirs and lack protection from unauthorized commercial and dignity exploitation.

Protection in India through Passing off

In India the Delhi High Court has added a new dimension to protection of the proprietary interest of the celebrities in the name, likeness etc and prevent its misappropriationby according them protection through the common law passing off remedy.In *ICC Development (International) Ltd* v. *Arvee Enterprises*[29], the Hon'ble Delhi High Court observed that:

> Passing off cases can be divided into two broad categories. First are those where the competitors are engaged in a common field of activity and the plaintiff complains that the defendants have named, packaged or described his product or business in a manner likely to lead the public to believe that the defendants' product or business is that of the plaintiff. Second type of passing off, is where it is alleged that defendant has promoted his product or business in such a way as to create the false impression that his product or business, is in some way approved, authorised or endorsed by the plaintiff or that there is some business connection between them. By this false linkage or relationship, the defendant hopes to gain on the goodwill of another. Plaintiff's case is based on this form of passing off.[30]

In this case the Delhi High Court has extended passing off doctrine to include cases of misrepresentation through falsely creating an impression that the defendant's business or product is endorsed by the plaintiff. With respect to the right of publicity the court observed that:

> The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event. Any effort to take away the right of publicity from the individuals, to the organiser [non-human entity] of the event would be violative of Articles 19 and 21 of the Constitution of India. No persona can be monopolised. The right of Publicity vests in an individual and he alone is entitled to profit from it. For example if any entity, was to use KapilDev or Sachin Tendulkar's name/persona/indicia in connection with the 'World Cup' without their authorisation, they would have a valid and enforceable cause of action.[31]

From the observation of the court we can infer that publicity rights are acknowledged in the indicia of the identity and can be conferred when attached to an event, product etc. Moreover, the producer of a film, the organizer of a sports event cannot claim rights in the persona of the individual. As considered by the Delhi High Court, the publicity rights in India, originate from the right of privacy which emanates from human dignity enshrined in Articles 19 and 21 of the Constitution. Therefore, in this case the Delhi High Court has recognized the personality aspect of publicity rights but at the same time it has also provided protection to the right to publicity through the doctrine of passing off, similar to the stance taken by the courts in UK.

[25] The very fact that so much has been written about the controversy in question and the relationship between the respondent and her late mother-in-law Smt. Indira Gandhi shows the interest which the public had in the happenings though it related to matters of private relationship between the two individuals.

[26] *Supra* note 24.

[27] *Id.*

[28] *GianKaur* v. *State of Punjab* (1996) 2 S.C.C. 648.

[29] 2003 (26) P.T.C. 245 Del.In this case the plaintiff was the organizer of the ICC World Cup to be held in South Africa, Zimbabwe and Kenya in 2003 (hereinafter, "the Event") and had created a distinct 'logo' and a 'mascot' for the Event. It was contended that ICC events have acquired a "persona" or "identity" of their own. The defendants were misrepresenting their association with the plaintiff and the World Cup, by advertisements in media and by using said offending slogans with the intention to unlawfully derive commercial benefit of association with the plaintiff and the World Cup thereby, seeking to piggyback on the reputation of the plaintiff.

[30] *Id.* at 251.

[31] *Id.* at 253.

Protection in India through Exclusive Publicity Rights

Publicity rights are at a very nascent stage of development in India. The High Court of Delhi in a recent decision of *Titan Industries Ltd.* v. *M/s RamKumar Jewellers*[32]gave averdict on publicity rights, which is one of the mostauthoritative pronouncements on publicity rights in the Indianjurisprudence.In this case the Delhi High Court has relied on the conception of publicity rights in the USA and referred to the landmark case of *HaelanLaborotories* v. *Topps Chewing Gum*[33] quoting:

> A man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross" i.e., without an accompanying transfer of a business or of anything else.This right might be called a "right of publicity". For it is common knowledge that many prominent persons (especially actors and ball- players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways. This right of publicity would. usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

The Delhi High Court endorsed this view and delineated the contours of "publicity right"in the context of India which have been discussed below:

I) What are Publicity Rights: When the identity of a famous personality is used in advertising without their permission, the concern is not that nobody should commercialize their identity but that the right to control when, where and how their identity is to be used should vest with the famous

[32] 2012 (50) P.T.C. 486 (Del). In this case the Plaintiff was using the brand 'TANISHQ' in relation to jewellery. The brand was being endorsed by Mr. Amitabh Bachchan and Mrs. Jaya Bachchan for its diamond jewellery collections. Plaintiff came to know that the Defendant has copied the 'artistic work' of Plaintiff's advertisement as depicted in one of its hoardings and the Defendant's advertisement contained an identical picture of Mr. Amitabh Bachchan and Mrs. Jaya Bachchan as depicted in plaintiff's advertisement. This posed the issue of protecting publicity rights before the court.

[33] 202 F.2d 866 (2d Cir. 1953). In this case, baseball players had licensed their statistics and imagesfor use on baseball cards to one company but the defendant company printed competing cards with the same players images. The issue in this case was whether the player could properly assign the commercial rights in his likeness to *Haelan*, thus giving *Haelan*, rather than the player, the ability to sue for unauthorized commercial use of that likeness. The court held that the player's "right of publicity" was assignable to *Haelan*, and thus made personality rights alienable just like property rights.

personality.[34] The right to control commercial use of human identity is the right to publicity.[35]

Therefore, the court recognized that right of the celebrity in its persona and has described right to publicity as the right to control commercial use of "human identity". The words "Human identity" are broad enough to encompass aspects such as name, likeness, evocative aspects of human personality such as voice, role or characterization etc. The word identity can be construed to include all the aspects with which a person is identified with.

II) Who can claim publicity rights: The court has defined the celebrity as a famous or a well-known person.[36] A "celebrity" is merely a person who many people talk about or know about.[37]

The court has given a very wide definition of a celebrity. This definition could include not only world famous personalities rather could also include persons who are known within say a community (both real and virtual) provided many people talk or know about them. Therefore, if on social media a particular video or picture gets "many" likes such person could claim to be a celebrity!

III) The content of publicity rights:

i) Validity: The person claiming the publicity right must be able to show that he has an enforceable right in the identity or persona of a human being.[38]

This means that the court has not limited the ambit of publicity rights to the celebrated celebrities alone, but has enlarged it to include anyone who can prove that he has an enforceable right in his identity or persona. Further, the court extends the publicity rights to those entities who have been licensed, allowed or authorized to use such personas. Moreover, the court has specifically stated "human being" which means that "characters" that are a fictional construct and are not associated with a human being cannot be accorded publicity rights.

ii) Identifiability: The court has observed that the Celebrity must be identifiable from defendant's unauthorized use and infringement of right of publicity does not require proof of falsity, confusion, or deception, particularly when the celebrity is identifiable.[39] The court

[34] *Id.* at para 15.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

recognized that the right of publicity extends beyond the traditional limits of false advertising laws.[40]

The court has clearly recognized the established principle that for establishing the infringement of publicity rights, confusion amongst the public is not required, which is one of the requirements for claiming passing off remedy. Therefore, the view of the Delhi High Court is in conformity with law of publicity followed in the US.

The court in this case has also laid down three tests for identifiability:[41]

a) The test of unaided identification: This means that the simple comparison of the Plaintiff's identifying features and the defendant's infringing material create a strong sense of identifiability with the Plaintiff. This test is applicable particularly in case of very well known and widely recognized celebrities.
b) The test of proportional identification: This means that evidence of the common elements in the defendant's use when added up at geometric rate point to the plaintiff.
c) The test of intent to trade upon identity: To gather evidence both direct and circumstantial to construe the intention of the defendant's to trade upon the identity of the plaintiff and in such case there will arise a presumption of identifiability.

iii) No intention or knowledge required to make the defendant liable for violation of the right of publicity.[42]

Therefore, the court has eliminated element of intention with respect to infringement of publicity rights wherein the misappropriation of identity is so stark that "Res IpsaLoquitor"- things speak for themselves. The defendant cannot escape liability by pleading lack of knowledge or intent.

The Delhi High Court therefore, recognized the proprietary value that the celebrities have in their personas and has ventured into providing it protection from exploitation through exclusive publicity rights.The court recognized the need to protect the rights in the personas of celebrities and cautioned against exploitation of the same.Therefore, this judgment has strived to define and detail

[40] *Id.*

[41] *Id.*

[42] *Id.* at para 17.("In this case the court observed that the liability of infringement by the defendant is based on the identifiability of Mr. Amitabh Bachchan and Mrs. Jaya Bachchan from the defendant's advertisement which is the exact replica of the plaintiff's advertisement being the proof of identifiability. There is a direct interrelationship between identification and defendant's state of mind. The defendant's use of the personality rights of Mr. Amitabh Bachchan and Mrs. Jaya Bachchan in its advertisement itself contains a clear message of endorsement and the message is false and misleading. Further, since Mr. Amitabh Bachchan and Mrs. Jaya Bachchan are clearly identifiable there would be an infringement of the right of publicity for it is not tied down to any proof of falsity. The right to publicity extends beyond the traditional limits of false advertising laws").

the content of the publicity rights and laid down the foundations for the protection of such rights in the context of India.

Conclusion

The whole construct of publicity rights connotes that the so called celebrities in our society dead or alive, should have some rights to protect the exploitation of their commercially valuable identity which is a corollary of their special status as a celebrity. Thus the right of publicity provides celebrities with a vehicle for maintaining control over how their constructs are presented to the public. The nature of publicity rights as an exclusive right can be delineated as the right to prevent the commercial misappropriation of one's personality which includes both the private self and the constructed image. This right is exclusively for celebrities since a common person's real or constructed image would not ordinarily have commercial value and can be adequately protected through privacy laws. However, in the case of celebrity, privacy laws are inefficient because their personal information also carries high monetary value.

In USA, publicity rights are recognizedand they protect the different indicia of the persona of living and deceased celebrities and also strive at balancing the freedom of speech with the right to publicity. On the other hand, UK deploys the passing off remedy to cases of violation of rights of celebrities and does not confer any exclusive rights. Moreover, other laws like trademark, copyright, advertisement codes have been deployed to extend protection to celebrities in the commercial value in their identity. In India the publicity rights are in a nascent stage of development and the legal regime followed in India was similar to that of UK until the decision of the Delhi High Court's in the case of *Titan Industries Ltd.* v. *RamKumar Jewellers*, wherein the court has acknowledged and defined exclusive publicity rights on similar lines as recognized in USA.

In India, the journey of striving to protect the proprietary interest of the celebrities in their personas, has traversed from privacy to passing off to according exclusive publicity rights. The contours of the exclusive publicity rights defined and detailed by the Delhi High Court are comprehensive enough to cover the violations of publicity rights thriving in our country both in the real and the virtual world. However, its applicability in future cases will further pave the way for the concretizing of the publicity rights in India.

LENGTHENING THE LIGHT OF LIFE-CANDLE: The Transplantation of Human Organs and Tissues Act, 1994 and Beyond

SaurabhRana[*]

Introduction

If we trace the historic origin of human organ transplantations, we find that its technical basis was initiated by Alexis Carrel, a French Surgeon whoinvented the first perfusion pump paving the way to organ transplantation for which he got the Nobel Prize in Physiology and Medicine in 1912.[1]Today, medico-technical barriers like immunologicalrejection[2] have largely been overcome andmany socially sentient citizens come forward to donate their internal organs in the true spirit of humanity to save other precious human lives.[3] However, still transplantation of organs form one human being to another almost unfailingly presents an array of legal complications depending upon the situation in which the transplantation is resorted to and the status of the prospective donor. For example, if the prospective donor is an adult then the transplantation can be made only with his consent butif that person is a minor or a person of unsound mind, the question may arise as to whether transplantation can be done with the consent of his guardian or next friend, and if yes then who all may be considered to be so competent to provide the consent? The attributes of thesecomplications also permutatedepending uponwhether the prospective donor is a living person or a dead person, if deceased what kind of death it wasandhis relationship or the absence of it with the beneficiary.

In this paper, we shall discuss various dimensions associated with the issue of donation of human organs both in the national and international perspectives including the legal, moral and ethical dilemma associatedtherewith, the current

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1 http://www.nobelprize.org/nobel_prizes/medicine/laureates/1912/carrel-bio.html as visited on 19-10-2014.

2 When a person receives an organ from someone else during transplant surgery, that person's immune system may recognize that it is foreign. This is because the person's immune system detects that the antigens on the cells of the organ are different or not matched; see at https://www.nlm.nih.gov/medlineplus/ency/article/000815.htm as visited on 24-11-2014.

3 Dr. A.K. Thairen,*Ethical Issues in Organ Transplantation in India*,6 EUBIOS JOURNAL OF ASIAN AND INTERNATIONAL BIOETHICS (1996), 168.

legislative framework and the requisite changes thereto and above all, the need for formulating an appropriate policy and creating crucial public awareness.

Technical Aspect of Donor's Death: Brain Death or Cardio-Respiratory Death

The death which we fear is but the birth of eternity. Death is said to be the ultimate cure for all diseases however, a great deal of bewilderment bedevil most comprehensions about the death. Some of them are: the relationship between the concept of death and criteria of death; the meaning of the biological fact of death; the clinical significance of death of the organism as a whole; and whether death is to be considered as an event or as a process?For many years now, the debate has centered upon the criteria to be applied for assuming one's death being 'brain death' or the 'cardio-respiratory death'which transports us to the territory of the concepts of beating heart donors and the non-beating heart donors respectively.

Beating Heart Donor

As a matter of fact, after the death of one's brain, death of rest of the person within few hours or days is inevitable.Should we then not use organs from this person to save other lives? International medical fraternity debatedfor a long time on this proposition. In the past two decades, the concept of 'donation after brain death (DBD)' has been accepted world-over. Whilst the criterion of death of the 'entire' brain is used in the U.S.A., the British law requires only the proof of death of the 'brainstem'. In practice, the largest proportion of organ donationworld-over came from the patients who have been declared dead by applying brainstem criteria[4]while their heart-beatswere maintained by ventilator support.[5]

The technical advantages of the beating heart donation have neverbeen in dispute[6],but there seems to be a residual repellency to the procedure.Much of thisrancorrises from an inherent hatred towards performing something lethal amid the conditions pertaining to a living patient as the heart of this type of donor still beats.Concern seems to be irrational once the concept of brain stem death has been accepted; thereafter,the emotional bias, if any should be directed towards the recipient of the organ.

Perhaps the major problem lies in the fact that there are still those who, in all good conscience, cannot accept the technical criteria advocated for the diagnosis of brain death- doubts which equally baffle both doctors and relatives.[7]Some

4 In contrast to the 'entire' brain death criteria.

5 In case of donation from a brain dead person, ventilator support is continued after the brain death and the heart-beat is maintained thereby.

6 For example,the possibility of crucial organs' transplantation e.g. heart transplant which requires a beating heart can be done in this kind of death.

7 See J.M.A. Swinburne,*Discontinuation of Ventilation after Brain Stem Death*, 318 BRITISH MEDICAL JOURNAL(1999) 1753.

surgeons, while accepting a ventilated donor, will not operate until the patient is disconnected from the machine and shows a flat electro-cardiogram. However today, the medical fraternity generally seems to have acceded to the view that a flat electro-cardiogram is not necessary to establish the fact of death[8] as it is only by such pragmatic adaptation of the situation that beating heart donation may become universally accepted and as a consequence thereof, the maximum proportion of high quality organs may be obtained.

Non-Beating Heart Donor

The alternative to reduce the 'wastage' of organs would be to acknowledge the common man's possible distrust of brain death criteria for declaration of death of his near and dear ones and to have recourse to the cardio- respiratory definition of death. To take the definition of death in parallel[9]we enter into the realm of what is known as non-heart beating donation or 'donation after cardio-death (DCD)'. Such donationshave been contemplated in two ways:firstly, where the mechanical support is removed from a 'brain dead' ventilated patient whose heart will then cease to function as a result of respiratory failure. This raisespublic confidence and it has alreadybeen seen that many surgeons adopt this procedure as a routine; andsecondly, the patients who have died suddenly and who could not have been kept on ventilator.[10] However, this again raises a number of both legal and ethical questions.

The question herearises as to whether the use of this 'second-best' organ harvesting that is from the non-heart beating donors is better than no transplant et al and collaterally, whether it isan ethically or legally appropriate procedure. It must be noted however, that the extent of this fluster is still uncertain; some hold that the difference in outcome between a non-heart beating donation and a beating heart donationis of subtle nature only[11] while others report considerable variations.[12]Rapid response lies at the foundation of the success of non-heart beating donation. This being so, major significance is attached to what can be regarded as the 'atonal period'– that is, the so far undefined periods between the beginning and the end of the death process. It is surprising to find that, at least in the United States, there is no standard atonal period- the Institute of Medicine

[8] J.R. McConnell, *The Ambiguity about Death in Japan: An Ethical Implication for Organ Procurement*, 25 JOURNAL OF MEDICAL ETHICS(1999) 322.

[9] This approach is adopted in the United States' Uniform Determination of Death Act which was drafted in 1981 by the President's Commission study on the concept of brain death. See at: http://healthcare.findlaw.com/patient-rights/what-is-the-uniform-declaration-of-death-act-or-udda.html#sthash.jm2vwu2Y.dpuf as visited on 12-10-2014.

[10] G.Kootstra, R.Wijnen, J. .P.Van Hooff and C. J.Vander Linden,*Twenty Percent More Kidneys through a Non-heart Beating Program*, 23 TRANSPLANT PROC(1991) 910.

[11] R.M.H.Wijnen, M. H. Booster, B. M.Stubenitsky,*Outcome of Transplantation of Non-heart-beating Donor Kidneys*,345 LANCET(1995) 1067.

[12] S.Balupuri, P. Buckley, C.Snowdon,*The Trouble with Kidneys derived from the Non-heart-beating Donor: A Single Centre 10 Year Experience*, 69 TRANSPLANTATION(2000) 842.

U.S.A.suggests five minutes[13] but it seems it can be anything from ten minutes[14] to being discounted altogether[15].

Moral and Ethical Aspects of the Human Organ Transplantation

The basic ethical issue involved in organ transplantation is whether a person has a right to enjoy life on the basis of organs belonging to other. Once we choose to answer it in affirmative, we accept that we are prepared to inflict injury on others in order to prolong somebody else's life. Thus, we sacrifice the long cherished principle of non-malfeasance[16] in medicinebecauseeven if onedonates his organ voluntarily and without any consideration of recompense, he suffers injury to his body. There are other moral issues as well wherein the issue of money-consideration for the human organs has assumed the center-stage. Let's first consider the arguments opposing the money consideration:

Sale of Human Organs in Violation of Human Dignity

In contemporary ethical deliberations, human dignity has become a very handy tool to measure the ethical content of biotechnological applications, at times, without appreciating its true compass and connotations. Essentially speaking, human dignity is an expression of the human-content of homo-sapiens. It is an expression of the properties or virtues due to which human creature is known as human being. What are these virtues? These virtues,ubiquitoussincevedictimes in India are ten in number- namely, love, trust, righteousness, compassion, tolerance, fairness, forgiveness, beneficence, sacrifice, and concern for the weak. With these human virtues in mind, any act done to save the life of a human being or to liberate him from sufferings must not be contaminated converting it to becontrary to human dignity, and it is in this contextthat those who oppose the organ sale argue that the presence of money-consideration alters the very basic contentsof the act of organ donation.

However, those favouring the money consideration oppose this argument by saying that the concept of human dignity does not demand that other people should be forced to die a premature death where an illness can be cured by organ transplantation nor that the people who donate organs should otherwise die of hunger and their families be left to starve. In fact, the 'vendors' and 'buyers' are rendered vulnerable because of the introduction of unwarranted legal component

[13] See J.Menikoff,*Doubts about Death: The Silence of the Institute of Medicine*,26 J LAW MED ETHICS (1998) 157.

[14] G.Koostra,*TheAsystolic or Non-Heart-Beating Donor*, 63 TRANSPLANTATION (1997) 917.

[15] J.M. Dubois,*Non-Heart-Beating Organ Donation: A Defense of the Required Determination of Death*, 27 J LAW MED ETHICS (1999) 126.

[16] The ethical category of Non-Malfeasance represents the doctor's attempt to avoid any act or treatment plan that would harm the patient or violate the patient's trust, and has been popularized in the phrase "first, do no harm."; as seen from https://www.physiciansforreproductiverights.org/ethics/non-malfeasance/ on 24-09-2014

that brings in many players such as the authorization committee[17], police, lawyers, adjudicators and social activists each with its own agenda, philosophy and interest, thereby transforming a simple activity into anexceedingly entangled exercise. The argument that there cannot be genuine and free consent to the sale of organs is in stark antithesis of the concept of individual's autonomy. The decision to sell an organ taken by a person after considering all the choices, capabilities circumstances and consequences cannot be discounted by others on the sole delusive ground that it has been taken under some undue influence or inducement. The policy on organ transplantation reflectsacute social paternalism and is certainly not an objective approach.

Sale of Human Organs in breach of Equity

It has been the argument against human organ sale that once it is legitimized, organs will mainly be sold by 'those who cannot afford to keep their organs'[18]. Also, there may be transnational movement of organs where the 'rich' countries, with the power of their money, may drain organs from the 'poorer' countries thereby making their population even more vulnerable.

However, those favoring organ sale say that these issues require more rooted analysis. The open purchase of human organs is likely to have an immense impact on the cost of transplantation procedures. In many countries, including India, where there have been reports of organ trafficking, kidneys are sold for as little as Rs. 20,000 - 30,000 while reports on the total cost of a kidney transplantation vary widely ranging from Rs. 2 – 4 lacs.[19] This shows that the cost of organs is just a fraction of the total transplantation cost. It shows that the free availability of organs will reduce the costs of transplantation by curbing the expenses incurred in clandestine operations bymiddle-men who are now inextricably involved with the organ trade.

In developing countries especially as in India, peoplesurrounded by abject poverty and social deprivation do not have many options. Even when their organs are intact their aggregation is ailingas they suffer from starvation, sickness and scorn. Society has been a cold bystander of their sufferings for centuries. If selling organs seems to be the only way for them to get some money to survive, how can the societypassive to their predicament for ages all at once bar them from doing so.The prohibition on the sale of organs in fact worsens the lot of poor, as the buyers may refuse to pay or do not pay the agreed price as the moneyconsideration would otherwise be illegal and cannot be enforced. Thisway, the legal artificefabricated for protecting the poor produces just the opposite effect.

[17] See Section 9 of the Act

[18] E.H. Kluge, *Improving Organ Retrieval Rates: Various Proposals and Their Validity*,8 HEALTH CARE ANAL(2000) 279-95.

[19] Swami J.P.,*Punjab's Kidney Industry*, FRONTLINE, 2003 Feb; 115-17.

International Perspective of Human Organ Transplantation

Although progress in medical science and technology at the international level, has vastly improved the success rate for human organ transplantations however, severe organ shortage continues to prevent these medical advances from being realized by all potential patients requiring one or the other human organ transplantation. In different countries, it has been felt that theefforts to expand the available organ supply from within the territory seem to be the only viable and long-term solution for meeting transplant demand. However, often the availability of the organ transplants might well depend on the institutional frameworks rather than on the individual patient's demand in which the general awareness as well as specific regulations in each country play crucial roles.

Position in U.K.

A decade ago, the U.K.figuredamong the lower ranking nations for human organ donations. Then, the U.K. government set up the Organ Donation Task Force which made a number of recommendations aimed at 50% increase in organ donors in the 5 years ending April, 2013. To many quarter's surprise, this target was reachedhowever it still remains outside the top league nations in this respect. In September 2013, Royal Assent was given to the Human Transplant (Wales) Act which paved the way for a system of deemed consent to be introduced in Wales. This initiative, which will take full effect in late 2015, has been taken after widespread consultationswith all the stakeholders. The increase in the number of organ donors has not been matched by an increase in organ transplantions because nearly all the donations have been from DCD (Donationafter Cardio-Death or the Donation from Non-Beating HeartDonors) where as discussed above there remains only a few organs suitable for transplantation as thismode of death renders some vital organs ischaemic and unsuitable for transplantation. Furthermore, the potential donor pool is shrinking as the death rate falls and the prospective donors are older and heavier; both factors reducing the number of suitable organs that can be retrieved. Thus, the mortality of those on the national waiting list remains around 15–20% for those awaiting a heart, lung, or liver in U.K.[20]

Position in U.S.A.

The growing disparity between organ supply and demand is a major public health crisis in U.S.A. also. More than 90,000 patients await organ transplants in U.S.A., but only about 27,000 transplants are performed annually. The supply of available organs from deceased donors fails to meet the demand. Specifically, though national organ donation has increased by more than 60% from 1994 to 2003, the increase in the number of individuals who need transplants has risen

[20] J. Neuberger,A. Keogh,*Organ donation in the UK: How general practice can help*,63 THE BRITISH JOURNAL OF GENERAL PRACTICE(2013) 615.

twice as fast. The National Organ Transplant Act, 1984 addressed the need for equitable and efficient organ procurement and distribution and led to the formation of the Organ Procurement and Transplantation Network. Hospitals in this network collaborate with 58 organ-procurement organizations (OPOs) nationwide to coordinate the recovery of organs for transplantation. Unfortunately, sustaining the initiative was a major challenge. After an initial marked improvement that peaked in 2001, the consent and conversion percentages subsequently dropped. Many local factors contributed to the downfall. The dramatic aftermath of September 11, 2001 which included anthrax and precipitous budget crises diverted much attention away from organ donation, and disrupted momentum during thecrucial time for program implementation. Closing the donation gap in the future will involve public participation, donation after cardiac or brain death, incentivesfor donation andthe legislative policy revolving around them.[21]

Position in Pakistan

Pakistan is a developing Muslim country of more than 160 million people. According to the estimates of Sindh Institute of Urology and Transplantation (SIUT), a prominent kidney transplantation centre in Pakistan, approximately 15,000 patients in Pakistan diedue to kidney failure every year. The only treatment option available for these patients are either dialysis or kidney transplantation. As of 2007, there are 12 transplantation centers in Pakistan with five being in the public sector and seven in the private sector. It is a dismal fact that there is no liver transplantation centre in the country despite the high estimated prevalence of Hepatitis B and Hepatitis C in the population.The absence of an organized and well established national registry is also a major hurdle in this regard. Organ transplantation has recently drawn attention as a bioethical issue for a robust debate in Pakistan. Emerging concerns intertwined with it include the burgeoning requirement of transplantation, lack of legislation to govern it and the possibility of exploitation of human rights of the poorer lot. These efforts led to the promulgation of an Ordinance in 2007 to regulate the transplantation of human organs and tissues. This ordinance recognizes living donors to be at least eighteen years of age. Any close relative can be a donor according to it but he must donate voluntarily and without any duress or coercion. This Ordinance also makes provisions for the establishment of a regulatory monitoring authority for organ transplantation in the country. However, this Ordinance has not yet addressed the establishment or the development of an organ distribution system like U.S.A.[22]

[21] H.K. Koh,M.D. Jacobson, A.M. Lyddy,*A Statewide Public Health Approach to Improve Organ Donation: The Massachusetts Organ Donation Initiative*, 4AMERICAN JOURNAL OF PUBLIC HEALTH(2007)97.

[22] T. Saleem, S.Ishaque, N.Habib,*Knowledge, Attitudes and Practices Survey on Organ Donation among a Selected Adult Population of Pakistan*,10 BMC MEDICAL ETHICS(2009) 5.

National Perspective of Human Organ Transplantation

More than 2.5 lakh people in India require organ donation and transplantation per year. However, a dismal less than 10% get timely help. Though there has been steady increase in the number of organ donators in India, but the gap seems to get even wider.[23] In 2014, there were only 411 organ donors after brain death in India. This resulted in the transplantation of just 720 kidneys, 354 livers, 54 hearts and 16 lungs. Almost 1.5 lakh Indians need kidney transplantation every year but only 3000 of them receive one. Other 90% die waiting though theorgan donation rate in India after brain death increased from 0.05 per million population in 2006 to 0.34 per million population in 2014.[24]Similarly, India's annual liver transplantation requirement is 25,000 however only 800 patients get them.[25]Let us now take a bird's eye view of the legislative frame-work and the judicial approach to this crucial area of life saving medical intervention.

Legislative Framework: Critical Analysis of the Transplantation of Human Organs and Tissues Act, 1994

Unlike the United States of America, India follows the British lead and has chosen irreversible damage of the brainstem as being the diagnostic of death. U.K. passed the Human Organ Transplant Act, 1989 which formed the basis for the law on this issue in India also. The (Indian) Transplantation of Human Organs and Tissues Act, 1994 (hereinafter referred to as Act) lays down the definition of death under section 2(e) as: 'deceased person' means a person in whom permanent disappearance of all evidence of life occurs, by reason of brain-stem death or in a cardiopulmonary sense at any time after live birth has taken place. It goes on to state that 'brain-stem death' means the stage at which all functions of the brain stem have permanently and irreversibly ceased.

Death by brain deathcriteria suggests that there exist more than one kind of death ('brain death' and 'cardio-respiratory death') and that there are degrees of being dead ('brain-dead' and 'really dead' or 'dead-dead') as we have already discussed above.This Actdefines brain death in the Act. Whilst defining brain death, itmentions 'by reason of brain-stem death or in a cardio-pulmonary sense' thus leaving ambiguity in many minds as to the true meaning of death for the purpose of organ removal. In these circumstances, if organs can be had from such a 'brain dead person', there is no reason for prolonging the care of that person through medical and life support systems. But the hospitals, for the reasons above discussed, are unwilling to admit this and continue to hold fast to the old

[23] DurgeshNandanJha, *Docs: Organ Donation after cardiac death a timely help*, THE TIMES OF INDIA, DELHI EDITION, 10-08-2015.

[24] SushmiDey, *Organ donation rise, lack of infra plays spoilsport*,THE TIMES OF INDIA, DELHI EDITION, 06-08-2015.

[25] Times News Network, *Who can donate organs in India, when and how*,THE TIMES OF INDIA, DELHI EDITION, 02-08-2015.

'cardio-pulmonary' criteriai.e. the stoppage of heart beats for the diagnosis of death.

This has several harmful consequences. The agony of relatives is prolonged for days oreven weeks till the heart finally comes to a permanent halt and the oscilloscope shows a continuous flat line. In many instances, the family undergoes severe traumatic experience of seeking opinion after opinion from several consultants in the hope that someday some doctor would tell them that further treatment is likely to prove fruitful. The family continues to pay huge amount of money for 'intensive care' of an otherwise dead person anda bed in the intensive care unit (I.C.U.) is occupiedunnecessarily. Also, the doctors and attending staff carry out the charade of caring for a corpse whereas their time and efforts could be spent more fruitfully on other salvageable patients.

As far as the money consideration in lieu of the organ donation is concerned, Section 19 of the Act prescribes imprisonment for a term which shall not be less than two years but which may extent to seven years and shall be liable to fine which shall not be less than ten thousand rupees but may extend to twenty thousand rupees. In India, such punishments are prescribed only for serious offences and it is thus clear that organ sale is treated as a serious offence in India. Such an approach seems debatable. Much of this issue has already been discussed. A person who sells his organ does so because he knows that his organ is going to save the life of a fellow human being.A person's act of severing his organ in order to liberate a fellow being from a terminal illness cannot be dubbed as immoral simply because the act is accompanied by a reasonable material consideration.[26] A criminal has no such moral conviction or justification and commits the act solely for his personal gain without caring for any injury suffered by the victim. As such, it seems that the policy makers have not been realistic in the area of organ transplantation.

Section 9 of the Act mandates that no human organ removed from the body of a donor before his death shall be transplanted into recipient unless the donor is a near relative of the recipient. A near relative means spouse, son, daughter, father, mother, brother or sister in the terms of section 2(1). An unrelated altruistic donor is also permitted to donate organs but only with the prior approval of the Authorization Committee constituted under the Act. Subsection (5) and (6) of section 9 lay down the procedure to be followed while obtaining the approval of the Committee and this requirement of approval of the Authorization Committee has become a fertile area for the litigation, as we shall see in the later part of our discussion, which sometimes delays the whole process of donation and at times (even) frustrates the entire exercise because delay wrecks havoc for the patient and his family both physically and financially.

[26] Harris J. Erin G., *An ethically defensible market in organs*,325 BRITISH MEDICAL JOURNAL(2002) 114-15.

Looking this way, the intervention by the Act in the matter of organ transplantation seems to be too blunt a way of taking on the delicate ethical dilemmas, prevailing public and professional perplexity and confronting the day-to-day practical issues of this medical practice.Even after the enactment of the Act, illegal commercial transplantation of human organs is goingon unhindered for the 'clients' mainly rich patients from U.S.A., U.K. and the Gulf countries besides N.R.I.s.[27] The shock-inspiring news of large scale trading in human organs makes it evidently clear that this Act has failed on the *terra firma*to regulate unethical large scale trading in human organs in this country.

Approach of Indian Judiciary

An insight into the approach of judiciary in India can be had by the following cases which mainly revolve around the permission of the Authorisation Committee as prescribed under section 9 of the Act:

Rajinder Kumar v. *State of Punjab*[28]

The petitioner Rajinder Kumar was advised the transplantation of kidney. On an earlier occasion, the wife of the petitioner had donated her one kidney which was rejected by the body ofRajinder Kumar. The Authorization Committee found that the proposed donor was not related to the petitioner in any manner, but he and his wife were working as servants in the house of the petitioner. The Authorization Committee rejected the proposal as it found great economic disparity between the patient and the donor. The Punjab and Haryana High Court remarked that human conduct and reactions cannot be measured in any mathematical terms. The Court quoted instances where people due to sheer love and affection or due to humanitarian consideration do acts for the welfare of a person in need. The Court observed that the good donors should not be suspected and they should not be viewed with 'tainted glasses' and directed the Authorization Committee to grant approval to the petitioner forthwith to receive the kidney proposed to be donated.

Kuldeep Singh v. *State of Tamil Nadu*[29]

The facts of the present case were that the petitioner was undergoing treatment at Devki Hospital, Chennai for renal disorder. The hospital was duly approved by the authorities under the Transplantation of Human Organs and Tissues Act, 1994 read with Transplantation of Human Organs Rules, 1995 and was permitted to undertake kidney transplantations. Doctors treating him were of the view that both of his kidneys have failed to function. Both the petitioner and the donor belong to the State of Punjab. The Court ordered the Authorization Committee of

[27] AtulSethi, *India's Great Organ Bazar*, THE TIMES OF INDIA, DELHI EDITION, 02-08-2013.
[28] AIR 2005 P&H 172.
[29] AIR 2005 SC 2106.

the State of Punjab to examine the application of petitioner on the basis of materials to be placed by the petitioner and to decide whether the applicant has established the requirements necessary for according approval. If it accords approval, the same may be transmitted to the State of Tamil Nadu immediately.

Balbir Singhv. The Authorization Committee[30]

The petitioner Balbir Singh was suffering from Hepatitis with related cirrhosis of liver with portal hypertension. Petitioner required transplantation of liver and his brother Baljit Singh consented to donate part of his liver for transplantation. The Authorization Committee declined to permit since a near relationship between potential donor and recipient was not proved to its satisfaction. However, the Delhi High Court was convinced of the same and hence, it directed that the hospital could carry-out operation forthwith without carrying out any further tests to establish the near relationship between the two. Unfortunately, the condition of the patient deteriorated and he expired before undergoing the transplant surgery. The petitioned had incurred huge expenses to the tune ofRs. 4 lakhs without receiving the ultimate treatment which could have saved his life. This case thus brought forward the need to re-examine and review the statutory provisions as well as the approach of the Authorization Committee and judiciary to bring to the foretheir failure in taking timely action in high urgency matters like this.

The Way Ahead

In an effort to curb illegal organ trade and at the same time to overcome the massive shortage of organs for transplantation, the experts often mull a proposal to introduce the concept of 'presumed consent'on the lines of countries like Spain, which allowsthe medical fraternity to assume that all patients are willing to have their organs removed after death unless they have earlier registered their objection.

In fact, European countries have been classified according to two types of institutional settings for the purpose of meeting organ transplantationrequirements: one is optional consent (opt-in) settings and the other is presumed consent (opt-out) settings. In countries with optional consent or 'opt-in' legislation e.g. UK, Germany, and Sweden,a prior explicit permission is required from an individual or his family for organ removal. Countries with presumed consent setting like Spain, Portugal, and Austria, consider universal consent for organ donation without any writing or registration by the individual unless of course, one expressly opts-out. The opt-out system is more prevalent in the EU, although countries with opt-out legislation still differ in the 'enforcement'

[30] AIR 2004 DEL 413.

levels. It has been found that presumed consent policy has increased organ donations in Europe.[31]

While fully accepting that every doctor is entitled to his own clinical judgment, it has been suggestedthat the issue would be, so to speak, defused were it to be made compulsory for a 'Death Certificate' especially in the case of a brain- dead person[32], and the notification be handed-over to the next of kin before the initiation of any further procedure. This would ease the matter for the medicalprofessionals involved as it shallnot be then entirely compulsive on the surgeon undertaking a beating heart donation to have to first satisfy himself by personal examination of the body that life is extinct therein. At the same time, the process will also set the minds of the relatives at rest. This requires every I.C.U. in India to have a panel of doctors trained and authorized to diagnose brain-death.

Experts are also of the view that it is time to promote donation after circulatory death (the DCD or the non-beating heart donation, discussed above) where organs are retrieved for the purpose of transplantation after the death is confirmed using circulatory criteria.Doctors here point out the challenge in terms of the lack of any country-wide database which is a pre-requisite for this purpose. There is a need for a central database which, at a given point of time, can indicate the demand and supply without a time-lag.[33]

The major hurdle in the way of organ donation in the case of a brain- dead person lies in the feeling of the family that their ward still has a chance to survive till the heart is beating. In fact, even a section of doctors also hesitates to take the decisive step once they find that the heart is still beating. The brain death, while the heart is still beating does not convincemany to allow the organ donation hence, normally people wait till the heart stops beating i.e. the cardio-death. The challenges in the donation after circulatory deathincludes the identification of the patients as suitable potential donors, chalking a standard operating procedure as we have already discussed that in case of a cardio death only tissues such as skin, bones, corneas, veins and heart valves etc. can be donated as they do not require blood circulation unless the patient was supported by a ventilator enabling the vital organs such as heart, liver kidney etc. to keep functioning which allows a window of time for the entire co-ordination of the vital organ's donation.

It does not come across as a surprise that most families when asked for consent for the purpose of organ transplantation at the time of sudden and unexpected

[31] R.W. Gimbel, M.A. Strosberg, S.E. Lehrman, E. Gefenas, F. Taft,*Presumed Consent and other Predictors of Cadaveric Organ Donation in Europe: Progress in Transplantation*,13(1) NCBI (2003, March) 17-23.

[32] Times News Network, *Make brain death notification must*, THE TIMES OF INDIA, DELHI EDITION,08-08-2015.

[33] See however, A.R. Joffe, J. Carcillo, N. Anton,*Donation after Cardio-Circulatory Death: A Call For a Moratorium Pending Full Public Disclosure and Fully Informed Consent*, 6 PHILOSOPHY, ETHICS, AND HUMANITIES IN MEDICINE (2011) 17which says that the DCD donors may not yet be dead and potentially harmful pre-mortem interventions during DCD cannot be justified.

loss of a close family member refuse consent, especially if any communication in this regard has not been initiated earlier. Apprehension of mutilation, uncertainty over the wishes of the person deceased, perceived cultural and religious barriers and the feeling that the person of the deceased has suffered enough are some of the common reasons posed for denial. The family members remain alarmed and confused unless given sympathetic counseling.In fact, when solicited for the advance consent for the organ donation, very few people come forward as there looms fear about their medical treatment being short-circuited or being adversely affected if he or someone on his behalf consents in advance for organ donation. There are concerns that a patient might be prematurely declared brain-dead just to retrieve his organs.[34] In this situation, the misapprehensions of the prospective donor as well as his near and dear ones need to be placed in the context that the donor continues to be treated with dignity and respect and that the avenue of organ donation is considered if and only if death has been confirmed or further treatment confirmed as futile by a competent panel of medical professionals. It is observed that the concerned domain get great solace from the counseling that from their personal tragedy, life may crop-up in the shape and form of more than one such persons who desperately need one or the other human organ/s at the relevant time. This is one area where the necessity of public awareness and public participation in regard to organ donation needs no reiteration. It needs not to be emphasized that the various issues involved cannot be compartmentalized and the entire gamut of issues should be strategized in a holistic manner mainly to create public awareness and dispel associated myths at the same time. Measures should be taken to educate people with relevant information so that people can rest assured and make informed choice.

Incentives have also been considered as a means to increase donation instances. Financial incentives, any material gain or valuable consideration obtained by those directly consenting to the processcan be in the form of cash payments, contributions to burial expenses, tax concessions, health insurance for the immediate family members, college scholarships for children or say donation to a charity concern of the donor's choice etc. Several other strategies may have the effect of increasing organ donations e.g. voluntary reciprocal organ donation. Individuals who agree to donate their organs upon death would be provided priority on the waiting list in case they require an organ transplant in their life span. The foundation of this approach lies in the fact that if one's self-interests are taken care of, a person is more likely to overcome the inherent reluctance to donate his organs.

Another area where there exists a dire need of infrastructural improvement is that of post-mortem examination facilities. Once a patient is declared brain dead[35], almost 37 organs and tissues can be donated including vital ones like

[34] Times News Network, *Fears and myths still hobble India's organ donation story*, THE TIMES OF INDIA, DELHI EDITION01-08-2015.

[35] See in differentiation with the Dead by Cardio Death discussed above.

heart, kidneys, liver, lungs and pancreas. However, if a brain dead patient is kept for autopsy for hours, there is every possibility that the heart fails after which only a few tissues like cornea, bone, skin and blood vessels can be reused. At present, most post-mortem examinations are being done during daytime. It is suggested here that the post-mortem examinations must be conducted round the clock especially in the government hospitals across the length and breadth of this country. This will help the medical professionals harvest healthy vital organs from brain dead patients without any procedural delay.

Conclusion

The perception of organ donation is positioned on philanthropy and public-spirit[36]; however,theprocreation of proper policy and its proficient pursuit has the potentialofpulling down the acute shortage of donated organs in India.Some mechanism has to be developed at ground zero with participation from all the relevant spheres and strata of the society so as to institutionalize the process of organ donation and transplantation.Without addressing the arroyo in public awareness,without identifying and remedying the legal retardations and without putting in place the required infrastructural facilities right from a National Database/Registry of available human organs down to the crucial logistical support e.g. to ferry the organs from one geographical point to another, the queue of the patients desperately waiting for organs to get a fresh lease of life will only get longer.

Electronic and print media in its various forms can be used as efficient sources of information. Religious scholars may also be utilized for the mobilization of a favorable public opinion towards organ donation as no major religion has been antithetical to the idea of organ donationessentially being an act of 'giving' and thereby saving a human-life. In addition, a public spirited non-profit organization may be established to co-ordinate live organ donationseven by altruistic strangers.Instances from abroad show, as we have discussed about Switzerland and Canada, that only positive attitude and self-reported willingness to donate do not always translate to a higher donation rate; greater attention is to be paid to the role of institutional design in shaping the attitude of society about organ donation e.g. celebrating the Organ Donation Day on 13th August every year creates a significant symbolic institution in itself. Public policy plays a direct role through appropriate legislations and awareness campaigns which recognize the fact that the social networks have the strength of shaping the individuals' perception in such significant social movement.

Article 21 of the Constitution of India provides the right to life to all persons irrespective of their socio-economic strata. The definition of the 'right to life' in this context includes not only the much confabulated metaphysical right of

[36] See e.g. DurgeshNandanJha, *Teen dies waiting for liver, gives life to 2 after death*, THE TIMES OF INDIA, DELHI EDITION, 26-09-2015.

human dignity but also that of one's physical bodily integrity.Today, medical and biotechnology has made great strides but as in other sublunary unfoldings,the absence- lax, harebrained or prepensed of the component of accountability corners within its compass all the machinations of practically reducing the human body into a captivating commercial crusade. It depends upon the socio-economic-religious-cultural settings of a country as to which of the two consent systems as we have discussed above- optional opting-in consent system or compulsory opting-out system would be fit and felicitous; be it either way, people in India must be fully educated with exhaustiveexposure toall exigencies and extremitieswithin the expanse of organ donation so that they make 'informed choice' in the majestichuman spirit of magnanimity and munificence.

Trends in Enforcement of Patent Law in India

InduBhushan Singh[*]

Introduction

In today's economy the patent plays an important role in its development, as current economic system is based on advance technological developments. Hence, it has resulted in acceleration of patents. These patents carry with them an enormous commercial value, which becomes the driving force for those who invest huge resources in advanced technological research and developments. For the above mentioned reason there is a requirement of patent protection , because if there will be no protection available then an investor will not be able to obtain the fair return of their investment especially when an investor knows that every research programme will not lead him to success.

In India where we have followed the product patent regime in its full swing, *i.e.* relating to food medicinal and pharmaceuticals, after 10 years since 1995, as phase by phase basis, as against the other countries such as European countries and United States of America, where the said regime is pre-existing for a healthy passage of time, therefore it can be said that Indian Patent law is still at the nascent stage vis-à-vis European countries and United states of America with respect to the jurisprudential development, as in these countries we find the higher jurisprudential development. Never the less the Indian judiciary has time and again have adopted the correct approach which goes in consonance with patent law regime as per the intention indicated by legislature and keeping in mind the benefit of the public. Sometimes by taking aid from the decisions of the American and European countries courts whenever necessary, for those laws which are consistent with Indian patent law.

To make patent law in the country compliant with the terms of Agreement on Trade Related Aspect of Intellectual Property Rights (*hereinafter*TRIPs Agreement), the legislation has done an overhauling of the Indian Patent Act, 1970(*hereinafter* Act). And if to identify the single most important change in law of patent which was amended to fulfil the obligation of TRIPs agreement was repealing of section 5[1] from the Act. As a result of which doors to the

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[1] Inventions where only methods or processes of manufacture patentable - Now repealed

productpatents were opened in country. This removal of section 5 from the Act was accompanied by the introduction of the new definition of invention and inventive step by amendments in clauses (j)[2] and (ja)[3] of section 2(1) of the Act. Apart from this some other clauses of section 2(1) and section 3 of the Act were also amended, which redefined the concepts of invention and patentability.[4]

Object of Patent System

A patent in general sense can be said to be, an award for the inventor for his invention. This is given to the inventor by granting him exclusive right for an invention, which should be new, contains an inventive step and has industrial application. If we will look into the definition of patent given under section 2(1)(m) of the Act it says "patent means patent for any invention under the Act". Which direct us to look into the various provisions of the Act to constitute the proper definition of the term patents, which may be defined as "The exclusive right to use or grant an authority to be use by other an invention, which is new, contains an inventive step and has industrial application, granted to a person for a limited period in consideration of the discloser of invention".

Therefore the grant of patent for invention is a quid pro quo for disclosing the invention. This granting of exclusive rights in exchange of the complete disclosure of the working of the invention is the provider of inherent force behind the patent system. On one hand by giving the exclusive right to the inventor law ensures that the encouragement to the scientific research, new technology and industrial process should be given by providing the economic monopoly over the invention for limited period of time, as there is no other motivator or inspiration other them money, and reap the fruits of the labour and capital. On the other hand, by making the complete disclosure of the working of the invention, law ensures that when the exclusive right granted is over after the period of time then that invention can be used for the benefit of the public at large and hence the nation's economy. The patent system stimulates technical progress in for ways.

- Encourage research and invention
- Induce an inventor to disclose his discoveries instead of keeping them trade secret.
- It offer reward for the expenses of the developing inventions when it becomes commercially exploitable.
- Induce to invest capital in lines of production.[5]

[2] Invention means a new product or process involving an inventive step and capable of industrial application.

[3] Inventive step means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.

[4] *Novartis AG and others* v. *Union of India and others*, 2013 (54) PTC 1(SC).

[5] Ayyangar Committee Report on Patent Law in India, 1959.

Patent for an Invention

Patent means a patent for any invention granted under this Act.[6]The first and foremost thing which the patent system requires or works upon is invention. The invention remains in the centre of the patent system and all other thing are there to determine whether the particular thing is an invention which has the ability to pass the test of patentability. For invention to be patentable it require to be new, should have an inventive step and should be capable of industrial application, in addition to the test which the judiciary has evolved basing on the various provisions of the Act, such as section 3, is patentability.[7]

These all provision under the Act makes the question whether the particular invention is new and useful extremely difficult to decide, as it depends upon newness, inventive step and non-obviousness or state of prior art, which in particular includes prior publication on the subject and prior uses. The fact remains that no extensive search in the records of the patent office can be said to be final on the point that invention in patentable. This makes the invention vulnerable when it comes in the market, whether it is patented or not,as the validity of a patent is not guaranteed by the Act, even though various checks have been provided to prevent an invalid patent being granted.

The Act provides for the pre-grant opposition as well as post-grant opposition of the patent. So the patent has to prove its solidarity when it comes in the market. Therefore the pertinent question arises is what is patentable invention? To understand this we have go through the definition of invention give under patent Act. Which is an invention means a new product or process involving an inventive step and capable of industrial application.[8]On bare reading of the definition it is clear, that the "invention nowhere accords any differential treatment to any particular type of invention, be it be product or process patent of any kind. Rather it lays down general test which is indicative towards the satisfaction of three conditions that is:

- Must be new, which means it must not have been anticipated and
- Must involve an inventive stepand
- Must be capable of industrial application.[9]

These three conditions are like the pillars on which the invention is based and are very fundamental for its establishment. If any one of the pillar does not support the invention independently then the invention is not the as required for the grant of patent.

[6] S. 2(1) (m), Patent Act, 1970.

[7] Invention is different from patentability. Supreme Court in *Novartis AG and others* v. *Union of India and others*, 2013 (54) PTC 1(SC).

[8] S. 2(1) (j), Patent Act, 1970.

[9] *Id.*

Patentability

Patentability is term used as a test for the invention to be patentable if all the conditions that need to be met for a patent to be granted under the Act is fulfilled in other words if the invention is an invention which passes all the test give under the various provisions of the Act, such as inventive step, industrial application non obvious etc. such invention is granted the patent under the Act as it passes the test of patentability.

A patent may be granted only for an invention subject to the satisfaction of the following condition, that is to say.

i. the invention is new
ii. it involves an inventive steps
iii. capable of industrial application
iv. the grant of a patent for it is not excluded by section (3) or (4) of the Act

The definition of patent[10] under the act shall be construed accordingly as it direct us to patentable invention.But the Patent Act does not say that what is a patentable invention, rather it says what inventions are not patentable inventions. Chapter-II of the Act directs us towardthose inventions which are not patentable. The chapter comprise of sec. 3 and 4 which tells about those invention which are not inventions as per the Act and inventions relating to atomic energy are not patentable respectively, hence both section gives us the condition which if not fulfilled by the invention, will not be the inventions within the meaning of this Act. Therefore, even if there is an invention it is to be shown that they does not fall under the provision of chapter – II.

The Supreme Court in *Novartis AG* v. *Union of India*[11], said:

> It is fundament that for grant of patent the subject must satisfy the twin test of "invention" and "patentability". Something may be an "invention" as the term is generally understood and yet it may not qualify as an "invention" for the purposes of the Act. Further, something may even qualify as an "invention" as defined under the Act and yet may be denied patent for other larger considerations as may be stipulated in the Act.

Novelty

The foremost requirement of invention as given in the definition of invention inAct is it must be new or novel in light of prior art. Prior art means all information and knowledge with respect to the invention that was available on the date of patent application. The law reflects that the invention should be something new as per layman's understanding. The Act explains the meaning of new invention as any invention which has not been anticipated by publication in

[10] *Id.* S. 2 (1)-(m).
[11] 2013 (54) PTC 1(SC).

any document or used in the country or elsewhere before the date of filling of patent application, in other words the subject matter has not fallen in public domain or that it novel or new if it does not form part of the state of the art (prior art).[12]

If an invention is published in any document or used anywhere in the world, it will be considered to be part of prior art or public domain, which will lead to an automatic conclusion of anticipation and thus will not be considered new or novel.An invention will not be considered novel if it is anticipated by a publication in any document anywhere in the world.[13] Any such prior publication giving the information as to the alleged invention must be for the purpose of practical utility, equal to that given by the subsequent patent. To prove anticipation the latter invention must be described in earlier publication. If the question of patentable invention is to be decided solely on prior publication then it must be shown that the specifications contain clear and unmistakabledirections so to use it, as it would not be considered enough to prove that the invention described in an earlier specification could have been used to produced this or that result.[14] In other words it is the disclosure in the specification supporting the claim[15], which means, disclosure must show that the invention have been so presented to the public that no subsequent person can claim the invention as his own.

The coverage of the patent cannot be more than the disclosure made in its specification. If the coverage can go beyond disclosure it would lead to negate fundamental principle of patent law[16], as under the scheme of patent a monopoly is granted to a private individual in exchange of invention being made to public so that at the end of the term of the patent the invention may belong to public at large who may be benefited by. It isrequired that the investor should set forth in the specification sufficient information to enable a person skilled in the art make and use the inventions after the end of its term.

If the invention is already in public knowledge or public use before the filling date of the patent application then this will anticipate the invention and will negate its novelty. Public knowledge or public use must be accessible to public and should not be under an agreement of secrecy if in case it is made known to public under such secrecy clause.[17] It will also be considered as accessible to public if a product made is imported in India before the priority date of patent application. An invention ceases to be novel if it is put on sale or is commercially

[12] S. 2(1) (l), Patent Act,1970.
[13] *Id.* S. 13(1).
[14] *Canadian General Electric Co. Ltd.* v. *Fada Radio Ltd.*, AIR 1930 PC 1.
[15] The disclosure describes the claim. As the scope of protection granted under the patent lies in the disclosure or specification that supports the claim. And the disclosure defines the various ways the invention can be used.
[16] *Novartis AG and others* v. *Union of India and others*, 2013 (54) PTC 1(SC).
[17] Kankanalaet al, INDIAN PATENT LAW AND PRACTICE (2010).

worked out in India by the applicant or any person authorised by him before the date of patent application. However if the invention was displayed with the consent of the true and first inventor or person driving the title from him at an industrial or other exhibition as notified by the central government in official gazette will not be treated as anticipation by public display, if the application for patent is made within 12 months of opening of such exhibition.[18]

Inventive Step

An invention should possess an inventive step in order to be eligible for patent protection. Patent Act defines inventive step as a feature of invention that involves technical advancement as compared to existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.[19] The definition of inventive step gives us two conditions which is required to satisfy that the invention have the inventive step. First, the invention should be technically advance as compared to prior art or should have economic significance. Second, the invention should not be an obvious to a person ordinarily skilled in the art. The Act does not define technical advance or economic significance and does not provide guidelines for determining non obviousness of the new invention. The judiciary have laid down some guidelines for determining the non obviousness and technical advance or economic significance of an invention.Inventive step is mixed question of fact and law and not a pure question of law.[20]

Maclean J. has summarised the law on this subject and was approved by Lord Warrington in *Canadian General Electronic Company Ltd.* v.*FadaRadio Ltd.*[21]

> There must be a substantial exercise of inventive power or inventive genius, though it may in cases be very slight. Slight alterations or improvements may produce important results and may disclose great ingenuity. Sometimes, it is a combination that is the invention thought, ingenuity and skill, producing in a distinctive form a more effective result...A new combination of a well known device and the application thereof to new and useful purpose may require an invention to produce it and may be a good subject matter for a patent.

The apex court in landmark case on jurisprudence of inventive step, *Bishwanath Prasad* v. *Hindustan metal industries*[22] while dealing with the meaning of word inventive step said in order to be patentable, an improvement on something which already existed before or combination of different matters already known,

[18] S.29(2)(b), 31(1)(a) and (b), Patent Act, 1970.
[19] S. 2(1)(ja), Patent Act, 1970.
[20] *Bishwanath Prasad RadheyShyam* v. *Hindustan Metal Industries*, AIR 1982 SC 1444.
[21] AIR 1930 pc 1.
[22] AIR 1982 SC 1444.

should be something more than a mere workshop improvement, and must independently satisfy the test of invention or an inventive step. To be patentable the improvement or the combination must produce a new result or a new article or better or economical article. Courtfurther stated that, the combination of old known integers may be so combined that by their working inter-relation they produce a new process or improved result. Mere collection of more than one integer or thing, not involving the exercise of any inventive faculty, does not qualify for the grant of a patent.

To determine the obviousness the test should be the possibility for a layman who is unimaginative person skilled in the art to recognise the inventive step of the invention on the basis of the common knowledge of the art at the priority date then the invention is said to have inventive step. Further, if the layman after looking into the prior art without the knowledge ofthe alleged invention, could constitute step which are obvious to the skilled man, then it is not an inventive step, but ifit requires any degree of invention then it is an invention having inventive step. In other words the inventive step should be something that could not have been discernible to the unimaginative person skilled in the art and not something which was published in the prior art.[23]

Mosaicing

Mosaicing means combining two or more things. Mosaicing can be done by making something by combining the different things which is already in the public domain or forms part of prior art. For example, if one wants to make the nail that should not come out smoothly from the wall, so he introduces the spiral groves to make it a screw, but when one puts the screw with the hammer those groves will break the wall more. To curb this he made the slit on the top of the screw so to put a screwdriver in that slit and turn it. While looking at this, the nail was first well known after that screw was well known and to turn anything with the screwdriver was also known, but was introduced in the screw for the first time. Now the question arises that, as nobody has done that slit on the top of the screw before, so it makes it new but is it an inventive? To answer this, as all three things are there in public domain and we have to combining all three known art, which is called Mosaicing. So to check the obviousness a person who is skilled in the art but is an unimaginative person achieves the result same, as the above example, by Mosaicing of the known art, then it would be said as obvious and would not pass the test of inventive step.

Mosaicing is not allowed in order to challenge the novelty, as novelty is something which is not already there in a prior published document. For novelty purpose one can only site single document.

[23] *Hoffman-La Roche Ltd.* v.*Cipla Ltd*, MANU/DE/0517/2008.

Mosaicing is permissible in determining obviousness as also said by Lord Reid[24]:

> When dealing with obviousness, unlike novelty, it is permissible to make a 'mosaic' out of the relevant documents, but it must be a mosaic which can be put together by an contention unimaginative man with no inventive capacity.

Terrell[25] has observed with regard to mosaicing that:

> The mosaicing of individual documents or prior uses is not permissible, unless it can be shown that the skilled person, confronted with a particular citation, would turn to some other citation to supplement the information from the first.

The Delhi High Court in *J. Mitra And Co. Pvt. Ltd.* v.*Kesar Medicaments*[26] held that if all the features of the invention were present in different prior art and their combination could not be foreseen, by an person skilled in the art but an unimaginative person, then that invention will possess the inventive step and hence patentable. Court went further by saying that a product would lack inventive step only if a mosaic out of the relevant documents can be put together by an unimaginative person with no inventive capacity.

The Court further pointed out by referring the *Billcare Ltd. Case*[27] that as far as the aspect of mosaicing is concerned, the legal position is that it would not be a defence to merely show that the various components in the patented product are known separately. The combination of such components may be patentable.

Industrial Application

A patent shall be granted if the invention is capable of industrial application. Patent Act provides that an invention is capable of industrial application if it is capable of being made or used in the industry.[28] For determining industrial applicability consideration may also be given to the economic significance of an invention.

Approach of Judiciary while Interpreting the Patent Law

Evergreening

Ever-greening is term used to label practices that have developed in certain jurisdictions wherein a trifling change is made to an existing product, and

[24] *Technographv. Mills and Rockley*[1972] R.P.C 346 at p. 355.
[25] Simon Thorley *et al*, TERRELL ON THE LAW OF PATENTS (2006).
[26] 2008 (36) PTC 568 (Del).
[27] *Bilcare Limited* v.*Amartara Private Limited*, 2007 (34) PTC 419 (Del).
[28] S. 2(1)(ac), Patent Act, 1970.

claimed as a new invention. Which leads to extend the patentees exclusive right over the product as the coverage or protection afforded by the alleged new invention helps in preventing competition.[29]

The concept of ever-greening is provided under section 3(d) of the Act. Section 3(d) sets up a second tier of qualifying standards for chemical substance or pharmaceutical products. In order to leave the door open for a true and genuine invention but, at the same time to check any attempt at repetitive patenting or extension of the patent term on spurious grounds. It lays down higher threshold of patentability for medicines, drugs and other chemical substances and gives a concept i.e. "patentability" distinct and separate from invention.[30]

It is one thing to say that the patent lacks the inventive step in as much as same is obvious to the person skilled in art as a same may amount to mere workshop improvement which in term is not patentable. However, it is another thing to say the patent is a new form of old substance which is pre-existing. The line may be blurred between the two but there lies a subtle difference. This is why even the legislature thought it appropriate to inserted define both the concepts separately in two different sections i.e. section 2(ja) and 3(d).[31]

Mere discovery of new form, new use or new property of known substance which does not result in the enhancement of known efficacy of that substance is not patentable. The discovery of new form of known substance will be patentable only if it results in enhancement of the known efficacy of that substance.[32] It may be noted that the word efficacy is used both in main substantive provision and also in the explanation added to in provision.It give rise to the pertinent question that what is the meaning of efficacy as per patent law. Answering this question, Supreme Court in *Novartis AG* v. *UOI*[33] recently held:

> The test of efficacy in context of section 3 (d) would be different, depending upon the result the product under consideration is desired or intended to produce. In other words, the test of efficacy would depend upon the function, utility or the purpose of product under consideration. Therefore, in the case of medicine that claims to cure a disease, the test of efficacy can only be therapeutic efficacy.

The next question which needs to be answered was about the parameters of therapeutic efficacy and its advantages and benefits that may be taken into account for determining the enhancement of therapeutic efficacy. The court said, therapeutic efficacy of medicines must be judged strictly and narrowly in the light of the text added to section 3(d) by 2005 amendmentwhich lays down the

[29] *Novartis AG* v. *UOI*, 2013, (54) PTC 1(SC).
[30] *Id.*
[31] *F.Hoffman-La Roche Ltd.* v. *Cipla Ltd.*, 2012 (52) PTC (Del.)
[32] S. 3(d) Patent Act, 1970.
[33] 2013 (54) PTC 1(SC).

conditions of "enhancement of known efficacy". Further the explanation requires derivative to "differ significantly in properties with regard to efficacy. Therefore, making it evident that not all advantageous or beneficial properties are relevant, but only such properties that directly relate to efficacy, which in case of medicine is its therapeutic efficacy as efficacy is capacity of drug to produce an effect.[34]

Efficacymeans the enhanced effect of the drug to produce a desired or intended result. For example, if car polish is to give certain resulti.e. shining of car, and after making certain changes in its formula a really enhanced result in its quality is seen i.e. increases the shine by 80 percent, then it could be termed as enhancement of known efficacy and would be entitled for the grant of patent and it will not be hit by section 3(d). In a similar line if the drug does not give the enhancement as it is required or it gives a slight enhancement for eg. 20-25 percent then it won't be therapeutic enhancement as per the requirement of the act.

The Apex Court in *Novarties AG* v. *UOI*[35] paves way to the grant of patent in India in incremental innovationsby establishing that one has to prove the therapeutic efficacy of the invention. The test which was given by the court for granting the patent to incremental innovation is by way of enhanced therapeutic efficacy, and the parameters of therapeutic efficacy can only be judged strictly and narrowly, based on external as well as internal factors.

Patent Linkage

The introduction of the pharmaceutical drug in the market can be either done by inventor of the new drug or by the different generic manufacturers. But for such introduction there is mandatory requirement of getting market approval from the drug regulation authority. Patent Linkage is the term used for the system that allows a patent holder to link his patent rights with generic drug approval process. As the drug regulatory or marketing authority is separate from the Patent granting authority and there is a gap between the two over their functional overlap, as to allowing or disallowing a generic patent drug to get a marketing approval prior to the expiry of patent. In India there has been no such provision for filling the gap between the regulatory or marketing authority and the patent granting authority.

Patent linkage is the practice of not allowing the grant of marketing approvalof the drug to any third party prior to the expiration of the term of patent, without the consent of the patent owner, by linking the drug marketing approval to the patent status of the patented product.

In *Bayer Corporation* v *UOI*, BayerCorporation demanded a Patent Linkage based system by proposing that Drug Controller General of India (*hereinafter* DCGI)

[34] *Novartis AG* v. *UOI*, 2013 (54) PTC 1(SC).
[35] 2013 (54) PTC 1(SC).

does not approve the marketing rights for a drug for which a patent exists. Facts of the case are Bayer was the manufacturer and marketing its patent 'Sorafenib' product as Nexavar in India. Cipla filed an application for a license to manufacture, sell and distribute a generic version of Sorafenib to the DCGI. Bayer opposed it on two grounds, first, by citing a potential patent infringement if Cipla's application for marketing approval is accepted.[36] Second, by contending that if Cipla manufacture Sorafenib it will make Cipla's drug a 'spurious' drug under the provisions of the Drugs & Cosmetic Act.[37] Bayer took it further by demanding a Patent Linkage based system, wherein the DCGI does not approve the marketing rights for a drug for which a patent exists.

Justice *RavindraBhat*, settled the controversy and concluded by saying that the Drugs & Cosmetic Act and the Patents Act are made to fulfil different objectives, thus serves very different purposes. Therefore, the competent authority enforcing the provisions of one Act is not technically competent to deal with the provisions of the other Act. Court while restricting itself from interfering in the policy matters said if the contention of Patent Linkage by the Bayer would be allowed and stop DCGI to approve the marketing rights for a drug to Cipla, judiciary would be attempting to enter a legislative role, which it should not be doing. And if there was any intention of the legislation to bring the change in relation to patent linkage, they would have done it, as patent act was amended many times.

Compulsory Licence

The request for a compulsory licence can be made by any person by making an application to the controller for such grant, if after three years from the date of grant of a patent, the demands to supply the patented invention to the public are not met by the patent holder, or the patented invention is not available to public at a reasonable affordable price, or that the patented invention is not worked in the territory of India.[38]

India's first compulsory licence was granted by the controller of the patent to NatcoPharma Ltd.[39] for producing generic version of Bayer's patented drug 'Nexavar', used in the treatment of cancer. While granting the compulsory licence controller based its decision on non fulfilment of all the three grounds mentioned in section 84 of Patent Act, by Bayer Corporation. Controller in its report said that Bayer took no adequate or reasonable steps to start the working of the invention in the territory of India on a commercial scale and to an adequate extent. Further went on saying that the drug is exorbitantly priced and out of reach of most of the people. Controller pointed out that the product in question is not a luxury item

[36] S. 48, Patent Act, 1970; it is right of the party to stop third parties to make, use, offer to sale, or import its patented product without its consent.
[37] S. 2, Drugs & Cosmetic Act, 1945.
[38] S. 84, Patent Act, 1970.
[39] 2012 (50) PTC 244 (PO,Mum.).

but a lifesaving drug and it is highly important that a substantial part of the demand be met strictly. In the present case, even 1 percent of the public doesn't derive benefit of the patented drug.[40]

The controller of patent after considering the facets of the law related to compulsory licensing said the law relating to compulsory licensing has been in existence since 1830's and was later recognised through the Paris Convention, 1883. Controller considered that the cost of the drug as provided by the Bayer is approx. Rs.2.8 Lakh per month and Rs 33.65 Lakh per year and Natco requested Bayer for a voluntary licence to manufacture and sell the drug at price of Rs 8800 per month which was rejected. After discussing the provisions of the TRIPs agreement[41], controller said there is need to balance of rights and obligations of patentee and granted the compulsory licence with some conditions such as Natco will pay the royalty at the rate of 6 percent of the net sales of drug to the patentee (Bayer), and also the price of the drug shall not exceed Rs 8800 for a pack of 120 tablets *i.e.* one month treatment and to supply the drug free of cost to 600 needy and deserving patients per year.[42]

On an appeal, Intellectual Property Appellate Board (IPAB) upheld the licence with an increase in royalty rate to 7 percent. Then the writ petition was filed by Bayer alleging that the decision of the IPAB was arbitrary. The Bombay high court dismissed the writ petition upholding the order of the controller and the IPAB. Bayer filed Special leave petition against the decision of Mumbai High Court. Supreme Court while dismissing the Bayer's SLP concluded that there was no reason to interfere with the order of the Bombay High Court and that the question of law could be adjudicated in future.

Conclusion

Unlike Copyright or Trademark, Patent is not for the creation. Patent does not give right to practice invention; rather it gives right to exclude others to practice invention. Patent starts with a legal document, which is granted by the patent office after it goes through the process of examination, which describes the invention.

The patent is granted to encourage inventions and to ensure that it is worked on commercial scale in the territory. The Patent Act ensures that a monopoly is granted to a private individual in exchange of invention being made public so that, at the end of the patent term, the invention may belong to the people at large who may be benefited by it. Therefore the grant of patent for invention is a quid pro quo for disclosing the invention. The disclosure of the invention should be

[40] *NatcoPharma Ltd.* v. *Bayer Corporation*, 2012 (50) PTC 244 (PO,Mum.).

[41] Arts. 30 and 31, TRIPs, allows member countries to enact provisions for grant of compulsory license to prevent the abuse of patent right.

[42] *NatcoPharma Ltd.* v. *Bayer Corporation*, 2012 (50) PTC 244 (PO,Mum.).

complete and it should disclose the best method of performing the invention under the claims, as specified in complete specification.Claims are what one gets right upon, *i.e.* if any patent is infringed then the claims are infringed. As the infringement of the product should be checked in light of claims, it should be checked if the accused product is infringing any one of the claim then he is infringing the product.

For the grant of the patent it is fundamental that the product must qualify the twin test of 'invention' and 'patentability'. To qualify as invention, product must be novel, non-obvious capable of industrial application, should possess technical advancement over existing knowledge or have economic significance. To qualify the test of patentability, invention should not be hit by any of the provision of chapter two[43] of the Act. What we have to first see that whether the product is obvious or inventive based on the prior art, if it is obvious then it is not an invention. But if it is not, then it qualifies the test of invention then we have to check that whether it is hit by any of the provisions of the section 3 and 4, if it is, then invention is not patentable but if it is not, then it is patentable.

The judicial pronouncement marks the precedent that gives hope to the public that if new drug under patent will not be made available to them which satisfy their reasonable requirement or if not made by the public at a reasonable price or is not properly worked in India, then the consequence for that will be the grant of compulsory licence for making the generic drug at a fraction of price, while royalties are paid to the patent owner.

Judiciary has kept themselves at bay by not interfering in the policy matter. WhenBayer demanded a Patent Linkage based system to be enforced by judiciary, it was answered by judiciary by saying that if the contention of Patent Linkage by the Bayer would be allowed and stop DCGI to approve the marketing rights for a drug to Cipla, judiciary would be attempting to enter a legislative role, which it should not be doing. And if there was any intention of the legislation to bring the change in relation to patent linkage, they would have done it, as patent act was amended many times.

The Indian judiciary has time and again adopted the robust approach which goes in consonance with patent law regime as per the intention indicated by legislature and keeping in mind the benefit of the public. The Judiciary is developing law of the country by taking the balanced approach between the public policy and inventor's interest. As mention above, Judiciary is harbouring the intention of the legislation by interpreting the law, in liberal, proper and harmonising decisions, by dictating what law ought to be.

[43] As the title of the chapter two of the Patent Act, does mention the words "inventions not patentable", this itself shows the intention of the legislation that the qualifying standards for the patentable invention is set up in two tiers, in order to leave the door open for true and genuine invention but, at the same time, to keep a check on any attempt to get the patent on spurious grounds.

DATA PROTECTION IN THE DIGITAL AND PHYSICAL SPACE: New Imperatives and Dynamism in Legal Norms

Monika Negi[*]

Introduction

The notion of 'entrustment' is intrinsic to the very act of creating data. The entities are 'entrusted' to create data of individuals. These individuals are variously acting in the roles of a citizen to the state, consumer of financial services, client of the health industry, member of social networking forums, etc. In each of these roles, individuals leave a digital and/ or physical data footprint that is 'entrusted' to the protection offered by these entities in their role as gatekeepers of this data. The notion of 'entrustment' becomes more significant as these entities themselves double as both creators/collectors as well as handlers/protectors of data. The citizen 'entrusts' the government to collect and create as well as secure the data involving citizens. The consumer 'entrusts' the financial and banking institutions to secure the data in their possession.The health industry is 'entrusted' by its clients to ensure protection of health records. Members of social networking sites 'entrust' these service providers to ensure confidentiality of their information transactions.

Once the notion of 'entrustment' is established as a sound basis of establishing responsibility of ownership, handling and protection of data, the next step becomes that of establishing legal liability based on breach of 'entrustment'/confidence that goes above and beyond the notions of morality and ethics. What legal liabilities then arise through 'entrustment' of information to the 'responsibility' of entities as diverse as Government, financial bodies, health industry, insurance industry, educational institutions, research and development organizations, internet service providers, etc. which includes within its ambit confidentiality and privacy of information, establishing authorized access, release of sensitive information only through consent of the individual concerned, custody of data?

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Traditional Concept of Privacy

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespass.[1]

However, the passage of time revealed that only a part of the pain, pleasure, and profit of life lay in the physical things, and the remaining in the personhood, in the sense of, thoughts, emotions and sensations and the like. The unique feature of common law enabled the judges to afford the requisite protection, without the interposition of the legislature, in this area of intangible nature, i.e., privacy.[2] Judge Cooley pronounced this as right *"to be left alone"*.[3]Sustained effort in common law world spanning over three to four decades paved the way for concrete legislative responses relating to protection of information. As stated earlier, the then obtaining jurisprudential foundation in common law culture never made any attempt to treat information per se as a subject deserving legal response and protection. Therefore, our experiences of information explosion have really triggered the debate. The emergence of computing information with the aid of information technology has finally influenced the direction.[4]

Data Protection and Privacy: Two sides of the same coin?

Data protection and Privacy are being used to convey concerns and emphasize upon the need for legally and legislatively addressing the same. Both these expressions deal with information, information in a given context and in a given relationship. Privacy is analyzed and advocated more as a part of rights discourse whose underlying emphasis was on, unwarranted or unauthorized interference as such, but extends to *'access'* and also anything which is attributable to *'person'*. While recognizing the nature of harm that is caused to an individual by indulging in this process, the courts have endorsed remedies emanating from multiple sources like tort law, criminal law, contract law, and constitutional law. Common law countries have positively responded to these concerns expressed and experienced with regard to privacy.

1 Samuel D. Warren& Louis D.Brandeis, *The Right to Privacy*, 15 HARV. L. REV.193 (1890).
2 *Id.*
3 *See Generally* Thomas McIntyre Cooley, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT (1993).
4 Rodney D. Ryder, GUIDE TO CYBER LAWS (IT ACT, 2000, E-COMMERCE, DATA PROTECTION AND THE INTERNET)(2nd edn. 2005).

The concern with data protection, on the other hand, is more on account of 'digitization' that is unleashed by information technology. *'Data protection'* is wide enough to include any information, as a logical corollary, takes within its fold *'privacy'*. *'Privacy'* is always considered to be a *'right'* on the part of a person who is or has become vulnerable owing to a threat or act leading to disclosure of information. Data protection is more a kind of ***obligation*** on the part of a person or institution or firm or establishment which/who is in custody of ***'information'*** of and about persons (In terms of commercial practice or service to be rendered, normally transmitted by the persons voluntarily, for and towards a mutually agreed purpose). This information or data is to be protected by the person who renders the agreed service.[5]

The India Specific Challenge to Privacy/Data Protection

There is no general data protection law in India, though some provisions exist in other regulations. The Public Financial Institutions Act of 1993 codifies India's tradition of maintaining confidentiality in bank transactions. Privacy in telecommunications has also been regulated by the Telecom Regulatory Authority of India (TRAI), which regulates all telecommunication services in the country. The Common Charter of Telecom Services for adoption by all Telecom Service providers provides,

> *All Service Providers assure that the privacy of their subscribers (not affecting the national security) shall be scrupulously guarded.*[6]

The rise of business process outsourcing (BPO) operations and call centers in India has placed the government under increasing pressure to implement a data protection law that conforms to US and European data protection standards.[7] The National Task Force on IT and Software Development had submitted an "IT Action Plan" to Prime Minister Vajpayee in July 1998 calling for the creation of a "National Policy on Information Security, Privacy and Data Protection Act for handling of computerized data." It examined the United Kingdom Data Protection Act as a model and recommended several cyber laws including ones on privacy and encryption. However, no action has been taken following these suggestions. The National Association of Software and Service Companies (NASSCOM) has continued to urge the government to pass a data protection law to ensure the privacy of information supplied over computer networks and to meet US and European data protection standards.[8]

[5] *Id.*

[6] *See Citizens' Charter*Department of Administrative Reforms and Public Grievances, Ministry of Personnel, Public Grievances and Pensions, Government of India*available at* http//www.goicharters.nic.in (last visited on Oct. 12, 2015) .

[7] John Ribeiro, *Indian Law May Satisfy Data Protection Concerns,*COMPUTERWORLD(Apr. 21, 2004)*available at* (http://www.computerworld.com(last visited on Oct.12, 2015).

[8] Ian J. Turnbull, PRIVACY IN THE WORKPLACE 93(2009).

Press coverage of the growing privacy concerns in the US over data sent to India as well as continued pressure from EU companies have led NASSCOM and other industry leaders to move for increased privacy protection in India. This protection may take the form of a Safe-Harbor agreement similar to the US and EU privacy framework.[9] NASSCOM has also identified State-specific data privacy laws with which Indian regulations must apply, including the Health Insurance Portability and Accountability Act (HIPAA), the Gramm-Leach-Bliley Act, and California's identity protection law, SB 1386.[10] NASSCOM has suggested changes to the Information Technology Act 2000 that would conform to US and EU privacy laws and allow India to negotiate with the EU for recognition as a country that offers an adequate level of protection for personal data[11] and has issued a statement that it hopes the provisions will be in place by the end of 2005.[12] Foreign companies are currently relying on contractual obligations to impose privacy protection standards for customers.[13]

The debate over privacy is reaching a fevered pitch as policy makers, public interest advocates, and industry leaders clash over the importance of personal privacy and the role of the government in protecting it. This debate is prompted not only by extraordinary technological innovations, which dramatically expand both the practical ability to collect and use personal data and the economic incentive to do so, but also by the ongoing implementation of the new IT Rules, 2011 and the intention of the government to bring in a new privacy legislation, which intends to plug the many concerns raised by stakeholders in the past. These two related developments have put privacy on the front page of national newspapers and made it the hot topic for industry and academic conferences, scholarly and popular books, position papers, public surveys, internet web pages and discussion groups, government hearings and reports, and proposed legislation. Not surprisingly, information and communication technology have become a dominant force in virtually all aspects of society in India and much of the world. Today, information services and products constitute the world's largest economic sector[14].

As a result, more data than ever before is made available in digital format, which is easier and less expensive than non-digital data to access and manipulate,

[9] Margaret P. Eisenhauer, *Privacy and Security Law Issues in Off-shore Outsourcing Transactions, available at http://www.outsourcing.com/legal_corner/pdf/Outsourcing_Privacy.pdf* (last visited Oct 12, 2015).

[10] NASSCOM, *Indian Privacy Law*, 2002, availableathttp://www.nasscom.org (last visited Oct.13, 2015).

[11] Kamlesh Bajaj, DATA SECURITY COUNCIL OF INDIA: A SELF REGULATORY ORGANIZATION 9 (2007), available at http://www.dsci.in/sites/default/files/DSCI%20Privacy%20SRO.pdf (last visited Oct.13, 2015).

[12] Amy Yee,*NASSCOM Outlines Plan to Protect Privacy,*(May 31, 2005),*available at* www.ft.com(last visited Oct.12, 2015).

[13] *Supra* note 5.

[14] James Gleick, *Behind Closed Doors: Big Brother is U.S,* N.Y.TIMES(Sep. 29, 1996).

especially from geographically distant locations. Data today often can substitute for what would previously have required a physical transaction or commodity, such as currency. The ramifications of such a readily accessible storehouse of electronic information are astonishing: others know more about you-even things you may not know about yourself-than ever before. Data routinely collected about citizens include their health, credit, marital, educational, and employment histories; the times and telephone numbers of every call they make and receive; the magazines they subscribe to and the books they borrow from the library; their cash withdrawals; their purchases by credit card or cheques; their electronic mail and telephone messages; and where they go on the world wide web.[15]

Not only has technology changed over the past 20 years; the individuals using it have changed too. This new generation of users consists of individuals who post and search for personal, often intimate, information online; communicate with friends and colleagues on social networks; and are accustomed to their location being tracked and broadcast in search of nearby friends or restaurants. Indeed, even the distinction between the private and public sphere has muddled, with users of social media broadcasting personal information to sometimes strangers whom they label 'friends'. More pressing than before is the need for a 'right to oblivion', which would extricate individuals from the increasingly burdensome informational load they carry through different stages of life.[16]

The accurate identification of individuals is a key concern for many government agencies and corporations. It is important to them because it contributes significantly to administrative efficiency and the control of fraud, and can offer benefits to clients as well. A key focus of information systems security in recent years has been the intensification of efforts to establish accurate identity. The application of identification systems involves conflict between two conditions. On the one hand, flawed identity checking results in unnecessary duplication, fraud, and client disruption, with resultant costs and risks; and on the other, a rigorous identification procedure is invasive, and its effectiveness may be undermined by unpopularity and resultant falsification and evasion.[17]

India is not a particularly private nation. Personal information is often shared freely and without thinking twice. Public life is organized without much thought to safeguarding personal data. Infact, the public dissemination of personal information has over time, become a way of demonstrating the transparent functioning of the government. While many agencies of the government collect personal data, this information is stored in silos with each agency of the government maintaining information using different fields and formats.

[15] Kant Patel & Mark E. Rushefsky, HEALTH CARE POLICY IN AN AGE OF NEW TECHNOLOGIES166 (2002).

[16] Omar Tene, *Privacy: the new generations*,1(1) INT'L DATA PRIV. L. 15(2011).

[17] S.G Davies, *Touching Big Brother: How Biometric Technology will Fuse Flesh and Machine*7(4)INT'LTECH. AND PEOPLE 15 (1994).

Government databases do not talk to each other and given how differently they are organized, the information collected by different departments cannot be aggregated or unified.Data privacy and the need to protect personal information is almost never a concern when data is stored in a decentralized manner. Data that is maintained in silos is largely useless outside that silo and consequently has a low likelihood of causing any damage.[18]

However, all this is changing with the implementation of the UID (Unique Identification)Project. One of the inevitable consequences of the UID Project is that the UID Number will unify multiple databases. As more and more agencies of the government sign on to the UID Project, the UID Number will become the common thread that links all those databases together. Over time, private enterprise could also adopt the UID Number as an identifier for the purposes of the delivery of their services or even for enrollment as a customer. Similarly, the private sector entities such as banks, telecom companies, hospitals etc are collecting vast amount of private or personal information about individuals. There is tremendous scope for both commercial exploitation of this information without the consent/ knowledge of the individual concerned and also for embarrassing an individual whose personal particulars can be made public by any of these private entities. The IT Act does provide some safeguards against disclosure of data / information stored electronically, but there is no legislation for protecting the privacy of individuals for all information that may be available with private entities.In view of the above, privacy of individual is to be protected both with reference to the actions of Government as well as private sector entities.[19]

India too has ushered in a unique identification number known as Aadhar which represents a sharp transition from a paper based to an IT-enabled identity system. The biometric aspect of Aadhar is considered to be a particularly powerful feature of the number, and will play a significant role in increasing accountability for service providers and to broaden access. Biometric-linked authentication to access benefits would make it easy for service providers to limit leakages of resources and benefits to those who are not entitled to it.[20]

However concerns over it exist: UID document says the information that data base will hold will only serve to identify if the person is who the person says he, or she, is. It will not hold any personal details about anybody. But according to UshaRamanathan[21] what the document does not say is that it will provide the bridge between the 'silos' of data that are already in existence, and which the

[18] *SeeApproach paper for a legislation on privacy*, IndiaDepartment of Personnel Training, Ministry of Personnel, Public Grievances and Pensions, Government of India*available at* http://www.ccis.nic.in (last visited on October 12, 2015).

[19] *Id.*

[20] NandanNilekani, *The possibilities of the Aadhar Number*, 55 YOJANA(June 2011).

[21] UshaRamanathan, *Implications of Registering, Tracking, Profiling*, THE HINDU(Apr. 4, 2010).

NPR (National Population Register) will also bring into being. So with the UID as the key, the profile of any person resident in India can be built up.

Why is this a problem? Because privacy will be breached. Because it gives room for abuse of the power that the holder of this information acquires. Because the information never goes away, even when life moves on. So if a person is dyslexic some time in life, is a troubled adolescent, has taken psychiatric help at some stage in life, was married but is now divorced and wants to leave that behind in the past, was insolvent till luck and hard work produced different results, donated to a cause that is to be kept private — all of this is an open book, forever, to the agency[22] that has access to the data base. For the poor, who often live on the margins of life and legality, it could provide the badge of potential criminality in a polity where ostensible poverty has been considered a sign of dangerousness.

Considering that other nations' experience with such type of an identification system have led to the same concerns how far is it suitable to introduce it in a country like India where no specific privacy laws exist, where the writ of the state runs large and where no mandatory 'privacy impact assessments' take place before a huge exercise such as this is undertaken?

This contentious issue is now at the ire of the Supreme Court with the Court now deciding to set up a Constitutional Bench to revisit the question whether there is a fundamental right to privacy or not. This has been brought to light in the light of the ongoing controversy that the Aadhar card scheme is an invasion into a citizen's privacy.

In 1954, the Supreme Court Bench led by then Chief Justice M.C.Mahajan held that the right to privacy was not recognized by the Constitution makers as a fundamental right, and so there was no need to make an effort to make it one. The new Constitution Bench, will be hearing on the fundamental issue whether the State is right by creating a situation by which a citizen is enticed to voluntarily part with his privacy rights- bank account details, fingerprints, iris signatures, etc- for social benefit schemes he is already entitled to from a welfare state.[23]

The Balancing of Data Protection with other Specific Rights

In the words of Michel Gentot (n.d.) duringhis term as president of the French NationalData Processing and Liberties Commission,freedom of information and data protectionare *"two forms of protection against theLevianthan state that have the aim*

[22] There are no defined criteriafor deciding on what, how much, and the time frame for holding and deleting the information.

[23] KrishandasRajagopal, *After 60 years, SC to take a relook at right to privacy*, THE HINDU(Oct. 9, 2015).

of restoringthe balance between the citizen and the state".[24]On first inspection, it would appear thatthe right of access to information and theright to protection of personal privacy are irreconcilable. Right to information (RTI)laws provide a fundamental right for any personto access information held by government bodies. At the same time, right to privacy laws grant individuals a fundamental right to control the collection of, access to, and use of personal information about them that is held by governments and private bodies. However, the reality is more complex. Privacy and RTI are often described as "two sides of the same coin"—mainly acting as complementary rights that promote individuals' rights to protect themselves and to promote government accountability. The relationship between privacy and RTI laws is currently the subject of considerable debate around the globe as countries are increasingly adopting these types of legislation.

To date, more than 50 countries have adopted both laws. Privacy is increasingly being challenged by new technologies and practices. The technologies facilitate the growing collection and sharing of personal information. Sensitive personal data (including biometrics and DNA makeup) are now collected and used routinely. Public records are being disclosed over the Internet. In response to this set of circumstances, more than 60 countries have adopted comprehensive laws that give individuals some control over the collection and use of these data by public and private bodies. At the same time, the public's right to information is becoming widely accepted. As equal human rights, neither privacy nor access takes precedence over the other. Thus it is necessary to consider how to adopt and implement the two rights and the laws that govern them in a manner that respects both rights. There is no easy way to do this, and both rights must be considered in a manner that is equal and balanced.

Conclusion

Finally, privacy is best described as part of a larger continuum of rights.It is not an encompassing sphere, but rather a point along a line, that is free to move between the normative and descriptive, as well as between concepts of identity and dignity.Privacy should not be conceptualized as the mere means of protecting property, but as a tool for formulating identity.Critics would be better served by formulating individual points along that line, than attempting the unduly broad and onerous task of providing one sweeping definition of privacy.[25]

[24] David Banisar, *The Right to Information and* Privacy: *Balancing Rights and Managing Conflicts*, WORLD BANK INSTITUTE, GOVERNING PAPER SERIES*available at* http//www.ssrn.com (last visited Oct 19, 2015).

[25] Jonathan Kahn,*Privacy as A Legal Principle of Identity Maintenance*,33(2) SETON HALL L. REV. 410 (2003).

Few issues in this field admit of easy answers. Any attempt to strike a balance between competing interests is difficult, especially in a fast-changing environment. Most would agree that law and welfare oriented agencies should be provided with the best possible tools to enable them to perform their vital tasks. Data can constitute an extremely valuable method or tool for the above but the whole premise of data protection legislation is to minimize the potential for misuse, which is considerable. Within India, the main problem is perhaps a lack of awareness.

If data were nuclear particles or perhaps even genetically modified foodstuffs, people would be aware of and more mindful of the dangers involved in their use and transportation. The danger today is that data flows are invisible and when society becomes aware of the potential for misuse, it may be too late to put this technological genie back in the bottle.[26]

[26] Ian J.Lloyd, INFORMATION TECHNOLOGY LAW 19 (5th edn. 19 2008).

The Legislative and Judicial Conundrum Surrounding Parallel Imports & Exports in Copyright Law

*TanviSaini**

Introduction

The economic and social development of a country depends on the continuous generation of creative ideas and access to those ideas from around the world. In order to reward the creativity of authors copyright laws provide the minimum protective safeguards to the rights of authors over their intellectual property. While authors deserve this protection, an excessively rigid and inflexible protection regime may fail to generate the full social benefits that are expected from the author's creations. A balance therefore often needs to be struck when there are conflicting interests of creators and of the society.

In its November 2010 Report, the Parliamentary Standing Committee with oversight over India's Ministry of Human Resource Development,[1] made several observations on the need to amend the copyright provisions for textbooks in the Indian Copyright Act, 1957. Allowing parallel importation and confirming its legality explicitly was one such step that was proposed.In this context the Standing Committee in its 2010 Report, had suggested that a new proviso should be introduced in the proposed amendments stating,"provided that a copy of the work published in any country outside India, with the permission of the author of the work and imported from that country into India, shall not be deemed to be an infringing copy."[2]Hence for the first time ever, an initiative was taken by the legislature to clear the ambiguities that circumvent the issue of "parallel imports" by explicitly excluding them from the realm of infringement. However since the time the proposal for such an amendment was put across, there was a policy battle that was fought in newspapers and blogs, over this obscure part of copyright law, known as "parallel imports".[3] Many book publishers objected to the government proposed amendment to Section 2 (m), of

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[1] *See*Department-Related Parliament Standing Committee on Human Resource Development, 227th*Report on the Copyright (Amendment Bill 2010)* (Nov. 23rd, 2010).

[2] *Id.*, para 7.1.

[3] *See e.g.* Rahul Matthan, *Nobody's About to Kill Books*, THE INDIAN EXPRESS(Feb. 9, 2011); Thomas Abraham,*The Death of Books*, HINDUSTAN TIMES(Jan. 20, 2010).

the Copyright Act 1957. They insisted that it would unleash chaos in the market. Eventually the large publisher's lobby managed to convince the Minister for Human Resource Development to go against the recommendations of the Parliamentary Standing Committee.[4]

As fate would have it, the insertion of the proposed new proviso to section 2 (m) was dropped by the Copyright (Amendment) Act, 2012, which resulted in a debate in the Parliament. ThenGovernment asked the National Council of Applied Economic Research (NCAER) to examine inclusion of the new proviso. Thus a study by the NCAER was conducted[5], although due to the paucity of time and space it is not possible to deal with this study in detail here, yet it would be useful to mention the closing remarks of NCAER, which are as follows:

> We do not envisage that permitting parallel imports of printed books will have an immediate damaging effect on the publishing sector or on the economy as a whole. The impact of the effect of amending Clause 2(m) will be tested over time.[6]

A cautious opening may be a good way to start. Acrimonious debate must give way to harmonious meetings between producers, consumers and other stakeholders. It is only through mutual understanding and healthy exchange of views that we can come to an optimal solution. If such a meaningful exchange is not feasible, we suggest going ahead to add the new proviso to Clause 2(m) with the requisite safety valves. India must learn to manage its affairs with its own logic and on its own terms."[7]

Parallel Imports-Meaning

Parallel importation is when an original copyright product (i.e. produced by or with the permission of copyright owner in the manufacturing country) placed on the market of one country is subsequently imported into a second country without the permission of the copyright owner in the second country.[8] Thus, while the goods are genuine, the channels of trade are not as were originally desired by the producers. The producer might have desired to sell the goods in a particular region or in another region through his authorised trade channel.Trade conducted by a channel not authorised by the producer, in competition with the authorised channel is generally considered to be 'non-official' or 'parallel trade'.

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4 *Supra* note 1, para 7.3.

5 *See*National Council of Applied Economic Research (NCAER), *The Impact of Parallel Imports of Books, Films/Music and Software on the Indian Economy with Special Reference to Students,*(Jan. 2014). *Available at*http://copyright.gov.in/documents/parallel_imports_report.pdf (last visited Aug. 20, 2015).

6 *Id.* at v (Executive Summary).

7 *Id.* at96.

8 *See*Consumer International, COPYRIGHT AND ACCESS TO KNOWLEDGE: POLICY RECOMMENDATIONS ON FLEXIBILITIES IN COPYRIGHT LAWS23 (2006).

Thus given the prevalence of dubious claims that parallel imports create anarchy, it is useful at the outset to clarify that parallel imports are not the same as black market imports; the former involve copyrighted works that are clearly legal in the country from where they are imported.[9]

The Correlation between Exhaustion,First Sale and Parallel Imports

Every IPR holder possesses a bundle of exclusive rights accruing from the protection granted to his innovation. These rights, however are not unlimited and inexhaustible. Taking a cue from the literal interpretation of the term exhaustion, it means a limitation or curb on the rights of the holder to a certain "extent" and at "a point" from which the commons can freely gain access to the innovation.[10] To understand the principle of exhaustion one also needs to develop an understanding of the "doctrine of first sale". According to this doctrine, with the first saleof a work, the right holder loses his ability to further determine its movement having already benefitted from the first sale.[11]Thus it limits the right holder's exclusive right of distribution.

In this respect it is also important to mention the 'territoriality principle' of IPR which means that these IPR are vested by, exercised and enforced under national legislations.[12] The national legislation/statute defines the contours of the principle of exhaustion and it can either be:

(i) National
(ii) Regional or
(iii) International in nature[13]

Depending on the kind of exhaustion regime adopted by the nation state, the rights of the IPR holder are limited only to the microcosm of the nation state or to the wider regional arena or to the world respectively. That is to say it decides, whether upon the first sale of a work the rights of the owner exhaust nationally, regionally or internationally. Thus if a country recognizes national exhaustion i.e. the right of the right holder is exhausted only in relation to the country where he makes he makes the first sale, then parallel imports in that country are considered illegal. But if a country recognizes international exhaustion i.e. the rights of the

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9 PraneshAggarwal, *Why Parallel Imports of Books Should Be Allowed,*(The Centre for Internet and Society)*available at*http://cis-india.org/a2k/blogs/parallel-importation-of-books (last visited Aug. 20, 2015).

10 Donelly Darren, *Parallel Trade and Internal harmonization of the Exhaustion of Rights Doctrine,* 13 SANTA CLARA COMP. HIGH TECH L. J. 445 (1999).

11 J.C. Paul *et.al.,US Patent Exhaustion: Yesterday, Today, and maybe Tomorrow,* 3 J.INTEL. PROP. L. AND PRACT.468 (2008).

12 *See* Stothers Christopher, PARALLEL - TRADE IN EUROPE, INTELLECTUAL PROPERTY, COMPETITION AND REGULATORY LAW2 (2007).

13 *See* PrabudhaGanguly, INTELLECTUAL PROPERTY- UNLEASHING THE KNOWLEDGE ECONOMY25 (2001).

right holder are exhausted in relation to the whole world the moment the first sale is made, then parallel imports are considered legal.

It may be seen that while national exhaustion allows for stronger territorial control, international exhaustion allows for weaker territorial control and greater freedom of trade. It is noted that an issue of double payment arises since the copyright owner has obtained her/his reward (from first sale anywhere in the world) and by asking for a right to require her/his permission, which is equivalent to receive payment more than once, given that full value was already obtained upon the sale elsewhere.[14]

The Doctrine of First Sale under Copyright Law

The doctrine of first sale, is in essence, a limit on copyright owner's right of distribution and springs from the distinction drawn between 'property rights and intellectual monopoly rights such as patents and copyright.[15]

The property right of a person in an article he/she owns, gives him/her the freedom to deal with that article as they deem fit. It is based on the logic that "once a copyright owner has parted with title to a particular copy embodying the work, successive possessors of the copy should not be put into trouble of having to negotiate with the owner each time they contemplate a further sale or transfer".[16] For example, when an author sells a copy of her book, the property that is transferred is not her copyright in the book, but merely the property rights in that particular physical copy of the book. So the buyer is not allowed to reproduce the book (for that is the exclusive right of the author) but is entitled to re-sell it, as sale is an important aspect of his ownership right. The first sale doctrine ensures the copy right owner an opportunity to realize the full value of each copy. Importantly it ensures, that the copyright owner does not realize the value of each copy more than once.[17] Content- wise the distribution rights are to be understood as an opportunity to provide the public with copies of the work and put them into circulation, as well as control their use. The exhaustion of rights principle thus limits the distribution right, excluding control over the use of copies after they have been put into circulation for the first time.

Therefore the doctrine of first sale stipulates that a person is entitled to sell his copy of copyrighted work to anyone without being required to observe any conditions imposed by the copyright owner to such sale. In this respect, ownership in copyright is and should be equated to ownership in any other good. The Delhi High Court, in this regard, summarizes:

[14] *See generally* Mary Vitoria *et.al.*, LADDIE, PRESCOTT AND VICTORIA: THE MODERN LAW OF COPYRIGHT AND DESIGN1536 (2011).

[15] F. Granville Muson, *Control of Patented and Copyrighted Articles after Sale*, 26 Y. L. J.270 (1917).

[16] *Id.*

[17] PraneshPrakash, *Exhaustion:Imports, Exports and the Doctrine of First Sale in Indian Copyright Law* 5 N.U.J.S. L. REV.636 (2012).

> The doctrine of exhaustion of copyright enables free trade in material objects on which copies of protected works have been fixed and put into circulation with the right holder's consent. The exhaustion principle in a sense arbitrates the conflict between the right to own a copy of a work and the author's right to control the distribution of copies. Exhaustion is decisive with respect to the priority of ownership and the freedom to trade in material carriers on the condition that a copy has been legally brought into trading. Transfer of ownership of a carrier with a copy of the work fixed on it makes it impossible for the owner to derive further benefits form the exploitation of a copy that was traded with his consent.[18]

Parallel Imports and the Copyright Act, 1957

Although there is no provision in the Indian Copyright Act that grants the owners and licensees of a work the exclusive right to import a copyrighted work in India, Section 51 (b) (iv) of the Act, states that import of infringing copies of a work constitutes infringement.[19] It is clear that copies published without the permission of the owner are infringing copies, and thus cannot be imported. But can copies that are legally purchased and published outside India, also amount to infringing copies attracting the operation of section 51?,

According to section 2 (m) of the Act, a reproduction of a literary, dramatic, musical or artistic work, a copy of a film or sound recording is an 'infringing copy', if such reproduction, copy or sound recording is made in contravention of the provisions of the Act. Thus this section does not provide with the appropriate answer as it deals only with importation of infringing copies. Further the attempt made to amend section 2(m) under the (Amendment) Act, 2012 wherein parallel import of a work published outside India with the permission of the author and imported into India would not be deemed to be an infringing copy, also failed.

Section 14, lays down that in case of literary, dramatic and musical work, it is the exclusive right of the owner, "to issue copies of the work to the public not being copies already in circulation". The explanation to this section clarifies that "a copy that has been sold once shall be deemed to be a copy already in circulation".

Thus there seems, as of today, no clear provision under the Copyright Act, 1957 that expressly makes parallel imports an infringement of the right of the owner of copyright. But the judicial treatment met out to these provisions and the

[18] Justice Ravindra N. Bhatt of the Delhi High Court in *Warner Brothers Entertainment Inc. v.Santosh V.G*, CS (OS) No.1682/2006.

[19] Indian Copyright Act, 1957, Section 51 (b) (iv) reads: Copyright in a work shall be deemed to be infringed (b) when any person (iv) imports into India any infringing copies of the work. Further the proviso to the section reads: Provided nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

judgements delivered thereafter seem to have narrated a different concern altogether.

Judiciary on Parallel Imports

The Penguin Book Case

The issue of parallel importation first reached the higher judiciary in the year 1984 when the Delhi High Court in *Penguin Books Ltd.* v. *India Book Distributors*[20], was called upon to pronounce on whether an import by a third party without the express authorization of the copyright owner constitutes infringement. The court strangely, ruled that it constituted infringement because it violated the owner's right to publish.[21]

It should be noted that prior to the 1994 amendment of the Copyright Act, 1957 the first two clauses of section 14 read as " (i) to reproduce the work in material form (ii) to publish the work." Thus this judgement extended the right to publish the work to include the right of importation, but did so without a firm jurisprudential basis.

While the judge notes that "publication" under the Copyright Act in (1984) was defined as meaning "the issue of copies of the work, either in whole or in part, to the public in a manner sufficient to satisfy the reasonable requirements of the public having regard to the nature of the work", it does not explain how importation is subsumed under such a definition contrary to the plain meaning of the law.

The judgement in the*Penguin Book case,* was overruled by a legislative amendment to section 14 of the Copyright Act, 1957.[22] The amendment removed the 'right to publish' and instead introduced a right to "issue copies of the work to public not being copies already in circulation". This not only ensures the centrality of the 'doctrine of first sale' in India but also allows for international exhaustion, thus making way for parallel imports. Importantly as one commentator puts it, "With amendments, the decision in the *Penguin Case* is no more the law. Like most other nations we have also accepted the principle of international exhaustion. This seems to be after taking into view the public angle."[23] Unfortunately the legal commentators seemed to have paid greater attention to legislative changes than the judiciary.

[20] A.I.R. 1985 Del 29.
[21] *Id.* at 37.
[22] *See* The Copyright (Amendment) Act, 1994.
[23] Ashok Arathi, *Economic Rights of Authors under Copyright Law,* 15 J.I.P.R. 46 (2010).

The Eurokids Case

In 2005, the same issue of parallel importation in literary works arose before the Bombay High Court, in *Eurokids International Private Ltd.* v. *India Book Distributors Egmont*[24]. Unfortunately, the decision by the Bombay High Court was even more ill-reasoned than that of the Delhi High Court in the *Penguin Case.* Nowhere in the judgement is the issue of first sale doctrine, on which the issue of parallel imports rests, even cursorily examined. The amendment to section 14 by the 1994 amendment was nowhere acknowledged nor was its implication on exhaustion of rights examined.As per the logic of the judgement any copy that is sold in India by a third party in contravention of an exclusive license contract is automatically assumed to be an infringement. The court relied on the*Penguin Books case,* as a precedent without having noticed the subsequent amendment of 1994.

The Warner Brother's Case

In 2009, the Delhi High Court, pronounced another verdict on parallel importation in the case of *Warner Brothers* v. *Santosh V.G.*[25]However this was a case on DVDs and not books. Warner Bros. was in the business of production of films and was the owner of the copyright in the films produced by them. By virtue of the International Copyright Order 1991, they enforced their exclusive right under section 14 (d)[26] of the Act against the defendant, Cinema Paradiso alleging that the rental services of DVDs, legally purchased from the United States by them infringes their right as it is imported without their authorization. The central issue before the court was whether giving on hire or rent in India by the defendant, copies of the cinematograph films authorized for sale or rental only in a particular territory outside India constitutes infringement under section 51 (a) (i) of the Copyright Act, and its importation into India infringement under section 51 (b) (iv).

The court answered the question in the favour of the plaintiff and granted an injunction against the defendant. In a nutshell the Court held that importation of copies under section 2 (m) is an act of infringement and the principle of exhaustion inapplicable in so far as the explanation to section 14 and the term 'copy in circulation' applied only to literary, musical and artistic works. It reasoned that the very existence of the proviso to section 51 limiting importation for the private use of the importer fortifies the proposition further, that is, importation other than for private use of the importer amounts to an act of infringement.

[24] 2005 (6) Bom CR 198.
[25] CS (OS) no. 1698/2006
[26] Section 14(d) of the Copyright Act, 1957 illustrates the rights of the author of a cinematograph film. The right in specifically claimed to be infringed in this case was that of rental.

Primarily, the Court in this case has failed to address the effect of international exhaustion in USA on the copyrighted DVDs. This is relevant in view of the first sale doctrine,[27] wherein the exclusive right to distribution[28] a species of which is importation[29] is exhausted by the first sale when the copies are manufactured in the United States[30] or where the copies are first sold domestically.[31] The manufacture and sale of DVDs by WB has been restricted to the territory of United States, thus the first sale of the DVD would exhaust the rights internationally. It follows that any subsequent transfer of ownership in terms of sale, rental, lending and leasing cannot be restricted by WB.

It is to be noted that the essence of an infringing copy lies in the 'manufacture' of such copy on any medium and subsequent importation in contravention of this Act. Such manufacturing would indeed infringe the reproduction right of the author and its importation, an importation of infringing copy. Only when such a copy is imported in contravention of the provisions of the Act, (assignment and licensing) would there be an infringement. However if the copy is sold and not assigned/licensed, the claim of violation of the Act will not hold water.[32]

Export of Copyrighted Works

Barring a few exceptions notably the United States, the copyright law in no country regulates exports. Even in the United States, section 602 of their Copyright Act regulates only the export of infringing copies and not the export of legal copies. In India there are two judgements of Delhi High Court that seemingly make illegal, export from India of legal copies of a copyrighted work. As one of these recent decisions[33], bereft of any sound judicial reasoning, is an *ex-parte* order, handed down by the Delhi High, the facts of which are briefly described below:[34]

> John Wiley & Sons based in New York exclusively licensed the rights in certain books to Wiley India Pvt. Ltd. These books were sold at reduced prices in the Indian Market and were clearly labelled as "Wiley Student Edition restricted for sale only in Bangladesh, Myanmar, India, Indonesia, Nepal, Pakistan, Philippines, Sri Lanka and Vietnam. Another label on the book read, "the book for sale only in country to which first consigned by Wiley India Ltd. and may not be re-exported. For sale only in Bangladesh, Myanmar, India, Nepal, Indonesia, Pakistan, Philippines, Sri Lanka and Vietnam."John Wiley & Sons, being the owner of the rights, had given exclusive license to Wiley India Pvt. Ltd. to publish and print an English re-print edition only in the territories entailed in the agreement and not beyond that. Further, they wished to impose this restriction on all buyers of the book by way of that notice, and attached conditionally, thereby preventing exports to USA.

[27] *Bobbs-Merill Co.* v. *Straus* 210 U.S. 339 (1908).
[28] 17 U.S.C.Section 106(3).
[29] *Quality King Distributors Inc.* v.*L'anza Research Int'l Inc*523 U.S. 135, 138 (1998).
[30] *Omega S.A* v. *Costco Wholesale Corp.* 541 F.3d 982 (C.A. 2008).
[31] *Parfums Givenchy, Inc.* v. *Drug Emporium* 38 F. 3d477 (9th Cir. 1994)
[32] Karishma D. Dodeja, *The Sheer Film of Protection- An Exercise in Exhaustion*, 18 J.I.P.R. 10 (2013).
[33] *John Wiley & Sons* v.*PrabhatChander Kumar Jain* 2010 (44) P.T.C. 675 (Del).
[34] Justice Manmohan Singhin *John Wiley & Sons* v.*PrabhatChander Kumar Jain* 2010 (43) P.T.C. 486 (Del).

At this stage, it would be pertinent to dwell upon the facts of *Bobbs-Merill's*case[35]. In this case the plaintiff sold a copyrighted novel with a clear notice under the copyright notice stating that the book was not to be sold at a price lower that $1 and that a sale at a price lower that it would be construed as an infringement. Macy & Co., a famous retailer, purchased a number of copies of the book both at wholesale and retail prices, and re-sold the books to its customers at 89 cents per copy. This was quite clearly in violation to the condition imposed by the notice.It may be seen that the facts of this case mirror are similar to that of John Wiley. It is only the nature of the stipulations that vary. The Court in *Bobbs-Merill Co.* noted that:

> The precise question in this case 'Does the sole right to vend secure to the owner of the copyright the right, after the sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price would be treated as an infringement. We would not think that the statute can be given such a construction....In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract... To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.[36]

In India the statute explicitly notes that the right to issue copies of the work to the public, guaranteed to the owner of the copyright over literary, musical and artistic works is restricted to copies not already in circulation. Thus one might have presumed the ruling of the Court in the case of John Wiley in favour of the defendants. The actual decision however, turned out to be completely different. The two honourable judges of Delhi High Court issued injunctions in relation to export of books accepting the claim of infringement of the plaintiff. It stated that

[35] *Supra* note 27.
[36] *Id.* at 350.

the plaintiff could validly engage in market segmentation and that the violation of the stipulations mentioned on second page of the books constituted infringement under section 51 read with section 14 of the Copyright Act, 1957.

The High Court did not refer to the authoritative book of Copinger or the express wordings of the copyright statute. Copinger (XV^th edn. 2005) in unequivocal terms in para 7.80 states that in exact "similar situation of export from UK, the UK courts would have nothing to do with it and it would be a matter to be dealt with by the authorities and the law of country of import." The law also clearly states that the copyright owner cannot control the movement of literary, dramatic and musical work, not being a computer programme, once it is in circulation. The law as understood for long in India was sought to be changed by Delhi High Court without any change in the domestic law or international treaties.[37]

Further it is submitted, all IP laws the world over including India, only regulate or restrict imports and not exports. Exports of IP incorporated products have never been addressed in IP laws. Copyright law of no country mingles in export of copyright content. In the same vein Copyright Act, 1957 of India does not have a provision dealing with export of any product incorporating copyright content. The export of any copyright content product cannot be infringement of copyright if the work is legally available in country of export. Such exports do not tinker with any of the rights granted under section 14 or 51 of the Act. Exports from India of copyrighted work even without the consent of the copyright owner are perfectly legal.[38]

Two Potential Concerns with respect to Parallel Importation

There are two potential concerns to access to knowledge from allowing parallel importation. *Firstly*, the concern is that of cultural imperialism; the worry that a nation will be overrun by cheap foreign cultural imports, negatively effecting the local industry. For instance the Pakistani film industry has been negatively affected by the Indian film industry[39] and the American film industry has had such an effect on multiple countries. However this has not been of concern to publishers who argued against the amendment to section 2 (m); they are happy to provide Indian readers with greater access to foreign books as long as they are the only ones authorized so to do.*Secondly*, it is the concern that greater parallel importation, especially from developed countries, will lead to an increase in the

[37] Ashwani Kr. Bansal, *Insights Into Select Issues of Intellectual Property Law*, 32 DEL. L. REV.9 (2013).

[38] Ashwani Kr. Bansal, *Intellectual Property Rights: Judicial Law Making with Foreign Bias*, 2 J.O.L.T.I.10 (2012).

[39] BhartiDubey, *Pakistan Film Industry Bombarded by Bollywood*, THE TIMES OF INDIA(Nov. 1, 2009).

price in those developing countries where differential pricing is practised.[40]This is because companies will have less incentive to maintain lower prices in developing countries when those can be freely imported in developed countries.

Concluding Remarks

Thus it can be seen, that various Indian Courts, have fundamentally misconstrued the Copyright Act, when it comes to the question of exhaustion and parallel importation, and have made serious errors in their judgements. They have completely ignored the first sale doctrine, the 1994 amendment and have also failed to a large extent to give adequately reasoned judgements. These shortcomings are also evident in the court's interpretation of export of copyrighted works. Therefore these decisions have wrongly imposed a national exhaustion regime on India in spite of there being no provision in the statute on it.

An amendment was proposed for section 2(m) of the Act, which would have made the position with respect to parallel imports clearer, however those efforts failed, and unfortunately the plight of it still remains in the hands of the judiciary, which so far is unable to rightly decide this issue.

Given the flexibility, allowed by the TRIPS under Article 6[41] with regard to exhaustion, it is important for India to make use of this flexibility and create a beneficial regime. It is also necessary to bear in mind that law should reflect the needs and expectations of its society and maintain a balance between the rights of the authors and consumers. Given that many developing nations have adopted international exhaustion of copyrights and have benefitted immensely from this, it is time for India to tread on the same path.

[40] Lawrence Liang &AchalPrabhala, *Comment: Reconsidering the Pirate Nation* (2006) *available at*:http://link.wits.ac.za/journal/j07-liang.pdf (last visited Aug. 21, 2015).

[41] Article 6 of TRIPS states:For the purposes of dispute settlement under this Agreement, subject to the provisions of Article 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

Experiential Notes on Pedagogy of Law in India

SunandaBharti[*]

Introduction

We live in an era where technological advancement is so paced that PPt's (Power Point Presentations), OTP's (Over-head Projectors) and other such software and hardware can easily be branded as outdated. There are universities where inventions such as the Blackboard[1] and now even Google glass[2] are being used by teachers to impart knowledge.

The use of Blackboard (Bb)by teachers for putting self-made notes etc on the School website and then accessing the same from the comforts and confines of your classroom is utilitarian and impressive. It is something worth imbibing as it not only saves time of the teacher by compelling her to remain focused; it also motivates her to prepare a lecture with in-depth coverage of the course.In renowned Universities of the West, there are portions reserved from the syllabus where the requirement of a lecturer is almost dispensed with. The content is put online, through specially designed software and the teacher just acts as a facilitator. The whole idea of teacher-taught acquires a new meaning.

Though the phenomenon is yet to catch up in India due to lack of will, complacency and infrastructure/financial problems, there is no denying that one should eventually move towards adopting such new techniques in order to adapt to the changing teaching environs and requirements. Online study modules have

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[1] Briefly put, a Blackboard (Bb) is a web based software that can enables the teacher to provide handouts, course materials, syllabus, study tools (quizzes, sample tests), and discussion threads online.One can have all these advantages with a website that contains syllabus and course content but still Bb would be a smarter option because there is no paucity of space and since it is specially designed for educational purposes, it is more user-friendly. Additionally, unlike a website that would have public access, Bb would require authentication (login) that will allow only your students to sign in and view your course.

[2] Google Glass is a wearable computer with an optical head-mounted display (OHMD) developed by Google. It might be out in the market even as this is being written. It is a wearable device in the form of spectacles that can communicate with the Internet via natural language voice commands. So, one just has to speak to send a message. Additionally, it can record what one sees-live, translate the voice and many unique things. Teachers in some universities have started experimenting with it to provide quality education to the students. Imagine, the voice being simultaneously translated into Hindi or any vernacular to suit the needs of the multilingual students/international student community.

to become a reality also in order to compete in the international education market. Future of legal education in India lies in accepting that some courses can be 'self taught' online through specially designed modules. It would lead to smart teaching as the teacher would be able to devote more time to topics that require/merit face to face teaching (ones that require frequent interaction between teacher and student). This could be and in all probabilities would be linked with online examinations for the concerned topics. Some distinct advantages are saving of paper and also the time that goes into assessment. Online research is likely to get a major boost as the Internet phenomenon catches up making access to knowledge just a click away and hopefully at nominal cost.

Experimentation

Teachingcan be an exhilarating and an intellectually stimulating experience. Some subjectshowever bear the ignominy of being difficult to understand and score. Teachers who teach hard-core theory would easily relate to it. The problem with such 'difficult' subjects is that students create a mental block about it and refuse to pay complete attention in the class. It is assumed that the matter would have to be parroted and can never be understood. Sometimes this mental block is so strong that the task of diluting and ultimately erasing that negative almost seems an impossibility. The challenge of it can be faced successfully by adopting the following three stages:

1. Breaking the traditional learning pattern-moving beyond lectures
2. Teaching students how to answer in examinations
3. Helping students write effectively

Breaking Traditional Learning Pattern

Learning by rote is almost a tradition in Law colleges. For difficult topics, help is readily available in the form of Dukki's[3] or help books. They have become a bane not only because of the incorrect knowledge they deliver but also because of the intellectual atrophy they tend to create. Students just mug it up and regurgitate the same, page after page in the examinations, *irrespective* of what has been asked in the question. Hence it is necessary to break their pattern of learning. Glanville Williams[4] points out the same problem which reflects on the universality of the habit when he admits that:

> "I have marked hundreds of scripts in which the answer offered to a question was nothing but a formless mass of cases and propositions. The candidate has simply vomited over the page everything they knew about

[3] Dukki's or small size help booklets in law have a long history and derive their name from the old 2 paisa coin which was the price of the booklets in old times.

[4] Glanville Llewelyn Williams was a prominent and preeminent Welsh legal scholar who is considered an authority on Jurisprudence and Criminal Law.

the topic/s. They made no attempt to bring their knowledge into relation with the question..."[5]

Moving Beyond Lecture Method

Students, grasp more easily if they are asked/invited to participate. Unconventional as it may sound, but experience of the author has been that 'Law' can be better understood without legal jargon. Not only does everyone listen with rapt attention, the students may also be eager to be the 'first-ones' to reply and pose queries.Such method however requires you prepare the lecture in advance to maintain and retain the flow and wrap up the discussion in time. Otherwise, handling end-of-the-class queries, within the allotted lecture time may be a problem. Use of alternate visual aids such as Over Head Projectors--Slides and Transparencies serves as a boon in saving time.

All these endeavours ultimately reflect in students' score and class participation.. Also the answer scripts improve in content quality.

There may however be a definite batch of students every year who despite remaining religiously studious throughout the semester become jittery in the last few days before the exams and remain so till the end, which result in pathetic scores for most. For their specific morale boosting, or one to one query solving, the Internet may come to onesrescue.

Imparting knowledge and sharing of views though blogs[6], forums[7] and websites can be immensely useful. This way, the queries raised by the students can be settled even during vacations and preparatory leaves.Most students are able to articulate and express their problems better in writing. Especially in a subject like Law, the author finds blogging to be a very powerful and effective medium of study and opinion exchange. The students not only give structured comments, they inadvertently end up honing their writing skills—a must for any good law student.

Some students are particularly religious when it comes to practicingwriting. During preparatory leave they often reduce their class notes or exam notes to soft copy and mail it to the teacher for feedback. This should be encouraged as a good practice.Glanville Williams says that:

> "The wise student will at the outset of his course look at the examination papers of the last few years and whether compelled or not will write out answers to some questions (even in brief note form) in order to gain practice in self-expression."[8]

[5] Glanville Williams, LEARNING THE LAW 145 (12th Ed. 2006).

[6] A blog is the short form of the expression web log. It is a web-page or site that can be easily created by anyone to post content online. It consists of discrete entries referred to as 'posts'. It can be maintained by a single individual or a small group.

[7] For instance, http://groups.yahoo.com/group/indomitables_LC1/ is an informal yahoo group maintained for student teacher interaction generally within Law Centre-I, Faculty of Law, University of Delhi.

However, it is important to put in a word of caution that the answer should be moulded according to the requirements of the question in real exam situation.

Teaching Students How to Answer in Examinations

It is important to teach the students and never to take it for granted that they would learn the skills required for answering themselves. Hence, every semester, just before the commencement of exams, it is fruitful to engage students in an interactive discussion that takes the students through the familiar journey of taking exams. Do's and don'ts should be carefully articulated and presented to them.. Some of the suggestions that may be given are:

Focus on the Question: The first thing to be told is not to proceed with *'who cares what the question is asking for'* mentality. Students in their zeal to complete the exam in time do not even bother to read the question paper completely or thoroughly. Consequently, what they write does not pertain to the question. Many do not bother and feel that it's their bounden duty to reproduce everything that they know or even remotely know about the topic. It is almost as if their mind starts doing a "keyword search" much like the "Ctrl+Find" function on the computer. If it is a jurisprudence paper for instance and the student wants to attempt the answer on 'Feminist legal Theory', the student would do a rough scan of the paper and the moment she hits upon the word 'feminist' or anything even vaguely similar, she would start reproducing whatever she has parroted, in the topics context, on the paper. It is more like an action driven by the force of habit, a default action in computer terminology, which is bound to lessen considerably if exchanging views through blogging and forums is introduced to them.

Most students write with a pre-formed mindset resulting in irrelevant or baseless content in answers. Since it is more a force driven habit, it is hard to unlearn. Here the importance of compulsory reading of the question paper and its consequent benefits may be highlighted.

If one is not to look to keywords, what should one look for in the question paper is an important question.Look for leading words. [9]. Unless the paper setter has been utterly careless, most of the questions in law are set with a certain specific answer pattern in mind. There are words in the question itself that gives a key to what the answer should be. For instance, Enlist, Enumerate, State, Describe, Discuss/Explain etc all have a different meaning and so require the examinee to

[8] Glanville Williams, LEARNING THE LAW 140 (12th Ed. 2006).

[9] See http://writing.colostate.edu/guides/processes/exams/ (last visited Aug. 15, 2015). This site gives a detailed narrative of what the leading words may mean.

treat them differently. All that one has to do is to identify these leading words and interpret them correctly.[10]

[10] Here is a general list of the most common words used in law exams (not necessarily Jurisprudence).

1. ANALYSE/EXAMINE: Basically scientific terms that tell you to scrutinise or explore the various facets of a question from every angle possible and present them clearly in your answer. For instance, if the question says: Law is Command of the Sovereign. Analyse. Here one would have to deal with how law has been defined by John Austin, what is his command theory, his idea of sovereign and how law command and sovereign integrate together...all of this.
2. COMPARE: We have to put side by side the two concepts given and weigh them against each other primarily in terms of similarities. One may mention some differences in the answer but concentrate on aspects that are much the same.
3. CONTRAST: Often the term is used alongwith 'compare', meaning, the question says compare and contrast (or DISTINGUISH) and the students take them to be the same. It is wrong. While contrasting, one has to stress the qualities or characteristics that are different in the concepts one is discussing. Again, in the end one may just mention the similarities. In distinguish, one has to write both the similarities and dissimilarities with equal thrust.
4. CRITICISE: State what you think about the concept or issue in question. Give points for and against, not just against. They have to be your points not just a compilation of the popular perceptions. For instance Capital Punishment per se is inhuman. Criticise.
5. DEFINE: It is an easy expression that wants you to clarify the meaning of a certain concept in clear, concise terms. For eg. Define Feminist Legal Theory. One may give various definitions of the same term.
6. DESCRIBE: It is a keyword which is not of much relevance in Jurisprudence because it wants you to put a certain visualisation in the form of words as vividly as possible. For eg, describe the crime scene...'the discreet door opened with a click and a masked figure, with a pistol in hand, entered the dimply lit room...
7. DISCUSS/EXPLAIN: This term means that you should give a complete and detailed answer. Make sure that you give not only what you think about the issue at hand but also a few popular perceptions about it that are different from that of yours. For eg. Law is command of the sovereign. Discuss. Here, in addition to what you did in analysis, you should also focus on how the theory is understood; what are the different views on it.
8. ENUMERATE: Make a list of the main points in your answer and number them in the order of importance or chronology. '1' being the most important and so on...Usually meant for short answers. ENLIST is another such leading word that wants you to present an ordered list which may be in random order.
9. EVALUATE/COMMENT: Present a value judgement, stressing advantages and disadvantages of the situation. For eg. The Hohfeldian Thesis gives a sound relation between the concepts of right and duty, but the relation is not always true. Comment. Here, one would have to mention how the thesis has stood the test of times and how its applicability still explains the relationship between rights and duties by and large. Then one has to mention the exceptions, where the thesis fails-the concept of absolute duties...and round off the answer in a balanced way.
11. ILLUSTRATE: Use examples to help explain your answer and if possible present a diagram, picture or a small drawing or a flow chart. Tables may also be used. For eg. Right is a correlative of duty. If one exists, the other has to be present. Illustrate using Constitutional provisions from Part III.
12. SUMMARISE: Give a brief presentation of the main points or statements. Express, concisely, the relevant details. Leave out the minor details. Summarise the Hohfeldian Thesis.

contd...

Good writing is not a genetic trait but an acquired skill that requires constant practice. For exam writing, a good idea is to ask students to underline or mark the leading words before they start to write the answers. This helps them to understand what is required and prevent them from losing track.If care is taken in firstly identifying these leading words and then write accordingly, it would make a huge difference in the answer content and pattern. John H. Langbein, Sterling Professor of Law and Legal history at the Yale Law School puts it quite pithily:

> Examination questions are dense: every sentence, every word may have significance. You should read a question through to get its general drift, then reread it with care.[11]

Closely related with the issue of correct interpretation is question whether what one is writing is actually pertinent and relevant to the context in which it has been asked. It nags examinees no end and is often their greatest headache. "Often one has to interpret a badly worded question. In such cases, it is always better that if the question is reasonably clear, one does not wander outside it. This is because the examiner would never give credit for irrelevancy, because that would be unfair to those who have answered to the point.[12]

Students often also have one standard query: How long should be my answer to score the maximum? How much detailed it should be. What should be the word limit? There are no standard answers to these. Williams provides a cue by advising not to operate on extremes—do not assume that your examiner is ignoramus and explain everything to him; and similarly do not convert your answer into a point-wise short note always. He would in the latter case be suspicious of the nutshell knowledge and may attribute it to your ignorance of details.[13]

It is important to apply oneself: Some answers make the examiner wonder in awe, just because they are awful. In an answer to any law question generally, it is pertinent that there is a structure to the entire text; there should be logical flow between paras, lines and words that constitute the whole mass. In order to have such a structured presentation to an answer, following tips may be suggested to students:

13. STATE: Set out the main points in clear, concise expression without minor details without any frills. It means stick to the basic points.

See http://writing.colostate.edu/guides/processes/exams/ for a detailed list of leading words and their meaning in different contexts (Last visited Sept. 29, 2015).

[11] John H. Langbein, *Writing Law Examinations*, http://www.law.yale.edu/documents/pdf/Faculty/Langbein-WritingLawExaminations.pdf (Last visited Sept. 29, 2015).

[12] Glanville Williams, LEARNING THE LAW 142 (12th Ed. 2006).

[13] Glanville Williams, LEARNING THE LAW 144 (12th Ed. 2006).

- THINK--give your tense nerves and imagination a breather. Ponder over what you are going to write. Writing an answer is like flying a Dakota wherein the takeoff and landing has to be perfect. So how one introduces the topic and the conclusion is very crucial. It does not however mean that one is permitted to fill the main body with garble.While writing the introduction, it is particularly important to be crisp and precise and avoid long winded beginnings and ends. Furthermore "try to make your answer attractive. Examiners are human beings and they are easily bored. If a question is capable of being answered in a sentence, answer it immediately in that sentence and proceed to explanation afterwards."[14] He states elsewhere—"before starting to write, read the whole paper, write down points of questions that you think you can attempt and while starting to write the answers, read those questions again. This way you give your memory two chances of recalling the details.[15]
- ORGANISE YOUR THOUGHTS—Students, are adamant in following that pattern of answer which they have learnt. Some do not bother even as much and reproduce their entire knowledge of the subject on paper. They may be advised not to do that. It is necessary to "always model ones answer to conform to the question. The examiner may have set the question like that with the object of seeing whether onesmind is sufficiently adaptable to vary the order of what one has learnt.[16]

  Elsewhere, Williams states:

  > "Before unmuzzling your wisdom on any question, ponder over the questioncarefully. Very often the examiner will have worded it in a particular way in order to enable you to show some originality of treatment."[17]

- USE ROUGH SPACE--It is a popular misconception that rough space is fit to be used only for numerical based questions and has no place in law for instance. Its practice should beencouragedamongst students to get rid of the mental block. Ofcourse everything is in oneshead, but thoughts can be better organised if one writes them down.
- DO NOT COOK-UP STORIES/DO NOT FILL-UP SPACE—Time and again teachers complain of getting scripts that do not make sense at all. They are simply an attempt to fool the examiner, a practice which should be discouraged at all costs. In examiners' literature, it is known as 'Padding'. No examiner gives credit for quantity of words written. Nonetheless, a huge

[14] Glanville Williams, LEARNING THE LAW 150 (12th Ed. 2006).
[15] Glanville Williams, LEARNING THE LAW 155 (12th Ed. 2006). Ever since our student days, we are advised by our parents to read the question paper as a whole first and to do it with a calm mind. Glanville Williams gives a sound logic to the advice and practice.
[16] Glanville Williams, LEARNING THE LAW 141 (12th Ed. 2006).
[17] Glanville Williams, LEARNING THE LAW 145 (12th Ed. 2006).

proportion of examination papers contain many paragraphs that should not have been written and for which no credit can be given.[18]. It is important to teach that in an exam space should be used prudently. If the answer is expressly divided into several sub questions, each sub question should be answered separately and if each sub question is numbered (say a, b, c etc), it is important to number the answer accordingly.[19]

'Inventing facts' is an offshoot of this habit. In law it is very important to retain the sanctity of the question. Never add to what the examiner has told you about the facts.As Williams also mentions, it is important in a law exam to guard against confabulation. Whatever you write has to be supported by authorities.

> "It hardly needs to be added that the examiner always want reasons and authorities for the answer even if he does not expressly ask for them."[20]

Associated with this is the irritating habit of compulsorily writing about the biography of the scholar who has propounded the theory as a part of the introduction. It can and should be avoided at any rate, unless the question compels you to trace the biographic background of the authority. Glanville Williams is blunt when he states that,

> "Many students begin their answer with a prologue. Cut it out. In particular, do not start with the historical background if you are not asked for it."[21]

Appeal to the eye: Expression includes articulation, precision, coherence and presentation of information. Somestudents write atrociously. Some others cannot spell and do not care about it.[22]If teachers are to expect a change in this pattern, they must be the change they want to see. It is of utmost importanceto suggest to the students that the answer sheet should not only be looked at content-wise but that some time is also invested in making it attractive. One may know the answer very well and may have prepared notes in advance, but if the candidate fails to deliver in presenting it well, it would be of no avail. Examiners are human beings and are naturally drawn towards well written and neat scripts more than those that are unstructured and untidy.Inadvertently or otherwise, good looking scripts with decent quality content are likely to fetch more marks than the ones which

[18] John H. Langbein, *Writing Law Examinations*, http://www.law.yale.edu/documents/pdf/Faculty/Langbein-WritingLawExaminations.pdf (Last visited Sept. 29, 2015).
[19] John H. Langbein, *Writing Law Examinations*, http://www.law.yale.edu/documents/pdf/Faculty/Langbein-WritingLawExaminations.pdf (Last visited Sept. 29, 2015).
[20] Glanville Williams, LEARNING THE LAW 142 (12th Ed. 2006).
[21] Glanville Williams, LEARNING THE LAW 143 (12th Ed. 2006).
[22] Glanville Williams, LEARNING THE LAW 151 (12th Ed. 2006).

have remarkable content but are ugly or untidy. On first glance one is not looking for literary merit but pleasant readable view.

Agreed that handwriting is a talent that one develops over a period of time and once acquired, the traits are difficult to change. One simple rule that may be suggested to pupils is that the handwriting should be at least legible.

Many students who share notes tend to question the intellect of the examiners when they do not fetch similar marks. The reason simply is that while a group of students might have prepared from the same set of notes, there is every possibility that they (each one of them) would have presented the same content differently. If the writing is not comprehensible in the first place, one cannot expect good marks despite impeccable content.

Besides writing, as has already been mentioned, it is also equally important to suggest that the students divide the entire answer content into readable pieces. For this, the standard schoolroom criteria of using side margins and highlighting may be adopted to begin with. One may underline important portions to which one wants the examiner to immediately focus and so on. Elsewhere in this paper also it has been mentioned that the answer should be broken up in the same fashion as the question is set. Even if the question is not compartmentalised, it is always beneficial use headings and sub-headings as it gives a structure to the presentation. Mostly, it also ensures a judicious use of space. Regarding space, though there is no constraint, it is advisable not to operate on extremes, that is fill up every line with impossible number of words or write only a couple of words per line. Both present different difficulties for the examiner.

Helping Students Write Effectively

A brief mention may be made of a popular problem that is particularly vexing in how students answer questions: they reproduce not only legal provisions but also famous legal theories almost verbatim thinking that it would fetch them good marks. Reverse happens in reality. Not only does it irritate the examiner, it also compels him/her to wonder if the examinee actually ever understood the point involved.

Just before the start of the exams it would be a great idea to briefly but cogently tell the students about Quoting, Paraphrasing and Summarising. In law, we cannot avoid relying, and often heavily, on statutory language or authoritative texts of legal scholars, but there is a technique, a method at using them creatively. Quoting, for instance, is when you copy a provision, saying or a theory word for word, exactly as it appears in the original a text.Paraphrasing restates the information using your own words.Summarising on the other hand includes briefly restating only the main ideas using your own words.

To give an illustration, the following line occurs in the famous novel 'Lord of the Rings' by JRR Tolkien which the author often uses while arguing against DP/Death Penalty or capital punishment:

> "Many who live, deserve death but many who die deserve life...can you give it to them? NO. Do not then be too eager to deal out death in judgment for even the wise cannot foretell all ends."

As a standard rule, students may be advised to use the language verbatim only when they strongly feel that re-wording the same would lose the punch. Verbatim reproduction should never be used as a garb to hide lack of understanding of the topic or issue at hand. In some laws, especially while relying on constitutional provisions, exact wording is needed for technical accuracy and in such cases, text may be safely reproduced verbatim.

In most instances where one is tempted to regurgitate verbatim text, paraphrasing can be suggested and adopted with some personal creative inputs. For instance, the abovementioned quotation from Tolkien can be stated in the following fashion using simple words:

> As Tolkien says, we should not be hasty in conferring death sentences for we are incapable of giving life to those who deserve it.

Better still and to re-emphasise the point of being crisp and precise mentioned elsewhere in the paper, one may just summarise the text to drive home the same point pithily, without beating about the bush. For instance, the quotation may be written as follows:

> Death Penalty (or Capital Punishment) should be used sparingly for it involves taking something we cannot give.

One may notice how the smart use of own words not only shortens the expression but also can be used as a bullet point or subheading in the answer.

The suggested experiments along with the assistance of improved technology would bear good results and also go a long way in improving the quality of education, and calibre of both the teacher and the taught. Imparting education is not the only goal of a good teacher. Had it been so, a talking computer could have done the job as effectively. As human agents, we must aim to teach with thinking, ever evolving head and a passionate heart and give our pupil that extra something which gives them an edge over others.

The suggestions may sound absurd to some and tantalising to others, but only experimenting can only testify to their success. Unless innovations are introduced in teaching Jurisprudence as per the felt needs and evolving intellect of the students;teaching the subject would not be a learning/gaining experience but a bland routine that involves evaluating sub-standard answer scripts conveniently presuming that students would never change the way they write.

Accessibility of Tribal to Justice —Issues and Challenges

K. Ratnabali[*]

"A person who is unaware of his legal rights and has no knowledge of the services available to him is in no better position than he would be if there were no such rights and services""[**]

-- Frederick H. Zemans

Tribal societies experience the co-existence and interaction of the twin legal systems—their age-old customary norms and the modern statutory laws. The two laws are neitherin harmony nor opposite to each other, but in a tangential relation. Such apposition of the two laws has impacted their lives and societies in myriad number of ways, creating not only a sense of confusion and alienation but resulting into noticeable injustice.

Any attempt to ease the conflict between the two by giving preference to one law andimplementing it in such societies will be detrimental. Tribal customary norms are not only part of their culture but also their identity as well. They govern every aspect of their lives. Any intent to nullify these norms or superimpose the mainstream law over these norms will have the potential of instilling threat to the tribal psyche. On the other hand if the tribals are left to be governed by their own customary norms, which may not, at times, be in conformity with the principles of equality and justice guaranteed to all citizens, it will not only be at variance from the extant constitutional practices but also turn out to be an impediment to their development in future.

A healthy intervention, therefore, is the need of the hour so as to bridge the gap between the two laws in such a way that the spirit of the tribal customary law is retained and nurtured while at the same time the tribals are enabled to reap the benefits of the modern day statutory laws.

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** Frederick H. Zemans& Paula B Weiss, *"Introduction"* in Frederick H Zemans (ed.) PERSPECTIVES ON LEGAL AID: AN INTERNATIONAL SURVEY 5(1979).

If we consider providing the so-called 'legal-aid' to such communities as one of the options available to resolve the conflict between the statutory laws and customary norms, we need to have a blueprint on how to go about it. Because an 'aid' has the negative connotation at times of being a 'crutch' or gives a negative impression of lack of or deficiency of a thing which one is trying to fill up by giving aid, such approach should not be the basis for providing a healthy legal intervention in such societies.

Whenever we think about such interventions, we need first to find out what is their need rather than what we think is their need. The whole core and focus of providing legal intervention in such societies is altogether different from providing legal aid to the underprivileged sections of the mainstream society. In the mainstream society, legal aid tries to fill in the economic, information and sometimes language gap that exist in justice delivery system whereas in the case of tribal societies one has to start right from the point of carving their traditional rights within the realm of rights guaranteed by the country's legal system to making justice accessible to them.

To elucidate the above point, an illustration may be cited.DongriKondh tribes of Odisha consider Niyamgiri Hills to be sacred as their god Niyam Raja lives there but its relevance to the tribe has not been taken into account at all by the government when the hill was considered for bauxite mining[1]. In spite of the twin fundamental rights to religion and to preserve one's culture[2]which have been guaranteed to all the citizens including the tribals, any cultural or religiously significant space of the tribals do not get recognition and protection as compared to similar spaces of the dominant population[3].Even the Supreme Court of India while dealing with the issue of grant of clearance to M/s Vedanta Aluminum Ltd, never talked about the possibility of violation of right to religion of the DongriKondh[4].

One has to look through the sociological lens so as to understand how each of the legal rights, which are guaranteed to all the citizens, will fit into the context of the tribals. Any attempt to read, interpret and apply the law, without taking into account nuances and scope of these rights from tribal's perspective, as it is will makeit infructuous. For instance, the property laws, land acquisition laws, those

1 *Available at* http://in.reuters.com/article/2008/07/25/idINIndia-34681420080725 (last visitedOct. 5, 2015).

2 In Article 25 of the Constitution of India, all citizens are given the right to freedom of religion, which includes the freedom to profess, practice and propagate religion. In Article 29 minorities have been given the right to conserve their distinct language, script or culture

3 One may be reminded of the shelving of the Sethusamudram Project, a project to create alternative shorter route for ships to cross the Gulf of Mannar by destroying Adam's bridge (*Ram setu*) because of the protest voices that came from the Hindu majority as it is believed to be built by Lord Rama with the help of *vaanersena*.

4 *Available at* http://judis.nic.in/supremecourt/helddis1.aspx (last visited Oct. 5, 2015).

dealing with rehabilitation of the displaced tribals etc.[5] recognize individual ownership of land but in most of the tribals societies their customary law recognizes community ownership. Therefore, if the law relating to land ownership is applied as such then such a law will never be fair, just and reasonable from their perspective. The resultant impact will be no different from the imperialism of one legal system over the other.

An effective legal intervention in the case of the tribals has to be multipronged. It has to be operated at the following three levels: -

i) at the preliminary stage of defining the legal rights in the context of the tribals,
ii) harmonizing the conflict between statutory laws and customary laws of the tribals,
iii) providing 'legal aid'[6] as understood in the general parlance.

A pre-requisite, therefore, for meaningful legal intervention in tribal societies is to first understand their customary law. But understanding an uncodified dynamic living law, which keeps on evolving, is indeed a challenging task. Though codification of the existing customary law helps in making a law transparent and predictable, yet it makes the law rigid and warrants the continuation of traditional norms which are founded on inequality. Another problem in codification is that the tribes and their territory are not coterminous[7]. As a result there is possibility ofcentral dominance of customary law of one tribe over the other who are living together in a specified territory.Moreover, customary law may vary within the same culture from area to area, from one kinship group to another; from one subculture to another[8]. Another danger is of the customary law being interpreted according to the norms of the formal law whose foundation is totally different from theirs[9].

Either of these approaches can have deleterious effect onthe diversity that is basic to the tribal search for an identity based on their past. A solution has, therefore, to

[5] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 is one legislation which partly recognizes community ownership.

[6] Providing legal aid to cross the barriers to equal access to justice such as
- Physical barrier
- Psychological obstacles – every feeling that prevents a persons from seeking legal services – a sense of fear, hopelessness, lack of information, ignorance, unfamiliarity, unfamilarity
- Language barrier – people who do not speak the same language spoken in the legal system or even those who do not speak the national language, for them the legal system remains a mystery filled with legal jargon which is incomprehensible to the uninitiated.
- Financial barrier- Poverty is also a major barrier to access to justice. A poor person has very limited disposable income which he is incapable of paying for legal services of any kind.

[7] Walter Fernandes,Melville Pereira,&VizalenuKhatso,TRIBAL CUSTOMARY LAWS IN NORTHEAST INDIA: GENDER AND CLASS IMPLICATIONS 25 (2008).

[8] Pathak Manjushree, TRIBAL CUSTOMS LAW AND JUSTICE: A TELEOLOGICAL STUDY OF ADIS, (2005).

[9] *Id* at 26.

be found that keeps a balance between these pitfalls and helps the tribes to move towards the future. The first step towards it is to accept the need for statutory recognition of their customary laws. That can bridge the gap between the national and the local on the one hand and between the formal and customary laws on the other. Today there is a hiatus between the two. Studies show that the problem of land alienation is caused mainly bythis approach[10]. The tribes live according to their community-based customary law but the State recognizes only individual land ownership. That makes encroachment on their land or its alienation or acquisition easy[11].

One has to find a creative solution which balances the need to respect their customary laws and the demands of equality[12] and human dignity. One alternative[13]is to give recognition to customary law aftereliminating elements which are not in consonance with spirit of equality and human dignity. Whenever such an exercise is done, there should be room for public debate and discourse in order to find out an amicable and saturated generally accepted code[14]. Such participation requires strong grass root level process of reflection by each tribal community[15].An effective reflection will be possible only if they are able to know about the law on the other side, appreciate it, compare it with theirs and form an informed decision as to what part of their customary law should be propagated and what hues from the formal law should be imbibed so as to align their laws and society towards progress and development.

From this perspective, education of the tribals is of utmost importance. But extending the formal system of education to the tribal areas does not seem to be the answer[16]. As it has been observed that where formal system of education has been implemented, there was slow progress in education as well as high number of school dropouts. Non-formal education, therefore, is suitable to the tribals. The content and curriculum should have relevance in their life and culture[17]. The pedagogy and medium of instructionshould be tribal friendly and their experience should be given importance in classroom discussions.

This article is an endeavour to put forth the salient issues which should perturb the minds of the educated intelligentsia at the initial stage for contemplation of a conceptual framework leading to a concrete blueprint to ensure that the fundamental rights as enshrined in the Constitution of India would benefit the

[10] *Id.*

[11] Walter Fernandes, Gita Bharali&VemedoKezo.THE UN INDIGENOUS DECADE IN NORTHEAST INDIA19-21 (2008).

[12] *Supra* note 7 at 27.

[13] Similar suggestion has given by Fernandes,*Et Al.,Seeid.*

[14] *Supra* note 8 at 75.

[15] See *supra* note 7 at 28.

[16] *See*K Sujatha, EDUCATION OF THE FORGOTTEN CHILDREN OF THE FORESTS: A CASE STUDY OF YENADI TRIBE(1987).

[17] *Id.* at 164.

tribes meaningfully as well as make access to justice easier. Whenever legal intervention to the tribals is sought to be given, one should keep in mind that it should not be considered as a favour to them, rather an essentiality to actualize the right to equality before law—a constitutionally guaranteed right to every person present in the territory of India. To ensure this right in its real spirit to societies where road to justice is strewn with unrecognized rights, unacquainted formalities, incomprehensible laws, economy driven legal services, is indeed a challenging task. And the task is all the more harder in the case of tribals where one has to have knowledge not only of the laws of the mainstream legal system but also their customary laws so as to give them the opportunity to enjoy the fruit of the mainstream legal system as well as retain their identity and culture which they strongly hold on to through their customary laws.

FROM TRAGEDY OF COMMONS TO EMPOWERING THE COMMONS: An Environmental Perspective

Sukant Vats[*]

Introduction

The Tragedy of Commons

Common property tenure and usufruct systems are central to many traditional management systems. In economics, the tragedy of the commons[1] is the depletion of shared resources by the individuals, acting independently and rationally according to each one's self interest, despite their understanding that the depleting the common resource is contrary to the group's long terms best interests. Hardin pronounced that whenever many individuals freely use a common property resource it is doomed to be degraded and will bring ruin to all, because no individual would have to pay the full costs of overexploitations, it would be in each individuals interest to extract as much as possible from the resource base, with the result that commonly held resources would inevitably be degraded.[2]

Central to *Hardin*'s article is an example (first sketched in an 1883 pamphlet by William foster Lloyd), involving medieval land tenure in Europe, of herders sharing a common parcel of land, on which they are each entitled to let their cows graze. In Hardin's example, it is in each herder's interest to put the next (and succeeding) cows he acquires on to the land, even if the quality of the common is damaged for all as a result, through over grazing. The herders receive of or the benefits from an additional cow, while the damage to the common is shared by the entire group. If all herders make in this individually rational economic decision the common will be depleted or even destroyed, to the determent of all.

Hardin also cites modern examples including the over fishing of the world's oceans. Hardin's common theory is frequently cited to support the notion of sustainable development, meshing economic growth and environment protection

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1 G. Hardin, THE TRAGEDY OF THE COMMONS 162 (1968).

2 *Id.*

and has had an effect on numerous current issues including the debate over global warming. Hardin contents that the majority of the problems are raised by rapid human population growth and the subsequent indiscriminate use of the earth's natural resources.

The ecologist further advocated that a world in which individuals rely on an individual and not on the relationship of the society led to gradual degradation of "The commons" or the community assets as also in case of environment. For example industries for their self-interest of gaining maximum profits will expand its business by opening new industries and thereby increased the discharge of their effluents into the ground water and gradually pollute the complete ground water table which will affect the whole community living nearby. In other words, every time person "A" gets in a car, it becomes more likely that person "Z" and millions of other will suffer pollution, congestion, carbon emission and traffic accidents.

Hardin's main argument is that common or open access resources will always be prone to over exploitation. His preferred solution is to privatize common resources wherever possible. Failing this, regulations like mutual coercion or mutually agreed upon is required. The former solution can be seen in, for example, the 1982 Law of the sea convention which extended the exclusive economic zone (EEZ) to 200 nautical miles, effectively privatizing as much as 90 per cent of the known resources of the seas. The above said view has largely lost theoretical support in recent years as distinction between common property regimes and private property regimes. It is believed that common property systems are inherently less productive, and more susceptible to degradation, than private property regimes. Common property regimes, which consist in essence of jointly held property and private property regimes consist of open access systems, which have no restriction on resource use, and which are in fact subject to degradation.

However *Jodha's*[3] (1990) study has been particularly valuable, which shows that privatization of common property has resulted in overall declines in the condition of poor households. Research undertaken in rural areas of India revealed that the poor obtain approximately one-fifth of their household income directly from common property resources, which in addition provide them with more than one-third of their farm inputs. Without the availability of common grazing land in these communities, over half of lands currently under food and cash crops would have to be diverted to fodder crops, or else livestock would have to be significantly cut, with consequent drop in draft power and manure. It is also argued that state intervention which have been undertaken to privatize common property, even when such interventions have been developed with the

[3] N.S. Jodha, *RuralCommon Property Resources: Contribution and Crisis*, ECONOMIC AND POLITICAL WEEKLY65-78 (June30, 1990).

specific aim of helping the poor, have resulted in overall declines in the conditions of poor households.[4]

In spite of the fact that the tragedy of commons scenario is no longer accepted by many development theorists, the metaphor remains a powerful influence on or at least a strong basis for the rationalization of the policies of both national governments and international developments agencies which advocate settling pastoralists[5], privatizing fishing grounds.[6]

To privatize common or open access resources in order to avoid over exploitation is not the solution, due to the reason that the appearance that private property is more stable and adaptive than common property is due the fact the rights of exclusion for private property owners are generally upheld by the state, that is, the customary ability of private owners to exclude others from utilizing their land has been formalized and codified in law. On the other hand, the equally essential common property rights of exclusion, which have a firm basis and long history in common law, have been substantially eroded through active or benign neglect of the state, and common property tenants are thus deprived of the legal protection afforded private owners.[7]

In addition, private ownership, secure land tenure and sustainable resource use are not inevitably linked, for example, small land owners who are obliged to go deeply in debt each season risk losing their land after a bad harvest, large land owners often show no qualms about clearing rainforests for short term gains, even when it is clear that the resulting pasture lands will become barren in only few years. *Bandyopadhyay*[8](1990) demonstrated that in certain communities in India, common property resources are better safeguard than private property resources. The short time preferences of the private owners, and their ability to abandon degraded lands once maximum resources had been extracted, mean that they do not have the same incentives for environmental preservation that exist in communities whose families have inhabited a region for generations, and whose descendants will continue to inhabit it for generations to come.[9]

[4] *Id.*

[5] W.M. Adams, GREEN DEVELOPMENT: ENVIRONMENT AND SUSTAINABILITY IN THE THIRD WORLD 24(1990).

[6] G.B.K. Baines in F. Berkes (ed.) TRADITIONAL RESOURCE MANAGEMENT IN THE MELANESIAN SOUTH PACIFIC: A DEVELOPMENT DILEMMA 71 (1989).

[7] Daniel W. Bromley &Micheal M. Cernea, THE MANAGEMENT OF COMMON PROPERTY NATURAL RESOURCES64 (World Bank Publications, 1989).

[8] *See*J. Bandyopaddyay, *From Environmental Conflicts to Sustainable Mountain Transformation: Ecological Action in Garhwal Himalaya*, in D. Ghai and J. Vivian (eds.) GRASSROOTS ENVIRONMENTAL ACTION: PEOPLE'S PARTICIPATION IN SUSTAINABLE DEVELOPMENT259-278 (1992).

[9] *Id.*

Responses of the Commoners: *Reactive* v. *Pro-active*

Justice should not only be done; it must also be seen to be done. In case of environmental laws, justice does not denote that framing of environmental protection laws and policies, rather the main objective of environmental laws and policies should be more accurately characterized as to ensuring that the environment is properly protected(seen to be done). There are two kinds of responses of the commoners to seek justice in cases of environmental matters.

1. *Reactive Responses*

A responses of commoners aftera climatic casualty has occurred is a reactive response i.e. to react in response to such causalities. The genesis of such responses is due to the recognized constitutional right of clean environment. These responses are redressed through public interest litigations and supported by polluter pays principle. In majority of cases justice cannot be done as damage to the environment is irreversible. At the maximum court fixes the quantum of liability of a wrongdoer and the compensation for the victims. The reactive responses are due to the fact that the developmental activity which caused serious irreversible environmental damage is done without calculating risks of commoners. Developmental activity is done in the name of commoners without consulting them, the object is overall development of nation but when the axe falls they becomes the subjects.

The reactive responses are a time consuming process and in many cases remained unnoticed due to political interventions. The main focus of reactive responses is not the protection of environment but redress of environmental impact, so the beneficiaries of reactive responses are the victims as they get compensation and not the environment as serious irreversible damage is already caused to the environment.

2. *Proactive Responses*

A proactive responses are in anticipation of climatic causalitiesthat have yet to occur. It prepares for the climatic causalities and its impacts.Due to irreversible environmental degradation, there is need to anticipateand act on climate risks as early as possible. These kinds of responses are supported by precautionary principle, that the prevention is better than cure. The proactive responses require that the commoners should participate in environmental decision making. The proactive responses are the genesis of environmental movements with an objective to prevent irreversible damage to environment.

The environmental movements may be defined as a loose, non-institutionalized network that includes, individuals and groups who have no organizational affiliation, or organizations of varying degrees of formality, that are engaged in collective action, and that are motivated by shared identity or, at least, shared environmental concern.[10] The environmental movements may be broadly understood as organized social activity consciously directed towards promoting sustainable use of natural resources, halting environmental degradation or bringing about environmental restoration or regeneration.[11] However, *BavaNoorjahan*[12]puts a different understanding of the environmental movements. According to him, it is a people's protest for protecting the natural environment from degradation, decay and destruction by various activities of human beings and for promoting the development of the fragile ecosystem, which is required for human development.[13]

The major drawback of proactive responses is that it completely halts the developmental activities. Political parties for their own benefits can easily mobilize the commoners against the developmental activities and termed it as national environmental movement. Political parties or influential groups pose the developmental activity as threat to the commoners, mobilize them against the developer, make it their political agenda to win the poll and once they are elected they fetchgood amount of money from developer to allow such developmental activity in the name of commoners.

Solution to the Tragedy of the Commons

Solution to the Tragedy of Commons can either be polluter pays, stringent regulations or empowering the commoners to participate in environmental decision making. *Hardin*[14] categorizes these as effectively the "enclosure" of commons which means paradigm shift from the system in which use of all resources as commons (unregulated access to all) to the system in which commons are "enclosed" and subject to methods of regulated use in which access is prohibited or controlled by public participation in effective environmental decision making.

The ultimate stakeholders in the environmental issues are the commoners, so the environmental protection measures[15] and policies must be drafted in such a manner so as to empower the commoners.In order to implement the environmental protection policies on the ground level and for the better

[10] C.A. Rootes, *Environmental Movements and Green Parties in Western and Eastern Europe*, in M. Redclift and G. Woodgate(eds.) INTERNATIONAL HANDBOOK OF ENVIRONMENTAL SOCIOLOGY319-348 (1997).

[11] RamachandraGuha&MadhavGadgil, ECOLOGY AND EQUITY 151-156 (1995).

[12] *See generally*BavaNoorjahan ,ENVIRONMENTAL MOVEMENTS FOR SUSTAINABLE DEVELOPMENT (1995).

[13] *Id.*

[14] *Supra* note 1.

[15] *See* Agenda 21: *Programme of Action for Sustainable Development*, United Nations Conference on Environment and Development, Rio de Janerio, Brazil, UN Doc. A/Conf. 151/26 (1992).

protection of environment the commoners can be empowered in the following ways:

1. *To Promote Environmental Education, Public Awareness and Training*

Education is perhaps the single most important influence in changing human attitudes and behavior, promoting economic growth and raising the quality of life, providing the knowledge and skills that produce jobs and increase productivity. It equips people for meeting contemporary needs.In order to empower the commons for the protection of environment, it is essential to incorporate sustainable development concepts into all levels of education, from basic to tertiary, and for all groups of society. This requires the development of new and alternative teaching methods and the strengthening of community involvement and educational partnerships. The potential for indigenous knowledge to contribute to educational efforts should not be overlooked. In addition, Governments might, where necessary, help relevant NGOs promote their access to and involvement in the educational system.

Another major priority is the promotion of public awareness. There remains a considerable lack of awareness of the interrelatedness of all human activities and the environment, due to inaccurate or insufficient information. Developing countries in particular lack relevant technologies and expertise. Public sensitivity to environment and development problems must be increased, along with a sense of personal responsibility and greater motivation and commitment towards sustainable development. In raising public awareness, modern communication technologies can be utilized such as social networking sites, viz, facebook, twitter and blogs..

A third priority is to promote training to develop human resources to facilitate the transition to a more sustainable world. This should have a job-specific focus, aimed at filing gaps in knowledge and skills that would help individuals find employment, increase productivity, and at the same time address environment and development needs.

2. *Strengthening the Role of Women towardsSustainable and Equitable Development*

Women's work in communities directly dependent on the local environment is often unrecognized and undervalued. In many countries, women sustain close interactions with nature in performing their multiple roles, with lasting environmental implications. These women are managers of natural resources on a practical day-to-day basis having extensive knowledge of local eco-systems and hence can play a major role in conserving biodiversity and protecting the environment. Women make up a substantial number of the world's food

producers, and in general take the main role in procuring, managing and utilizing water and fuel resources.

Ensuring sustainable development requires women's empowerment and their full, equal and beneficial involvement in decision-making process related to sustainable development. It also requires their full participation as planners, managers, scientist and technical advisers in all environment and development fields. .

Programmes should also be developed to raise consumer awareness and promote the active participation of women to achieve changes in consumption and production patterns. Women's knowledge and experience of sustainable development must be researched, and the results incorporated into development planning.

3. *Recognizing and Strengthening the Role of Indigenous People and their Communities*

Indigenous people and their communities represent a significant percentage of the global population. They have a historic relationship with their lands, including the environment of the areas which they traditionally occupy, and are generally descendants of the original inhabitants of those lands. Over many generations they have developed a pool of traditional knowledge of their lands, natural resources and environment. However, their ability to participate fully in sustainable development practices has tended to be limited as a result of economic, social and historical factors. In view of the interrelationship between the natural environment, its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize and strengthen the role of indigenous people and their communities.

4. *Strengthening the Role of Non-Governmental Organization*

Non-governmental organization (NGOs) plays a vital role in shaping and implementing participatory democracy. Independence is one of their major attributes and is the precondition of real participation. The credibility of NGOs lies in the responsible and constructive role they play in society. These organizations, including those non-profit organization representing major social groups, possess well-established and diverse expertise in fields which will be of particular importance to the implementation and monitoring of environmentally and socially responsible development.

5. *Strengthening the Role of Farmers*

Farming is the central activity of much of the world's population. Faced with limited access to technology and alternative livelihood, farmers in developing

countries are often forced to overexploit their land, inevitably leading to the loss of soil fertility and lower crop yields. If agricultural is to meet future food demands in the decades ahead, farmers worldwide must be able to adopt practices that are both highly productive and sustainable.

A farmer-centred approach that emphasizes participatory methods in research, extension and development is the key to implementing sustainable agricultural and rural development. Since farmer's livelihoods are intimately tied to the land upon which they toil, ensuring a decentralized decision-making process through the creation and strengthening of local organization in order to delegate more authority and responsibility would give them the necessary incentives to invest and utilize their land sustainably. Supporting the formation of farmer's organizations through the provision of legal frameworks is crucial to the decentralization process.

6. *Local Authorities Initiatives*

Local authorities construct, operate and maintain economic, social and environmental infrastructures, oversee planning processes, establish local environmental policies and regulations and assist in implementing national and sub-national environmental policies. They are expected to play a vital role in educating and mobilizing the public for sustainable development.

7. *Strengthening the Role of the Scientific and Technological Community*

The scientific and technological (S&T) community, with its enormous capacity for generating possible solutions to the many problems the Earth faces today, can greatly contribute towards environmentally sound and sustainable development. Yet its potential has been far from fully realized, due in large part to insufficient communication. It is imperative that links between these valuable human resources and both decision-makers and the public are expended and strengthened.

Conclusion

Protection of environment is *sine qua non* for the continuation of human existence on the Earth. With the passage of time, it has been realized that formulating laws and policies for the protection of environment on the piece of paper in the name of the commoners is not sufficient for the better protection of environment. Time has come to execute the talk with the complete involvement of the commoners in the implementation of laws and policies, which can be done by empowering them in terms of their enhanced role in decision-making and policy formulation, otherwise tragedy of commons will remain the order of the day.

The Principle 10[16] of the Rio declaration suggested that the key to sustainable development is efficient participation of all stakeholders. The principle further went ahead and finally gave three mutually interdependent pillars to empower the commons i.e. Access to Information, Access to Justice and Access to Public participation in environmental protection. These access principles can be traced in Aarhus convention[17] also. More recently, in 2010, Bali convention[18] took the concepts of empowering the commons in environmental protection from the Principle 10 further ahead by providing detailed guidelines to the aforesaid three pillars of sustainable development in order to protect the environment.

True democracy cannot exist in environmental matters unless all commoners have right to participate in environmental protection. To this purpose, there is a widely felt need to ensure that commoners are truly made part of the environmental decision-making process, only then the objective of sustainable development will be met in the future.

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[16] *Id.* Principle 10 of the Rio Declaration reads: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[17] Convention held in Aarhus, Denmark, Entered into force in 2001.

[18] Adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5; Part A of 26 February 2010.

Book Review

INTERNATIONAL LAW

by GURDIP SINGH (2015, 3rd edn.) *Eastern Book Company Lucknow*
Pages-749, ISBN: 978-93-5145-197-6, Price □ 545/-

Ashish Kumar*

There is hardly any dispute that international law has come of age. It has registered a steadily growing presence in the law school curriculum across the world[1].Unlike before, authors in the field of international law,nowadays feel more competitive given thepace to maintain their works' appeal among interested readers. This has positively promptedmany authors to revamp and renovate their existing works on international law.This is evident from the fact that in 20014-15, a number of popular books on international law[2] have been revisedin the light of new contemporary developments andoffered to the ones interested in reading and re-reading them.In this connection, Prof.Gurdip Singh's popular work, "International Law", has once again stood revised in its third edition. The third edition, introduced in 2015, has been vastly updated, and is thorough and comprehensive in its treatment of topics of international law, incorporating latest developments in the field of international law.

The book is divided into two parts. Part I[3]is titled"*Peace*"and deals with law of peace and incorporates historical development of international law, nature of international law, sources of international law and relation between international law and municipal law, position of individual under international law, recognition, state responsibility, mode of acquisition or loss of territorial sovereignty, individual and the state, law of treaties, jurisdictional immunities of

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1 The fact that international has become a dominant theme in legal studies, may be said to beevident in the statement of Noam Chomsky, who despite being a staunch critique of system of international law, famouslyquotes: "I do think that Magna Carta and international law are worth paying attention to." *See* Noam Chomsky, POWER SYSTEMS: CONVERSATIONS WITH DAVID BARSAMIAN ON GLOBAL DEMOCRATIC UPRISINGS AND THE NEW CHALLENGES TO U.S. EMPIRE 52 (2013).

2 Some of the popular authors on Public International Law who have refurbished their acclaimed works during 2013-14 include Malcolm N. Shaw (International Law, 7th edn., 2014), Alina Kaczorowska (Public International Law, 5thedn., 2015), (S.K. Verma, Public International Law (2nd edn., 2014).

3 *Seegenerally*Gurdip Singh, INTERNATIONAL LAW 3-413 (2015).

state, diplomatic and consular relations, and law of the sea. Part II[4] of the present edition is titled, "*Conflict Resolution, War, Neutrality and Human Rights*," and covers diplomatic modes of conflict resolution, arbitration, International Court of Justice, United Nations Peace Keeping Operations, compulsive methods short of war, war, economic warfare, star wars, implementation of human rights, and International Criminal Court.

The third edition is remarkably updated in terms of latest case laws, as for example, in the chapter on law of the sea, author has taken extra care in incorporating the recent cases decided by ICJ in 2014 such as *Case Concerning Maritime Delimitation between the Republic of Peru and the Republic of Chile*[5], *Bay of Bengal Maritime Boundary Arbitration*[6]etc.Similarly, an extended and detailed treatment is given to the working and scope of International Criminal Court, making the topic easily comprehendible even to non-law backgrounders.

The book,although meticulously crafted, nonethelessmisses some crucial issues, such as, the legality (or illegality) of "targeted assassination/killings", "attack by drones", "regime change" etc., which have, in recent years, created a lot of ripples among the scholars and practitionersof international law. An inquisitive mind of the student of international law commonly seeks explanation of such critical issues occurring on day to day basis, and their legality or otherwise under the international law. Hence, a critical discussion on such burning issues could have added more charm to the book under review.

Further, the reviewer also believes that a thorough discussion on future of international law is also required to be undertaken in a separate chapter in any standard textbook of international law, so that students or other interested readers understand, if and when international law might be considered a true "success" or "failure". Hence, futuristic visions of international law along with all the attendant consequences could have been incorporated in the present textbook to let readers know about the potential(whether powerful or diminishing) influences of future international law on republics, people, institutions and all the other stakeholders.

Nonetheless, the present textbook by Prof. Gurdip Singh, like its previous avatars, responds extremely well to the needs of beginners as well as advanced students of international law.The book provides carefulexamination of specific issues arising under various topics. The new avatar is shaped in a very catchy way. Cases have been highlighted in the text, and a separate table of important cases are also provided at the end of each chapter, directing the readers to probe the full text of the case using EBC Explorer.

4 *Id.* at 417-733.

5 Judgment of the ICJ dated27-01-2014, *available at*http://www.icj-cij.org/docket/files/137/17930.pdf (last visited Sept. 25, 2015).

6 Judgment of the Permanent Court of Arbitration dated 07-07-2014, *available at*http://www.pca-cpa.org/showpage5a3b.html?pag_id=1376 (last visited Sept. 25, 2015).

The third edition of Prof. Gurdip Singh'sInternational Law, with little infirmity as pointed above, is an engaging work, and, by all means, a definite textbook on International Law,which is meant for instructors and students alike.The textbook is an essential source of knowledge for anyone interested in the study of international law and hence recommended!

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I, Prof Ashwani Kumar Bansal, Chief Editor, hereby declare that the particulars given above are true to the best of my knowledge and belief.

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Sd/-
Prof Ashwani Kr Bansal