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Research Papers

Book Review

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From the Chief Editor

We draw immense pleasure in presenting December2013 issue of our research Journal-**Pragyaan: Journal of Law**. It continues to gain appreciation and accolades as it provides a platform that stimulates and guides the intellectual quest of Law scholars. Pragyaan-JOL is a blind refereed bi-annual journal that brings to its readers high quality research in Law that should help to address the challenges of the 21st century.

The Journal strives to see ways to harness the power of law to meet the real world challenges, and to provide substance for making informed judgments on important matters. The articles published in this issue are of great contemporary relevance in the socio-legal system of India.

Prof. (Dr.) M.K Bhandari, one of the senior Professor of Law in the country has joined as Dean, School of Law and is also looking after Research and Consultancy. He is now Editor of Pragyaan. I am confident that, under his team leadership, Pragyaan will earn more appreciation and attention of legal researchers all over the world. I must appreciate the efforts made by Prof. Bhandari, Dr.Kuldeep Singh Panwar, Associate Editor and Mr. Nakul Sharma, Former Editor and all colleagues of School of Law for their co-operation and support.

We wish to encourage contributions from scholars, scientific community and industry practitioners to add value to the journal. We have tried our best to put together all the research papers/ articles coherently. Suggestions from our valued readers for adding further value to our Journal are however, solicited.

I wish to convey my sincere thanks to all contributors whose Research papers are being published in this issue.

Prof. (Dr.) Pawan K. Aggarwal
Associate Pro Vice Chancellor and Dean Academics
IMS Unison University, Dehradun

From the Desk of Editor

A Law Journal is not just a collection and publication of a few Articles and Research papers of chosen experts on the subject. It is a gateway to research and expression of critical views by experts on contemporary socio-economic and politico-legal issues which shape and guide the emergence of system of governance. It is also a window of expression.

Pragyaan: The Journal of Law is a valued publication of the School of Law, IMS Union University, Dehradun. I feel honoured to be associated with this prestigious Journal as Editor. It will be my endeavour to groom **Pragyaan** as one of the most useful and often referred Journal of Law in India and abroad.

To begin with, we have included eminent legal scholars from various countries on our International Advisory Board. I must put on record my thanks and gratitude to Prof. Janine S. Hiller U.S.A., Prof. Yoshitoshi Tanaka, JAPAN, Prof. Yousuf Dadoo, South Africa and Arnaldo Sobrinho de Morais Neto, Brazil for accepting our invitation to become honourable member of the International Advisory Board. In the series, I must also wish to thank all members of the National Advisory Board for giving their consent to be on National Advisory Board. Their participation and indulgence will add value and enhance the utility of **Pragyaan**.

I must put on record my thanks to honourable Shri Amit Agarwal, Chairman, Board of Governers, Prof. R.C. Goel, Chancellor and Prof. (Dr.) M.P.Jain, Pro-Chancellor and Vice-Chancellor, IMS Unison University for guiding me in this endeavor. The support and co-operation of Dr. Pawan K. Aggarwal, Chief Editor is immensely appreciated and acknowledged. I also thank Dr. Kuldeep Singh Panwar, Associate Editor, Mr. Nakul Sharma former Editor and my collegues who are working hand-in-hand for bringing out the December 2013 issue of **Pragyaan**.

We also take this opportunity to invite articles and research papres for our next issues.

With Seasons Greetings.....

Prof.(Dr.) M.K.Bhandari
Dean- School of Law
Dean-Research and Consultancy
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Human Rights and Good Governance

Manoj Kumar Sinha*

ABSTRACT

The concern for promotion and protection of Human rights has been extraordinary over the years. Their protection demands an enabling social and political milieu and indeed conducive environment through appropriate regulations, institutions and procedures framing the action of the State. At the same time, Good governance has equivocally been highlighted at various platforms for its immense contribution to peace, progress and democratic institutions. It is rightly stated that Good governance policies empower individuals to live life with dignity and freedom. Good governance and human rights are mutually interdependent and reinforce better conditions of life, stability and freedom. Good governance cannot happen in isolation from human rights. The two concepts reinforce each other and many of their core principles are common. Popular participation, accountability, transparency, and State-responsibility underline the human rights approach as well as underpin the good governance framework as defined by the U.N. Commission on Human Rights. Although the linkages between good governance and human rights can be traced in the provisions of human rights instruments, as well as national constitutions, it is only recently that the idea of good governance has entered the international discourses on economic development and human rights. Interestingly, the importance of good governance was first recognized in the context of development and its first enunciation was in a World Bank Report which pointed out that good governance is a structural necessity for market reform and has emerged as a response to concerns over the impact of different governance practices on economic performance in the context of development policies. Consequently, the international economic institutions and aid agencies interposed good governance policies and regulations as a precondition for disbursing aid. Indeed, democracy and development will only be strengthened by pro-people and pro-human rights strategies. The interplay between good governance and human rights is a remarkable value addition that governance provides to development and human rights, and vice versa.

Keywords: Human Rights, Good Governance, Development, Millennium Development Goals, Transparency, Accountability, Democracy and Civil Society.

1. Introduction

The term good governance is frequently used in development literature.[1] The term governance implies the manner in which power is exercised by governments in managing a country's social and economic resources[2]. Good governance is the exercise of power by various wings of the government that is effective, honest, equitable, transparent and accountable. Human Rights and good governance are inherently linked and for the effective implementation of human rights good governance is utmost essential.[3] The concept of "good governance" emerged in the late 1980s as a response to concerns over the impact of different governance practices on economic performance in the context of development policies.[4] This concept was subsequently expanded to

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1. Gruberg, I. &Khan,S. (ed.), Globalisation: The United Nations Development Dialogue: Finance, Trade, Poverty, Peace Building (United Nations University Press, New York, 2000); Orji,E. "Issues on Ethnicity and Governance in Nigeria: A Universal Human Rights Perspective", Fordham International Law Journal, vol.25 (2001), pp. 430- 82; G.H. Fox & B. R. Roth (ed.) Democratic Governance and International Law (Cambridge University Press, Cambridge, 2000).
2. Udombana,N.J. " Articulating the Right to Democratic Governance in Africa", Michigan Journal of International Law, vol. 24(2003), pp. 1209-1287.
3. Background Note, Seminar on Good governance Practices for the Promotion of Human Rights, Jointly organized by the Office of the United Nations High Commissioner for Human Rights and the United Nations Development Programme, HR/SEL/GG/SEM/2004/BP.2, Seoul, 15–16 September 2004, available at, http://www.ohchr.org/english/issues/development/governance/compilation/forside_02.html, visited on 20 July 2006.
4. Gruberg, I & Khan, S. supra note 1.

include other dimensions, including political, human development and the realization of human rights.[5] Human rights are universal legal guarantees protecting human beings against actions and omissions that interfere with human dignity and fundamental freedom of individuals.[6] Human rights also include a set of performance standards which guide public authorities, and against which governments and their functionaries, as well as other relevant actors, can be assessed and held accountable. Wide ratification of the relevant international treaties by States from all regions and cultures affirms the universal nature of human rights.[7] Human rights are accorded to individuals and groups in order to enable them to realise their self –worth and dignity, and to organise society in such a way that these goals are effectuated and respected. Today, citizens of a State are well aware of the roles they should play in nation building and of the structures they should give to their societies.[8]

Indeed, it is difficult to find a single and exhaustive definition of "good governance", nor is there a delimitation of its scope, that commands universal acceptance. However, the term is being used with great flexibility.[9] The good governance has been said at various times to encompass: full respect of human rights, the rule of law, effective participation of people, political pluralism, transparent and accountable institutions, an efficient and effective public sector, legitimacy, access to information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.[10] Bad governance is largely regarded as one of the root causes of all evil within our societies.

The United Nations Development Programme (UNDP) has defined the word "governance" broadly as" the exercise of economic, political and administrative authority to manage a country's affairs at all levels.[11] It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences."[12] It described "good governance" as the "competent management of a country's resources and affairs in a manner that is open, transparent, accountable, equitable and responsive to people's needs."[13] The Commission on Human Rights (CHR) also adopted an important resolution on the subject of "the Role of Good Governance in the Promotion of Human Rights."[14] The CHR guided by the principles of Universal Declaration of Human Rights (UDHR) as a common standard of achievement of all people and all nations applying to every individual and every organ of society, and also by the Vienna Declaration and Programme of Action, which affirmed that all human rights are universal, indivisible, interdependent and interrelated.[15] This resolution also recognises that transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests and that such a foundation is a sine qua non for the full realization of human rights, including the right to development.[16] The good governance and the building of effective democratic institutions are a continuous process for all Governments, regardless of the level of development of the countries concerned.[17]

The resolution emphasised on the universality of the Human Rights and the adoption by the United Nations Millennium Declaration of a commitment to good governance in promoting human rights is further to strengthen the commitment of the international community for good governance.[18] The international community has entered in the 21st century with the hope that worst enemy

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Background Note, supra note 3.

6 Sinha,M.K. *Implementation of Basic Human Rights* (Manak Publications, New Delhi, 1999).

7 Sinha, M.K. *Basic Documents on Human Rights and Refugee Laws*, (Manak Publications, New Delhi, 2000)

8 Udombana, supra note 2.

9 Background Note, supra note 3.

10 Background Note, Supra note 3.

11 United Nations Developmental Programme: Good Governance, available at, http://www.undp.org/governance/mdgs.htm, visited on 21 July 2006.

12 *Ibid.*

13 *Ibid.*

14 The Role of Good Governance in the Promotion of Human Rights, The Commission on Human Rights, E/CN.4/RES/2004/70,57th Meeting,21 April 2004, http://www.ohchr.org/english/issues/development/docs/2004_70.doc, visited on 25 July 2006.

15 Para.5 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June1993 General Assembly, A/CONF.157/23,12 July 1993, available at http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument, visited on 25 July 2006.

16 The Role of Good Governance, Supra note 14.

17 *Ibid.*

18 Resolution adopted by the General Assembly, 55/2. United Nations Millennium Declaration, adopted as a Vth principles, Human Rights, Democracy and Good Governance, 8 September 2000, http://www.unmillenniumproject.org/index.htm, visited on 21 July 2006.

of mankind poverty will be completely eradicated from the world.[19] To achieve this goal the General Assembly of the United Nations has adopted the UN Millennium Declaration in September 2000.[20] States agreed to do their best to achieve the goals set in the UN Millennium Declaration by eradicating poverty and promoting human dignity and equality, and achieve peace, democracy and environmental sustainability.[21] The international community has committed, in the Millennium Development Goals, to cut extreme poverty by half by 2015, and by 2025, extreme poverty can be banished.[22] The UN Millennium Declaration envisaged a new global partnership to reduce extreme poverty and setting out a series of time-bound targets, all with a deadline to eradicate half of the world poverty by 2015[23]; to achieve this goal they adopted 8 Goals[24] as the Millennium Development Goals (MDGs).

The CHR resolution also urged upon member states to provide governance responsive to the needs and aspirations of the people in order to achieve the full realisation of human rights to eradicate poverty and to build international cooperation on development.[25] Governance is the process of decision-making and the process by which decisions are implemented. An analysis of governance focuses on the formal and informal actors involved in decision-making and implementing the decisions made and the formal and informal structures that have been set in place to arrive at and implement the decision.[26]

Government is one of the actors in governance. The other actors involved in governance vary depending on the level of government, in rural areas, for example, other actors may include influential land lords, associations of peasant farmers, local self government, cooperatives, NGOs,

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19 Shepherd, G.W. "The Denial of the Right to Food: Development and Intervention in Africa," *California Western Journal of International Law*, vol.15, (1985), pp. 528-41.

20 189 States adopted the UN Millennium Declaration. Report is available on http://www.undp.org, visited on 26 April 2005.

21 *Ibid.*

22 *Ibid.*

23 See home page, http://www.unmillenniumproject.org/index.htm, visited on 21 July 2006.

14 The 8 Goals are as follows: Goal 1: Eradicate Extreme Hunger and Poverty, Goal 2: Achieve Universal Primary Education, Goal 3: Promote Gender Equality and Empower Women, Goal 4: Reduce Child Mortality, Goal 5: Improve Maternal Health, Goal 6: Combat HIV/AIDS, Malaria and other Diseases, Goal 7: Ensure Environmental Sustainability, Goal 8: Develop a Global Partnership for Development, available at http://www.unmillenniumproject.org/goals/index.htm, visited on 21 July 2006.

25 The Role of Good Governance, supra note 14.

26 Gruberg. I& Khan,S (ed.), supra note 1.

27 UNESCAP, *What is Good Governance?*, available at http://www.unescap.org/huset/gg/governance.htm, visited on 18 July 2006.

28 *Ibid.*

29 Commission on Human Rights Rresolution 2000/64, *66th meeting 26 April 2000,* adopted by a roll-call vote of 50 votes to none, with 2 abstentions, available at http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2000.64.En?Opendocument, visited on18 July 2006.

30 *Ibid.*, para.1.

31 Background Note, supra note 3.

32 Ramcharan,B "The United Nations and Human Rights in the Twenty – First Century", in G. Alfredsson , et.al. (ed.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller,* (Martinus Nijhoff, Hague, 2001), p. 7.

33 Norris,P "Stable Democracy and Good Governance in Divided Societies: Do Power Sharing Institutions Work?" at http://ksgnotes1.harvard.edu/ research/wpaper.nsf/ d745629e080d1fe88525698900714934/ ab69bfceef0365c985256fa8006a1102/$FILE/ISA%20Norris%20Consensus%20democracy.pdf, visited on 21 July 2006.

functioning democracies, even those of long-standing, have not been able to sustain good governance, and this has lead to the degeneration of democracy and has compromised its sustainability.[39] Democratic governance and respect for human rights are the foundations for political and social stability and economic progress and they are also intrinsic to the goal of human development.

2.1.1 The human rights and democratic government

UN charters and resolutions have been perceived to provide a common framework of international norms and values that link human rights to development and democratic governance.[40] Human rights provide a constitutional framework for all countries to pursue sustainable development because it affords universally acceptable guidelines that transcend national boundaries.[41] The appeal to human rights is to have common ground for global governance systems that ensure the means to pursue development freedom for individuals, groups and nations. From a human rights perspective, the concept of good governance can be linked to principles and rights set out in the various international human rights instruments.[42] To begin with Article 21 of the Universal Declaration of Human Rights (UDHR), which recognizes the importance of a participatory government and Article 28 that states that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized.[43] The two International Covenants on Human Rights contain language that is more specific about the duties and role of governments in securing the respect for and realization of all human rights.[44] The UN Charter, the UDHR, International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) offer a normative basis for accountability at varying levels of governance.[45] Well before the Millennium Development Summit in 2000, the Copenhagen Declaration on Social Development and Programme of Action took up the importance of human rights for development in 1995. Many of the principles and goals enunciated in the Declaration also formed the central theme in the Brussels Programme of Action (BPoA),[46] including the commitment to "a political, economic, ethical, and spiritual vision for social development that is based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and co-operation, and full respect for the various religious and cultural backgrounds of people".[47] At that time, governments agreed specifically to promote democracy.[48] They also undertook to "promote all human rights and fundamental freedom for all, which are universal, indivisible, interdependent and interrelated, including the right to development as an integral part of fundamental human development and fundamental freedom for all, including the right to development" commitment.[49] The BPoA therefore is seen as integral to the goals for poverty eradication articulated in the Millennium Development Declaration; in fact, Goal 8 of the MDGs, to develop a global partnership for development, has direct relevance for democratic governance. Ten years after the Copenhagen meeting, governments recommitted themselves to these same values, with a renewed focus on rule of law and democracy. The Ulaanbaatar Declaration[50] sets forth six key principles or benchmarks endorsed by the Fifth International Conference on New or Restored Democracies (ICNRD), that is, democratic societies are

i just and responsible,

ii inclusive and participatory,

iii promote and protect the rights and freedoms of all their members,

iv open and transparent,

v function under agreed rules of law and accountability regardless of the challenges they may face, and

vi show solidarity toward others. The countries agreed

34 G. A. O'Donnell, "Democracy, Law and Comparative Politics", available at, http://www.polisci.berkeley.edu/faculty/bio/permanent/Collier,D/journal-comparative/scid-odonnell.pdf, visited on 21 July 2006.

35 Sinha, supra note 6.

36 *Ibid.*

37 *Ibid.*

38 Background Note, supra note 3.

39 UNESCAP, supra note 27.

40 Franck,T "Legitimacy and Democratic Entitlement" in G. H.Fox & B.R.Roth (ed.), supra note 2, pp. 25-48.

41 Marcelli, F." The Principle of Democratic Participation : A Key to Pan European Cooperation on Environmental Issues?" author's personal copy.

42 Background Note, supra note 3.

43 *Ibid.*

44 Sinha, supra note 6.

45 *Ibid.*

to a total of fifty-two commitments falling under these six principles.

The Outcome Document of the 2005 World Millennium Summit once again reaffirmed the commitment of the international community to address the special needs of the poor from developing Countries which continue to face persistent human development challenges. It has been realised that concerted effort should be made to achieve Millennium Development Goals (MDGs), in particular the goal of halving the proportion of people living in extreme poverty by 2015.[51] The UDHR, expressed the values of democracy in proclaiming that "the will of the people shall be the basis of the authority of government" (Article 21) and considered it essential that "human rights should be protected by the rule of law" (Preamble).[52]

Thus, it is necessary on the part of the state to establish a democratic form of government. In democratic form of government the people are enabled to express and discuss their opinion freely on all matters affecting them. In a democratic society, legislative institutions must exist to check the exercise of executive power and an independent judiciary must exist to safeguard the civil liberties of the people.

2. 2 Independence of judiciary

The justice system has been the major recourse of the human rights community in the enforcement of human rights.[53] Litigation has been identified as one of the key means of protecting and enforcing the rights of individuals. The independence of judiciary is an important requirement for good governance. The establishment and functioning of an independent judiciary for the protection of human rights and other constitutional guarantees are essential for good governance.[54] The independence of judiciary is often undermined during emergency through various ways, for instance removal of competent judges by unqualified persons and the establishment of special courts to try those who try to defy the authority. Such courts function under direct control of the State government and

46 Welch, Gita and Nuru, Zahra *Governance for the Future: Democracy and Development in the Least Developed Countries* (UN-OHRLSS, 2006), available at http://content.undp.org/go/newsroom/may-2006/good-governance-20060519.en, visited on 19 July 2006., p.37. The Brussels Programme of Action (BPoA) 2001-2010, adopted in June 2001 at the Third UN Conference on LDCs, articulates policies and supportive actions to promote the long-term economic growth and sustainable human development of LDCs.36 It seeks their successful integration into the global economy through partnerships that focus on developing the human and institutional resources needed to raise the quality of life for the 600 million people in the 50 LDCs.

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 The Fifth International Conference of New or Restored Democracies (ICNRD) was held in Ulaanbaatar on 8-12 September 2003 as a forum to share knowledge and experiences in promoting pluralistic democracy and in particular its participatory aspect as the theme of the Conference Democracy, Good Governance and Civil Society specified. The Sixth International Conference of New or Restored Democracies will be held in Doha, Qatar on 13-15 November 2006.Available at, http://www.icnrd5-mongolia.mn/, visited on 18 July 2006.

51 Welch, Gita and Nuru,Zahra supra note 46.

52 *Ibid.*

53 Sinha, supra note 6.

54 *Ibid.*

belief in respecting the official secret act. There is no transparency and accountability at the local level where it counts the most. Poor citizens cannot go to the government officials for any information related with the development and any other aspects, though the right to information has been recognised as a fundamental human rights in most of the Constitutions of the world. Thus, it is urge upon the states to bring out a necessary legislation and make all information available to citizens. Indian Parliament has passed a revolutionary bill last year, which empowers the citizens to ask for any information from the government officials, the bill is known as Right to Information Act, 2005,[65] interestingly, several states had already gone ahead with legislations of their own, so the culture of demanding to know what is going on is gradually taking root. Freedom of information lies at the root of the rights discourse. Failure of the State to provide access to information or State suppression of information can lead to the most egregious forms of human rights violations. The Right to Information (RTI) is fundamental to the realisation of rights as well as effective democracy, which requires informed participation by all.

2.5 Respect for human rights

In the past fifty years, the community of nations has produced a series of international and regional instruments both at international and regional levels. These human rights instruments are designed to promote and protect human rights and fundamental freedom of individuals. Those States, which are parties of these instruments, either at regional or universal levels, have an obligation to protect and promote the human rights of its citizens.[66] One of the important developments of the past couple of years has been the efforts of the United Nations Development Programme (UNDP) to integrate human rights as one of its activities. The UNDP and other development institutions are according more and more importance to issues of governance and capacity building in the process of development.[67] The UDHR recognises human rights as the foundation of peace, justice and democracy. Human rights are inalienable entitlements; they constitute the ground-rules for human development. The human rights framework reflects the crucial interdependence of economic, social and cultural rights, on the one hand, and civil and political rights, on the other.[68] The international community has developed a comprehensive legal framework for the protection and promotion of human rights. The ICESCR[69] and the ICCPR, and its two Optional Protocols together with the UDHR constitute the International Bill of Rights.[70] Alongside these, specific conventions were drafted to protect the rights of certain vulnerable groups, such as women and children, and to address certain specific rights, such as the elimination of racial discrimination.[71]

Under international human rights law, the participating States (States Parties) have specific obligations to (i) respect, (ii) protect and (iii) fulfil the rights contained in the conventions. Failure to perform any one of these three obligations constitutes a violation of such rights.[72] The World Conference on Human Rights in 1993 also states that, "while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognised human rights".[73] It is important to distinguish inability from unwillingness. Any deliberate retrogressive measure requires the most careful consideration, and need to be fully justified by reference to the totality of the rights provided for in the treaty concerned and in the context of the full use of the maximum available resources. In General, Comment No. 12 of the Committee on Economic, Social and Cultural Rights, on the right to food, the Committee stated "Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all."[74]

The entire UN system – including the funds, programmes and specialised agencies – has a responsibility to support State Parties in these efforts, according to Article 2 (1) of the ICESCR "States have to undertake steps, individually and through international assistance and cooperation, to the maximum of their available resources with a view to achieving progressively the full realisation of the rights recognised".[75] Since human development means

55 *Ibid*.

56 Sinha,M.K. "International Human Rights Regime and States of Emergency: Need for Reform" Indian Journal of International Law, vol. 39 (1999), pp. 677-688.

57 Weissbrodt, D., *The Right to a Fair Trial : Articles 8, 10 and 11 of the Universal Declaration of Human Rights,* (Martinus Nijhoff, Hague, 2001).

58 Sinha, supra note 6.

59 Weissbrodt,D, supra note, 57.

60 Sinha, supra note 7.

61 *Ibid*.

62 Weissbrodt,D, supra note, 57.

63 *Ibid*.

64 *Ibid*.

expanding people's choices and enhancing their freedom, empowering people goes beyond the development of human resources as means to economic growth and generation of income. [76]

Human rights and human development are two sides of the same coin. A human rights-based approach provides both a vision of what development should strive to achieve, and a set of tools and essential references.[77] It is based on the values, standards and principles captured in the UN Charter, the UDHR and subsequent legally binding human rights instruments. It attaches importance not only to development outcomes, as traditional approaches do, but also to the development process, as the latter implies the participation of all stakeholders to ensure that their interests and rights are included in the ultimate development outcomes.[78] The relationship between good governance, human rights and sustainable development has been recognised by the international community in a number of declarations and other global conference documents. For example, the Declaration on the Right to Development, which was adopted in 1986,[79] proclaims, according to Article 1, that every human person and all peoples" are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development".[80] In the Millennium Declaration world leaders affirmed their commitment to promote democracy and strengthen the rule of law as well as to respect internationally recognized human rights and fundamental freedom, including the right to development. According to the United Nations strategy document on the millennium development goals (MDGs), entitled "The United Nations and the MDGs: a Core Strategy', "the MDGs have to be situated within the broader norms and standards of the Millennium Declaration", including those on "human rights, democracy and good governance". [81] All recent international conferences, notably the International Conference on Financing for Development[82] and the World Summit on Sustainable Development, have reaffirmed the importance of good governance and

65 See for whole Right to Information Act 2005, available at http://www.humanrightsinitiative.org/programs/ai/rti/india/national/rti_act_2005.pdf, visited on 24 July 2006. This Act extends to whole India except the State of Jammu and Kashmir. The Act was enacted by the Parliament on 15 June 2005, and the Act came into force on 12 October 200. It includes the right to (i) inspect works, documents, records, (ii) take notes, extracts or certified copies of documents or records, (iii) take certified samples of material, (iv) obtain information in form of printouts, diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts

66 Ramcharan,B, supra note, 32.

67 *Ibid.*

68 Sinha, supra note 6.

69 Sinha, M.K., *Enforcement of Economic, Social and Cultural Rights: International and National Perspectives*(Manak Publications, New Delhi, 2006).

70 Sinha, supra note 6.

71 *Ibid.*

72 Sinha, supra note 69.

73 Vienna Declaration, supra note 15.

74 General Comment 12 by Committee on Economic, Social and Cultural Rights on Article 11 (Right to Adequate Food), Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, 20th Session, Geneva, 26 April-14 May 1999, E/C.12/1999/5, 12 May 1999. Para.23, available at http://www.ohchr.org, visited on 25 July 2006.

75 *Ibid.,* Paras.14-15.

proportion of seats women hold in national parliaments. Despite increased awareness that gender equality is a critical factor in economic growth as well as poverty reduction, gender inequalities still prevail in many countries. Gender inequality is evidenced by disparities in access to education and basic health services, women's lack of independent rights to own land, manage property, or conduct business,and women's under-representation at all government levels.[93]

2.8 Role of civil society

The term civil society refers broadly to organizations and associations of people, formed for social or political purposes, that are not created or mandated by governments. Civil society broadly includes non-governmental organizations, trade unions, cooperatives, churches, grassroots organizations and business associations.[94] These groups are important for their role in articulating and advocating for popular concerns. This advocacy function gives voice to a variety of interests and perspectives that governments and decision makers may otherwise not hear. It is increasingly accepted fact that real progress in tackling development deficits can only be made by building the institutions for good governance and by ensuring genuine civil society participation. In many countries, and even in those countries deemed to be "good reformers", governments are often extremely nervous of or even hostile to the development of civil society. Democratic governance requires the existence of constant and efficient linkages amongst governments and all members of society. Civil society is distinct from society in general since it refers to people organizing and acting together in the public sphere to attain collective goals, express shared ideas and views, exchange information, and improve the functioning of state institutions and make them more accountable, among many other functions.[95] Civil society provides a space for state institutions and members of society to consult with each other, interact, and exchange views and information on public matters. It also creates institutional spaces for the active participation of minorities and vulnerable groups in decision-making processes and for increasing political representation of the views and interests of such groups in state institutions.[96] It is important to emphasize that civil society is not a homogenous group; it encompasses a broad range of formal and informal organizations, associations and social movements. Community-based organizations, NGOs, charities, voluntary organizations and trade unions are all part of civil society. This intrinsic diversity in origin and ideas is one of civil society's main contributions to democratic governance. Contributions from civil society vary across countries depending on the development stage of the civil society organizations and individual country's needs and openness to their involvement. Civil society in many countries has been successful in helping enhance civic participation in democratic governance. In many instances, civil society has created awareness about participating in elections, raised issues for election manifestoes, and initiated debates and discussions on issues of public concerns. It has also played a significant role in voter education programmes, particularly among minorities, young and first-time voters, women and indigenous groups.[97] In countries with weak governance, civil society is frequently equated with political opposition. The United Nations, in many of its General Assembly resolutions and conventions, acknowledges the role of civil society in the promotion of human development, environmental and human rights protection, democracy and good governance. The Millennium Development Goals are very clear in this regard. Successive human development reports by the United Nations Development Programme acknowledge the critical role of civil society.[98]

One of the most important functions of civil society is to provide checks and balances to government power. In this context, civil society serves as the watchdog of democratic institutions, helping ensure that they are accountable to their constituencies. Civil society promotes state accountability in many cases by empowering and making the State's checks and balances work efficiently.[99] In other

76 Gruberg, I ,& Khan,S., supra note 1.

77 Welch. Gita, and Nuru, Zahra supra note 46

78 Gruberg,I , & Khan,S, note 1.

79 Declaration on the Right to Development Adopted by the General Assembly resolution 41/128 of 4 December 1986, available at http://www.unhchr.ch/html/menu3/b/74.htm, visited on 21 July 2006.

80 *Ibid*.

81 Welch, Gita and Nuru, Zahra supra note 46.

82 International Conference on Financing for Development, adoption of the Monterrey Consensus, A/Conf./198, 1 March 2002, available at http://www.un.org/esa/ffd/0302finalMonterreyConsensus.pdf, visited on 21 July 2006.

83 Welch, Gita and Nuru,Zahra, supra note 46.

84 Alam,A, "Crisis of Governance : Need for Political Reforms" in A.Alam (ed.) *Crisis of Governance* (Raj Publications, Delhi, 2003), pp. 9-45.

85 UNGA Res. 55/61 of 4 December 2000, available at http://www.unodc.org/pdf/crime/a_res_55/res5561e.pdf, visited on 25 July 2006.

86 UNGA Res. 58/4 of 31 October 2003, available at http://www.unodc.org/unodc/crime_convention_corruption.html, visited on 25 July 2006.

87 The UN Convention came into force on 14 December 2005 after getting required 30 ratification, in accordance with article 68 (1) which reads as follows: "1. This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, available at http://www.unodc.org/unodc/en/corruption.html, visited on 24 July 2006.

instances, where government mechanisms of accountability do not exist, civil society can exert pressure to create them in the first place. Civil society in this sense is not an adversary of the State, but instead serves to encourage it to improve and maintain its democratic nature.[100] By exposing abuses of power and government wrongdoings, increasing expectations of effective performance and creating political pressure, civil society can push state mechanisms to target corrupt, inefficient and unaccountable practices

2.9. Ethnic conflict and civil wars

Ethnic conflict and civil wars are the most pervasive forms of armed conflict in the world. In the 1990s, ethnic conflict and civil wars raged in dozens of countries, killing an estimated six million people. These conflicts usually involved neighbouring states, often undermining regional stability and respect for international law and organizations. Some conflicts engaged the interest of distant international powers. For these reasons, ethnic conflict and civil wars are major international security problems. Ethnic conflict and civil wars have continued to slow down the pace of development and realization of good governance in number of countries of the world especially in Africa. The nations' wealth is mostly spent in quelling one uprising or another. In this type of situation, human rights issues are not properly addressed and a lot of abuses are recorded. Those countries emerging from conflict situations face the immediate task of establishing law and order in the shortest time. These states have to adopt electoral and procedural elements that would help direct people's energies to consolidating peace.

3. Conclusion

The protection and promotion of Human rights need a conducive and enabling environment, in particular, appropriate regulations, institutions, and procedures framing the action of the State. Good governance policies should aim to empower individuals to live with dignity and freedom. Good governance and human rights are mutually linked and complementary. Good governance cannot be achieved in separation from human rights. The two concepts reinforce each other and many of their core principles are common. Popular participation, accountability, transparency, and State-responsibility underline the human rights approach as well as underpin the good governance framework as defined by the

88 Corruption, available at http://www.unodc.org/unodc/en/corruption.html, visited on 24 July 2006.

89 *Ibid.*

90 *Ibid.*

91 Welch, Gita, and Nuru,Zahra, supra note 46.

92 Olasfsdottir,O.T., "Equality Between Women and Men", in B. Ramcharan, supra note, 32, pp. 608-615.

93 Tomasevski, K,"Men and Women, Sex and Gender", in B. Ramcharan, Supra note, 26, pp. 429-440.

94 Phillips,A," The Role of International Non-Governmental Organisations in Promoting Minority Rights Monitoring" in Ramcharan, B, supra note, 32, pp. 897-906.

95 Welch, Gita and Nuru,Zahra supra note 46.

96 *Ibid.*

97 *Ibid*.
98 *Ibid*.
99 Phillips, A, supra note, 94.
100 *Ibid*.

New Dimensions of Intellectual Property Rights in India

*Dr. J.K. Das**

ABSTRACT

Initially, the international convention protected mainly three classes of "industrial properties" patents, trademarks and industrial designs. When other rights such as copyright were added to "industrial properties", the phrase used to describe the entirety of rights is "intellectual property". *The 1995 TRIPS Agreement has widened the scope and ambit of the protection of intellectual property rights. This article demonstrates the origin and development as well as the dimensions of intellectual property rights in post-TRIPS Agreement* India.

Keywords: TRIPs, Trademark, Intellectual Property Rights, Convention, Sui Generis, Damages.

1. Introduction

It is commonly agreed that the term "intellectual property"[1] denotes the rights over an intangible object of the person whose mental efforts created it. Copyright, patents, trademarks, designs, geographical indications or any other similar intangible property under any law for the time being in force are instances of such intellectual property. Intellectual property plays a monumental role in furthering the economic interests of a country. The technology developed, research made or invention done in a country is protected which in turn strengthens the economy of that country since the other countries must buy the products from the country inventing, researching and developing the new things or products. In this regard, after the American independence, the Constitution of the United States of America under Article 1 Section 8 (8) vested in the Congress the power to grant to authors and inventors exclusive rights over their works in order to "promote the progress of Science and useful Arts".

In Mazer v. Stein,[2] the US Supreme Court explaining the link between intellectual property rights and economic benefit to the society, held that the economic philosophy behind Clause 8 empowering the Congress to grant patents and copyrights is the conviction that encouragement of individual efforts by personal gain through the talents of authors and inventors in science and useful arts is the best way to advance public welfare. Thus, intellectual property attracts foreign currency and enhances export.[3] The term "industrial property" was used in the 1883 Paris Convention for the Protection of Industrial Property.[4] The law of confidence and passing off was also included within the term "industrial property". The Convention protected mainly three classes of "industrial properties" such as patents, trademarks and industrial designs within the territory of member States. Thus, Article 1(2) of the Paris Convention stated:

"The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of service or appellations of origin and the repression of unfair competition".

When other rights such as copyright were added to "industrial property," the phrase used to describe the entirety of rights is "intellectual property." Protection of public interest is one of the objects of intellectual property rights. Public interest implies non-interference with others' rights, which is an essential requirement of every civilized society. The society takes the responsibility to protect individual property so that it gets something in return, which is worth making the effort. This is evident from the

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1 For various issues on intellectual property rights, see, J. K. Das, "The TRIPS Agreement and Intellectual Property Rights: An Indian Perspective" *International Trade Law and Regulation* , Sweet and Maxwell, London (2010) Vol. 16 Issue 6 pp. 166-174; J. K. Das, *Intellectual Property Rights,* Kamal Law House, Kolkata (2008); David Bainbridge, *Intellectual Property*, Person Education (Singapore) Ptc. Ltd. (2003); W.R. Cornish, *Intellectual Property,* Sweet and Maxwell, London (1996); W. R. Cornish, *Intellectual Property: Cases and Materials,* Sweet and Maxwell, London (1999); Holyook and Torremans, *Intellectual Property Law*, Butterworths, London (1995); David I. Brainbridge, *Intellectual Property Law: Cases and Materials,* Pitman Publishing, London (1995).

2 347 US 201, 219 (1954).

3 For commercial exploitation of intellectual property, see, Hilary E. Pearson and Clifford G. Miller, *Commercial Exploitation of Intellectual Property,* Blackstone Press (1990); John Adams, *Merchandising Intellectual Property*, Butterworths, London (1987).

4 India is a party to the *Paris Convention* which entered into force in 1884. It was revised several times, the latest being in 1967 at Stockholm, Sweden. For the full text of the *Paris Convention,* see, Alfredo Ilardi, *International Encyclopedia of Intellectual Property Treaties,* Oxford University Press, London (2004).

nature of protection extended to individual property. The balancing of interests of the individual and the society is the foundation of all intellectual property laws. This is reflected from features such as limited term of protection to different types of intellectual property, depending upon the nature and scope of the right conferred upon the owner. The provision of fair use or research exemption to promote growth of knowledge, and limitations like provisions for compulsory and statutory licensing, government use to facilitate access to the products of knowledge at affordable costs are also intended to promote public interest. The protection of creators' rights is a fundamental social principle recognized by the United Nations through the Universal Declaration of Human Rights 1948 (UDHR). Article 27(2) of UDHR runs as follows:

"Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".[5]

The modern jurisprudential approach with regard to ownership of author's copyright in literary and musical works is recognition of two rights: author's economic right[6] as well as moral right.[7] Even after lawful transfer of the former, ownership of the latter remains with author and it is protected under law against any distortion or mutilation. The reputation and honour of the creator or author is as much a property right as was enumerated under the Berne Convention.[8] It is in this sense that literary and artistic works of an author or creator is protected as a human right under Article 27 of Universal Declaration of Human Rights. The same position with respect to the protection of the honour and reputation of the creator or author was upheld by the Supreme Court of India in Entertainment Network India Ltd. v. Super Cassettes Industries Ltd.[9] This protection is recognized to encourage creativity in the field of art, literature, music and aesthetic activity. If the author's copyright is distorted or mutilated, his honour, respect and reputation can be seriously affected. Hence, in every case of mutilation or distortion, the protection of the Court by way of injunction is called for.[10] Thus, in the contemporary era, the phrase "intellectual property" has acquired compendious meaning. This expanded meaning[11] is discernible from Article 2(viii) of the 1970 Convention Establishing the World Intellectual Property Organization, which defines "intellectual property" by including the rights relating to: (i) literary, artistic and scientific works; (ii) performances of performing artists, phonograms and broadcasts; (iii) inventions in all fields of human endeavour; (iv) scientific discoveries; (v) industrial designs; (vi) trademarks, service marks, and commercial names and designations; (vii) protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

However, the general definition of intellectual property and its associated rights are problematic. The general definition excludes, for instance, the most basic product of the mind "ideas" which are not generally protected as intellectual property. At the other extreme, confidential information[12] is conventionally viewed as a type of intellectual property, even though it is difficult to see how a secret, for instance, a marital secret such as a lesbian affair, constitutes a "product of the mind", although it may certainly have commercial value. The 1995 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)[13] has widened the scope and ambit of the

5 See, Music Choice India Private Limited v. Phonographic Performance Limited, MIPR 2010 (1) 162: 2010 (44) PTC 171 (Bom); Amar Nath Sehgal v. Union of India, 117 (2005) DLT 717: 2005 (30) PTC 253 (Del).

6 PVR Pictures Ltd. v. Studio, 2009 (41) PTC 70 (Del); Amar Nath Sehgal v. Union of India, 117 (2005) DLT 717: 2005 (30) PTC 253 (Del); Garware Plastics and Polyester Ltd. and Ors. v. Telelink, AIR 1989 Bom 331: 1989 (2) Bom CR 433.

7 Pine Labs Pvt. Ltd. v. Gemalto Terminals India Pvt. Ltd., 2011 VIII AD (Delhi) 380: 2011 (48) PTC 248 (Del).

8 India is a party to the *Berne Convention for the Protection of Literary and Artistic Works, 1886* which was adopted on September 6, 1886. The contracting States formed themselves into a Union known as "Berne Union" to ensure the protection of the rights of the authors of work in such States forming the "Union". The Convention underwent several revisions, the latest being in 1971 at Paris. See, Shahid Ali Khan, "Role of the *Berne Convention* in the Promotion of Cultural Creativity and Development: Recent Copyright Legislation in Developing Countries", 28 *Journal of the Indian Law Institute* (1986) pp. 424-440. The leading works on *Berne Convention* are: Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987); Nordemann, *International Copyright and Neighbouring Rights Law (1990);* Nimmer and Geller, *International Copyright Law and Practice* (1988).

9 (2008) 13 SCC 30: 2008 (37) PTC 353 (SC).

10 *Saregama India Ltd.* v. *Puneet Prakash Mehra*, 2011 (1) CHN 341: MIPR 2010 (3) 175.

11 Jenniter Davis, *Intellectual Property Law,* (2001) at p. 2.

12 See, D. S. Sengar, "Protection of Trade Secrets and Undisclosed Information: Law and Litigation" 53 *Journal of the Indian Law Institute* (2011) pp. 254-276.

13 TRIPS Agreement is one of the most important commercial treaties in modern history. Consisting of seven Parts and seventy three Articles, it lays down the basic principles, standards of enforcement, acquisition and maintenance, dispute prevention and settlement, transitional arrangements, as well as institutional arrangements of intellectual property rights. India is a party to the TRIPS Agreement which came into force with effect from January 1, 1995. For TRIPS Agreement, see, S. K. Verma, "Enforcement of Intellectual Property Rights: TRIPS Procedure and India" 46 *Journal of the Indian Law Institute* (2004) pp. 183-206; C. Niranjan Rao, "Patents for Biotechnology Inventions in TRIPS", 37 *Economic and Political Weekly* (2002) pp. 2126-9; Sudip Chaudhury, "TRIPS Agreement and Amendment of Patents Act in India", 37 *Economic and Political Weekly* (2002) pp. 3354-60; Nilima Chandiramani, "Legal Factors in TRIPS" 37 *Economic and Political Weekly*

protection of intellectual property rights. This article demonstrates the origin and development as well as the dimensions of intellectual property rights in post TRIPS Agreement India.

2. Origin of Intellectual Property Rights and its Development in India

2.1 Origin

The origin of intellectual property rights can be traced back to the ancient days when monopolies existed in the Byzantine Empire.[14] Ancient Greece in the 7th century BC granted monopoly to cooks to exploit new recipes for one year. But a few centuries later, Emperor Zeno in Rome rejected the concept of monopoly. Through a proclamation in 480 AD, Emperor Zeno ordered that no one should exercise monopoly upon any garment or fish or any kind of thing. By 1432, the Senate of Venice enacted a statute providing exclusive privileges to those inventing any machine or any process to speed up the making of silk. This protection was soon extended to other devices. Any new idea thus introduced started obtaining protection. The earliest of the legislations for the protection of intellectual property rights was in the area of patents.[15] Historically, the word "patent" has come from the Latin phrase "litterae patents", literally meaning "letters patent". "Patent" means 'open' and "letters patent" was used to refer to the open letters conferring privileges, rights, ranks, or titles by sovereign bodies or rulers. They were open official documents that were publicly announced. Initially, these letters were issued (around the sixth century) in Europe for the discovery and conquest of foreign lands on behalf of the ruler. Patents came to be related to inventions around the fifteenth century and the first patent law as we understand it today, was passed on March 14, 1474 by the Venetian Senate. The law passed by Venetian Senate stated:

"We have among us men of great genius, apt to invent and discover ingenious devices...Now, if provisions were made for the works and devices discovered by such persons, so that others who may see them could not build them and take the inventors' honour away, more men would then apply their genius, would discover, and would build devices of great utility for our Common Wealth".[16]

(2002) pp. 200-3; V. K. Ahuja, "GATT, TRIPS and India", 50 *India Quarterly* (1994) pp. 1-14; Suman Sahai, "Indian Patent Act and TRIPS", 28 *Economic and Political Weekly* (1993) pp-1495-7; S. R. Sen, "Innovation, TRIPS and Future Trends", 28 *Economic and Political Weekly* (1993) pp. 1918-9; M. D. Nair, "TRIPS and Public Health: The Doha Declaration" 7(3) *Journal of Intellectual Property Rights,* (2002) pp. 241-4; T. Ramappa, *Intellectual Property Rights under WTO: Tasks Before India,* Wheeler Publishing, New Delhi (2000); M. Blakeney, *Trade Related Aspects of Intellectual Property Rights* (Sweet and Maxwell, London, 1996).

14 Curtis Reid v. Clarice B. Covert, 354 U. S. 1 (1957).

15 Elizabeth Verkey, *Law of Patents,* Eastern Book Company, Lucknow (2005) p. 2.

16 See, Cattle Remedies v. Director of Ayurvedic and Unani Services, 2007 (2) ADJ 12: 2007(2) AWC 1093 [High Court of Allahabad].

17 In this case, Columba surreptitiously made a copy of a Psalter in the possession of his teacher Finnian, see, R. R. Bowker, *Copyright: It's History and its Law,* Houghton Mifflin (1912) at p. 3.

18 See, Robert P. Merges, Peter S. Menell and Mark A. Lemley, *Intellectual Property in the New Technological Age,* Aspen Publishers, New York (2000) at p. 345; Howard B. Abrams, "The Historical Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright," 29 *Wayne L. Rev.* (1983) at p. 1119.

Copyright Act was re-enacted in 1957.[21] The salient provisions of the Act of 1957[22] were: (i) establishment of the Copyright Board; (ii) expansion of definition of Copyright; (iii) right of the author to re-acquire his right after 7 years but before expiry of 10 years of the assignment; (iv) issue of general or special licences for public performances; (v) issue of licence to a library to make copy of any book; (vi) regulation of the activities of the performing arts societies, including the fees or royalties charged.

The 1983 amendment to the Copyright Act inserted Sections 32A and 32B providing for compulsory licences with respect to publication of foreign works in any Indian language for the purpose of systematic infrastructural activities at low price with the permission of Copyright Board. Section 19A empowered the Copyright Board, upon a complaint, to order revocation of the assigned copyright where either the terms are 'harsh' or where the publication of the work is unduly delayed. The Board has also been given power to publish previously unpublished Indian works and for the protection of oral works. The 1984 Amendment also provides for stringent punishments for piracy and sets out effective procedures to inhibit it. It provides protection against the making of films, video tapes or audio tapes of performance without the performer's permission with exceptions where such recording is either for private use or for news reporting. These rights are to be enjoyed not only by singers and actors but also by jugglers and snake charmers. The law also regulates hire or resale of any copies of films including videotapes or sound recording or computer programmes.[23] Under this law, a video shop is required to seek permission from owners of the same before giving out any tape on hire.

The 1994 amendment to the Copyright Act also expanded the scope of protection to include computer programmes. Through the Amendment Act, the Act confers the copyright holder with the additional exclusive right to sell, given on hire any copy of the computer programme regardless of whether such copy has been sold or given on hire on an earlier occasion. In other words, even the legitimate owner (e.g. purchaser) of a copyright work cannot sell or rent his copy of the work. The Act effectively eliminates the first sale doctrine. It also eliminates the "fair dealing" exclusion with respect to computer programmes. This is an unusual step as "fair dealing" has been a long standing exclusion which is a well settled part of copyright law. At the same time, a new exclusion from copyright infringement of computer programmes has been added. Any lawful possessor of a copy of a computer programme may make backup copies as a purely temporary protection against any loss, destruction or damage in order to use the computer programme for the purpose for which it was supplied. Such acts will not constitute either copyright infringement or violation of moral rights of the author. Another significant aspect of the 1994 amendment is narrowing down of the author's moral right. Now an author may restrain or claim damages in respect of any distortion, mutilation or modification of the work if it is done before the expiration of the term of copyright and if such acts are prejudicial to his honour or reputation. However, an exception has been carved out in the law for adaptation of computer programmes for the purposes of debugging. In addition to the moral rights mentioned above, the 1994 Amendment creates a new droit de suit (Section 53A- resale share right). This gives the authors of original manuscripts of literary, dramatic or musical works the right to share in the resale proceeds of such original copies where such proceeds exceed Rupees 10,000. The 1994 amendment increased the term of imprisonment from one year to three years and fixed the amount of fine for infringement of copyright to a minimum of fifty thousand Rupees and a maximum of two lakhs rupees.

The 1999 amendment to the Copyright Act inserted Sections 40A and 42A to empower the Central Government to make provisions for the broadcasting organizations and performers. They also empower the Central Government to restrict rights of foreign broadcasting organizations and performers. It is in the national interest of the country to provide protection to varied types of intellectual products for the better development of the society and its culture.[24] Foreign works and the newly developed technologies should also be protected so that the scope of learning of the people can be enhanced. Copyright law has brought natural conformity with the TRIPS Agreement and augments the societal purpose as well as the purpose of the producers of works of different intellectual varieties.

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19 The *Statute of Anne* came into force in 1710.

20 An Act of 1787 gave protection against the printing, working or copyright of an original pattern for certain types of textile. But it lasted only for

The Copyright (Amendment) Act, 2012 has been enacted by the Government of India bringing changes to the Copyright Act, 1957. The amendments make Indian copyright law at par with the Internet Treaties, WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). The amendment has made some changes that clarify the rights in artistic works, cinematograph films and sound recordings.

(ii) Patents

The first Indian Patents Act was enacted in 1856 to grant exclusive privileges to inventors. The aim of the Act was to enable English patent holders to acquire control over Indian markets. Subsequently, the Patent and Designs Protection Act 1882 was enacted, followed by the Inventions and Designs Act, 1888. These enactments aimed at the protection of interests of industrialists, manufacturers and importers. Again, the Patents and Designs Act was passed in 1911 as the first comprehensive law on the subject. It remained in force until the passing of the Patents Act of 1970. The salient features of the latter are: (i) patents are granted to encourage inventions and to secure that the inventive works are to be produced on a commercial scale, (ii) patents are not granted to enjoy a monopoly in important matters, (iii) two kinds of patents are recognized: product patent and process patent, (iv) no product patent can be granted to medicines, food items and chemicals except to their manufacturing process.

Subsequently, however, it was realized that in terms of Articles 70. 8 and 70. 9 of the TRIPS Agreement, member countries that do not provide for product patents in the areas of pharmaceuticals and agricultural chemicals, are required to provide the means to receive product patent applications for such products with effect from the coming into force of the Agreement (from January 1, 1995), and on completion of certain conditions grant exclusive marketing rights for a period of five years or until the patent is granted or rejected, whichever is shorter. Prior to the 1999 amendment, the Patents Act did not provide for grant of patents in respect of agricultural products, chemicals, pharmaceuticals and for grant of exclusive marketing rights (EMRS). The Patents (Amendment) Act, 1999[26] introduced substantial changes which has far-reaching consequences in the Patents Act. The Amendment introduced provisions pertaining to the claim for patent of an invention for a substance intended for use itself, or capable of being used as a medicine or drug by inserting sub-section (2) in Section 5 of the Patents Act. The amendment also brought into picture a new doctrine of exclusive marketing rights (EMRS). This TRIPS Agreement stipulates that patents would be available for any inventions (whether product or process) in all fields of

32 *Meghraj Biscuits Industries Ltd*. v. *Commissioner of Central Excise, U.P.*, MIPR 2007 (2) 29: 2007 (35) PTC 599 (SC).

33 *Thukral Mechanical Works* v. *P.M. Diesels Pvt. Ltd.*, MIPR 2009 (1) 14: 2009 (39) PTC 193 (SC).

34 See, *T.V. Venugopal* v. *Ushodaya Enterprises Ltd.*, (2011) 4 SCC 85: 2011 (45) PTC 433 (SC); *Satyam Infoway Ltd.* v. *Sifynet Solutions Pvt.*

service sector of this country.

The 1999 Act contains provisions for rectification and correction of the register of trade marks. Section 57 of the Act provides that in case of an application made by any person aggrieved to the Appellate Board or to the Registrar, the tribunal may make such order as it may think fit for concealing or varying the registration of the trade mark on the ground of any contravention or failure to observe a condition entered on the Register in relation thereto. The 1999 Act lays down that any person aggrieved by an order or decision of the Registrar under the Act or the rules made there under may prefer an appeal to the Appellate Board. It is in this respect, that the jurisdiction of the Court or any other authority is specifically barred. It is submitted that the aforementioned provisions have been incorporated in the Act for speedy disposal of disputes pertaining to trademarks and to provide better protection to the proprietors of trade marks. Though the Act empowered the Registrar to classify goods or services in accordance with the international classification of goods and services for registration of trademarks, a trade mark that has been demonstrated to be distinctive in the market shall be regarded as distinctive in law and be registrable. This will help in removing the difficulties with respect to registration of trademarks based on geographical names or laudatory epithets which have actually acquired distinctiveness.

With the increase of commercial activity on the internet, a "domain name" is used as a business identifier.[34] Therefore, the domain name not only serves as an address for "internet communication" but also identifies the specific internet site. In the commercial field, each domain name owner provides information or services which are associated with such domain name. Thus, a domain name may pertain to provision of services within the meaning of Section 2 (z) of the 1999 Act. A domain name is easy to remember and use, and is chosen as an instrument of commercial enterprise not only because it facilitates the ability of consumers to navigate the internet to find websites they are looking for, but also at the same time, serves to identify and distinguish the business itself, or its goods or services, and to specify its corresponding online internet location. Whereas a large number of trademarks containing the same name can comfortably co-exist because they are associated with different products, belong to business in different jurisdictions, the distinctive nature of the domain name providing global exclusivity is much sought after. The fact that many consumers searching for a particular site are likely, in the first place, to try and guess its domain name has further enhanced this value. Hence, a domain name can be said to be a word or name which is capable of distinguishing the subject of trade or service made available to potential users of the internet. Registration of domain name is an administrative act, which involves a request to the domain name registry, payment of fee and allotment, if there is no prior user with the same domain name.[35] Registration being ministerial act is not a pronouncement on the question of violation or infringement of trademark, deception, confusion.[36]

(v) Sui-Generis Rights

In addition to copyright, patents, designs, trademarks, there are various sui- generis[37] regimes that grant rights akin to intellectual property rights. Geographical indication, plant varieties and farmer's rights are examples of sui-generis rights. In India, the Geographical Indication of Goods (Registration and Protection) Act, 1999 introduced a new concept of geographical names free from the concept of distinctiveness.[38] The Act defines, "geographical indication" as an indication to identify the goods, whether natural or manufactured, emanating from a particular area or territory known for a particular quality or characteristics of the goods. Significantly, such geographical names if used by any person in relation to goods originating from entirely different places are likely to cause confusion or deception. The Geographical Indication of Goods Act is, therefore, designed to protect the use of such geographical indication from infringements by others and protects the consumers from confusion and deception through the process of registration of such indication by law. The Protection of Plant Varieties and Farmers' Right Act, 2001 also introduced another new concept in the field of intellectual property rights. In view of the ever increasing population over the world, the necessity for increasing agricultural production has become very important. This can be made possible only through the creation of new varieties of

Ltd., AIR 2004 SC 3540: (2004) 6 SCC 145.

35 For the impact of WIPO's initiative on domain name, see, C. P. Nandini and G. B. Reddy, "Resolution of Domain Name Disputes through ADR: Impact of WIPO's Initiative Towards eUDRP" 52 *Journal of the Indian Law Institute*, (2010) pp. 80-91.

36 Beiersdorf A. G. v. Ajay Sukhwani and Anr., MIPR 2009 (1) 143: 2009 (39) PTC 38 (Del).

37 See, Suresh C. Srivastava, "Geographical Indications under TRIPS Agreements and Legal Framework in India". 9 *Journal of Intellectual Property Rights* (2004) pp. 9-23; Philippe Cullet, *Intellectual Property Protection and Sustainable Development,* Butterworths (2005).

38 See, V. K. Ahuja, "Protection of Geographical Indications: National and International Perspective" 46 *Journal of the Indian Law Institute* (2004) pp. 269-287.

39 See, K. M. Gopakumar, "Seeds Bill 2004: For Whom?" 47 *Journal of the Indian Law Institute* (5005) pp. 483-501.

plants which will produce qualitatively and quantitatively higher yields of food grains, pulses, seeds and fruits of all varieties.[39] Creation of such varieties has become possible through scientific research which involves expenditure of money, labour and intellectual effort. To encourage scientific research and create incentives for producing new plant varieties, the persons or organizations producing such varieties should be rewarded either through the grant of patent rights or by an effective sui- generis system.

3. Post TRIPS Agreement Dimensions

The above discussion reveals that after the TRIPS Agreement's entry into force in 1995, India gave effect to its various provisions by way of amending the existing intellectual property laws or legislating new ones. In this process, it amended its Copyright Act, 1957 (in 1994 and subsequently, in 1999, 2012) and the Patents Act, 1970 [by the Patents (Amendment) Act, 2005]; replaced the Trade and Merchandise Marks Act 1958 with the Trade Marks Act, 1999; and enacted the Geographical Indications of Goods (Registration and Protection) Act, 1999; the Integrated Circuits Layout Design Act, 2000; and the Plant Varieties and Farmers' Rights Act, 2001. Besides these specific intellectual property laws, certain other general laws also provide for the enforcement of intellectual property rights. The Indian Penal Code, 1960 makes counterfeiting an offence (Section 483) punishable with imprisonment and fine.[40] The Specific Relief Act, 1963 provides relief by way of injunction (interim as well as permanent) for the activity of infringing upon the right of the owner. In the post TRIPS Agreement era, intellectual property laws in India received a number of dimensions in the area of substantive rights as well as the enforcement of such rights. Protection of computer softwares and databases as a substantive aspect of intellectual property law is discussed below.

3.1 Protection of computer software and databases

(I) TRIPS Agreement and Copyright (Amendment) Act, 1994

TRIPS Agreement has made significant progress over the pre-existing international copyright law in clarifying that computer programmes should be protected as literary

40 The penal laws, however, have been found inadequate and ineffective to deal with the infringement of intellectual property rights cases. See also, N. S. Gopalakrishnan, *Intellectual Property and Criminal Law* (1994).

41 See, Jayshree Watal, *Intellectual Property Rights in the WTO and Developing Countries,* Oxford University Press, New York (2001).

42 *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber and Another,* 1996 PTR 40: (1995) 15 PTC 274.

43 Gurleen Kaur v. State of Punjab, (2010) ILR 1 P and H 52; Eastern Book Company and Ors. v. D.B. Modak and Anr., AIR 2008 SC 809: (2008) 1 SCC 1.

44 See, K. N. Chandrasekharan Pillai, "Copyrightability of Supreme Court Judgment" 50 *Journal of the Indian Law Institute* (5008) pp. 94-97.

45 *Ladbroke (Football) Ltd.* v. *William Hill (Football) Ltd.,* 1964 WL 19516 (HL): [1964] 1 All E.R. 465.

46 *University of London Press Ltd.* v. *University Tutorial Press Ltd.*, [1916] 2 Ch. 601, 608.

47 *Kelly* v. *Morris.,* (1886) L.R. 1 Eq. 697, 701.

original in their parts, yet the sum total of the compilation may be original. In such cases, the courts have looked to see whether the compilation of the not-original material called for work or skill or expense. If it did, it is entitled to be considered original and to be protected against those who wish to steal the fruits of the work or skill or expense by copying it without taking the trouble of compiling it themselves. Hence, the protection given by such copyright is in no sense a monopoly, for it is open to a rival to produce the same result if he chooses to evolve it by his own labours.[47]

Thus, directories, catalogues, and the like have been held to be original and to acquire copyright if the work that goes into their making has been sufficient.[48] In G. A. Cramp. and Sons Ltd. v. Frank Smythson Ltd.,[49] it was held to have no copyright, where the work of compilation was not "substantial", but "negligible". The arrangement of the material is one of the factors to be considered. The Court observed:

"*There was no evidence that any of these tables was composed specially for the respondents' diary. There was no feature in them which could be pointed out as novel or specially meritorious or ingenious from the point of view of the judgment or skill of the compiler. It was not suggested that there was any element of originality or skill in the order in which the tables were arranged*."

Therefore, in each case, it is a question of degree whether the labour or skill or ingenuity or expense involved in the compilation is sufficient to warrant a claim to originality in a compilation. In Macmillan and Co. v. K. and J. Cooper,[50] an abridgement of an author's work which in fact was not an abridgement but a collection of detached passages from the author's work joined together, was held not to be an abridgement of the original work of the author but merely a selection of scripts taken from the author's work printed in the form of a narrative. The Judicial Committee observed:

"*... it is the produce of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material*."

In G. A. Gramp and Sons Ltd. v. Frank Smythson Ltd.,[51] both the parties were publishers of pocket diaries. The question for consideration was whether the appellants, in respect of their inserting certain tables in their diary of 1942, had infringed any copyright that the respondents had in a collection of tables included in their pocket diary known as "Litublue". Seven of the tables in the appellants' diary had been copied from the respondents' diary. The question was whether having regard to its nature and subjects, the compilation to be found in the respondents' diary which had thus been copied and made use by the appellants, could be regarded as the subject matter of copyright. It was held that the impugned compilation fell short of "displaying the qualities requisite to attract copyright." The Court observed:

"*Under Section 1 (1) of the Copyright Act of 1911, copyright subsists in 'every original literary work' and this expression includes compilation. The existence of sufficient originality is a question of fact and degree*."

Similarly, in S. K. Dutt v. Law Book Co.,[52] the plaintiff alleged that the copyright in his work "Indian Partnership Act, by Mukerji and Dutt" had been infringed by the second defendant in his publication entitled: "Law Book Company's Commentaries of Law and Practice of Partnership and Private Companies in India". It was observed that in order to construe infringement of a man's copyright, there must be sufficient infringement of the work. Fair dealing by any one has been kept out of the mischief of the Copyright Act. It was further observed:

"*Several persons may originate similar works in the same general form without anyone infringing the law in regard to copyright. The infringement comes in only when it can be shown that someone has, instead of utilising the available sources to originate his works, appropriated the labours of another by resorting to a slavish copy of mere colourable imitation thereof. The 'animus furandi', that is, an intention to take from another for purposes of saving labour, is one of the important ingredients to be found against a defendant before he can, in a suit under the Copyright Act, be indemnified.*"

Further, in Mohini Mohan Singh v. Sitanath Basak,[53] the plaintiff was the author of a book entitled: "Adarshalipi-o-Saral-Barna- Parichaya" which was first published in 1902 and had run into several editions. In 1919, the defendant published two books in which, according to the allegations of the plaintiff, his copyright had been infringed by the defendant. It was observed that the question whether a colourable imitation had been made of the work of another must necessarily be a question of fact. A mere similarity is not enough as it may be due to chance, both

48 *H. Black lock and Co. Ltd. v. C. Arthur Pearson Ltd.*, [1915] 2 Ch. 376: 31 T. L. R. 526.

49 [1944] A. C. 329.

50 AIR 1924 PC 75.

51 (1944 A. C. 329).

works having been taken from a common source. It was observed: "*Though similarity is to a large extent inevitable and each one of the points of similarity may not be worth anything, a conglomeration of so many points of similarity which, in the opinion of the defendant's own expert, constitutes a strange coincidence, points to the defendants having copied from the plaintiff's book.*" *Govindan v. Gopalakrishna*[54] *was a case of compilation. It was held that though in the case of "compilation," the amount of originality will be very small but even that small amount is protected by law and no man is entitled to steal or appropriate for himself the result of another's brain, skill or labour even in such works. On the defense plea of common source it was held: "A person relying on it must show that he went to the common source from which he borrowed, employing his skill, labour and brains and that he did not merely do the work of the copyist, by copying away from another work.*" In Shyam Lal Paharia v. Gaya Prasad Gupta,[55] the Allahabad High Court examined the various cases on the issue of compilation work and developed various principles enunciated in these cases[56] may be briefly summarized as follows: (i) A compilation which may be derived from a common source falls within the ambit of literary work. (ii) A work of compilation of a nature similar to that of another will not by itself constitute an infringement of the copyright of another person's work written on the same pattern. (iii) The question whether an impugned work is a colourable imitation of another person's work is always a question of fact and has to be determined from the circumstances in each case. (iv) The determining factor in finding whether another person's copyright has been infringed is to see whether the impugned work is a slavish imitation and copy of another person's work or it bears the impress of the author's own labours and exertions.

From the statements of the authorities and the trend of judicial opinion, it is clear that a compilation of previous works developed by any one by devoting time, money, labour and skill although the sources may be commonly situated, amounts to a "literary work" of the author who has a copyright. Thus, a compilation derived from a common source falls within ambit of literary work. A work of compilation of a nature similar to that of another will not by itself constitute an infringement of the copyright of another person's work written on the same pattern. The

52 AIR 1954 All 570.

53 AIR 1931 Cal 233.

54 AIR 1955 Mad 391.

55 AIR 1971 All 192.

56 *Waterlow Directors Ltd.* v. *Reed Information Service Ltd*, 1992 F S R 409; *William Hill (Football) Ltd.* v. *Ladbroke (Football)*, 1980 RPC 539; Khemraj Shrikrishandas v. Garg and Co., AIR 1975 Delhi130: ILR 1975 Delhi 251; *Sham Lal Paharia* v. *Gaya Prasad*, AIR 1971 All 182; *Govindan* v. *Gopalakrishna,* AIR 1955 Mad 391.

57 See, *O. R.G. Systems* v. *Collector of Central Excise*, AIR 1998 SC 2662: (1998) 6 SCC 56; *Barbara Taylor Bradford* v. *Sahara Media Entertainment Ltd.*, 2004 (28) PTC 474 (Cal): (2003) 47 SCL 445 (Cal).

58 *Baker* v. *Seldon* , [1879] 101 US 99 ; *Nichols* v. *Universal Pictures Corporation*, 45 F.2d (2d Cir. 1930); *R. G. Anand* v. *Delux Films*, AIR 1978 SC 1613: (1978) 4 SCC 118.

developed by any one by devoting time, money, labour and skill though the sources may be commonly situated amounts to a 'literary work' wherein the author has a copyright".[66]

It is clear from Section 2(0)[67] of the Act that computer database is specifically included as a compilation to be treated as a literary work. But it is only "original" literary work that is protected under Section 13[68] of the Act. In case of compilations, the originality is not regarding the materials but on the manner of organization of the material since in some cases, the materials as such may enjoy separate copyright protection. It is a well established law of copyright that facts are not copyrightable and are to be left open in the "public domain" as common source for free use by the public for the creation of new works since they are considered to be the basic building blocks. Thus, in cases of compilation of facts the question is whether there is any originality in the manner of the organization of facts for copyright protection. So, the important question in this case was not whether the database was a compilation but whether the one created by the plaintiff would qualify the test of 'originality' for the purpose of copyright protection. Instead of examining this question, it appears that the court has followed the "Sweat of the Brow" doctrine for the purpose of extending copyright protection for compilations of facts. The court, thus, relied on the time, money and labour of the plaintiff in collecting the information, which by itself is non-copyrightable, for the purpose of extending copyright protection. Even though the court used the word 'skill', it appears it has not inquired about the amount of skill used by the plaintiff in the manner of organization of the compilation. Thus, the court focused on the slavish imitation by the defendant to make out a clear case of infringement.[69] The court in this process has not dealt with the basic question of the requirement of originality for the purpose of extending copyright protection to compilation as a literary work. This seems to be the trend followed by the Indian courts even in earlier cases.

The "Sweat of the Brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection to a compilation beyond selection and arrangement, the compiler's original contributions, to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but must rather "independently work out the matter for himself, so as to arrive at the same result from the same common sources of information." The Supreme Court in Eastern Book Co. v. D. B. Modak,[70] relied on the US[71] and Canadian[72] judgments and observed:

The sweat of the brow approach to originality is too low a standard which shifts the balance of copyright protection too far in favour of the owner's right, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creative standard implies that something must be novel or non-obvious - concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy of the objectives of the Copyright Act.

(b) Modicum of Creativity Theory and Abolition of Doctrinal Tension

A higher criterion of "Modicum of Creativity" theory was deemed necessary after the decision of the American Supreme Court in Fiest Publication Inc. v. Rural Telephone Service.[73] In this case, the court examined whether the white pages of a telephone directory could claim copyright protection as compilation. The court while rejecting the "Sweat of the Brow" doctrine followed in earlier cases, emphasized the need the demonstrate originality for the protection of copyright in compilation. It was categorically stated that facts as such were not copyrightable. The observation of the court is quite pertinent, as follows:

"This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a compilation are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts. In no event may copyright extend to the facts themselves".

Since there was no originality in the organization of the name and address of the customers in the telephone directory, the court held that the white pages were not entitled to copyright protection.[74] It is true that the court has not laid down the standard of originality or creativity

59 The Chancery Court in *University of London Press Limited v. University Tutorial Press Limited,* [1916] 2 Ch 60 observed: "Assuming that they are "literary work," the question then is whether they are original. The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of "literary work," with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work that it should originate from the author. In the present case it was not suggested that any of the papers were copied. Professor Lodge and Mr. Jackson proved that they had thought out the questions which they set, and that they made notes or memoranda for future questions and drew on those notes for the purposes of the questions which they set. The papers which they prepared originated from

required to be satisfied in compilation for the purposes of determining copyright. It appears that it has been left to the lower courts to determine originality or creativity based on the facts of each case. The application of the Feist's ratio by the US lower courts for extending protection to maps[75] and numbers[76] is indicative of this. Had the Indian courts examined these decisions, they could have set the law in the proper direction. It is also interesting to examine whether the act of making a single copy or storing it in electronic means and using the information in it for business purposes amounts to infringement of copyright or can be treated as a fair dealing for private purpose. According to Section 14 of the Indian Copyright Act 1957, the act of reproduction including the storing in electronic means, distribution, communication to public, translation etc., are the rights of the copyright owner. It is the exercise of these rights without the authorization of the owner that constitutes infringement of copyright. Strictly speaking, even making a single copy or storing it in personal computer may amount to infringement of the reproduction right of the owner. But keeping in mind public interest, the Copyright Act permits limited use of copyrighted materials without permission of the owner of copyright. One such use is the fair dealing of literary work for private use[77] under Section 52 of the Copyright Act. It is true that the Act has not defined "fair dealing" and the courts find it difficult to lay down precise standards. On an examination of the case law from various jurisdictions, it is clear that the most important test is to find out whether the use is likely to harm the potential market or the value of the copyrighted work.[78]

It is generally understood that making a single copy for private use is within the ambit of fair use. The US Supreme Court examined the issue of copying the entire work for private use in Sony Corp. v. Universal City Studios Inc.,[79] and concluded that it falls within the scope of fair use. It is clear from the facts of the present case that the copy possessed by the defendant was copied from the plaintiff. It was not the allegation of the plaintiff that the defendant was reproducing the work and distributing it so as to affect his potential market in exercising the reproduction right. It was the use of the information in the work by the defendant to compete in the business of mail order service of the

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themselves, and were, within the meaning of the Act, original."

60 *Feist Publications, Inc.* v. *Rural Telephone Service Company, Inc.*, MANU/EG/0440/1991.

61 1996 PTR 40: (1995) 15 PTC 274.

62 The court referred to Sections 2(o), 2(y), 14 and 17(c) of the *Copyright Act, 1957*.

63 The court quoted from Laddie, Prescot and Vitoria, *The Modern Law of Copyright, 1980; Copinger and Skone James on Copyright,* 1991; David Bainbridge, *Software Copyright Law* (1996).

64 *Govindan v. Gopalakrishnan,* AIR 1955 Mad 391; *Sham Lal Paharia* v. *Gaya Prasad,* AIR *1971 All 182.*

65 *Waterlow Directors Lt.* v. *Reed Information Service Ltd.,* 1992 FSR 409 and *Willam Hill (Football) Ltd. v. Labroke (Football) Ltd.,* 1980 RPC 539.

66 *Burlington* v. *Rajnish,* 1996 PTR 40: (1995) 15 PTC 274.

67 Section 2(0) reads: "literary work includes computer programes, tables and compilations including computer databases".

68 Section 13(1) reads "Subject to the provisions of this Section and the other provision of this Act, copyright shall subsist throughout India in the following classes of works, that is to say, - (a) *original,* literary, dramatic, musical and artistic works ….".

69 1996 PTR 40 at p. 46.

about nature and quality of information which was confidential and precise developments, which plaintiffs' seeds offer to public. This aspect was crucial, because if information and techniques that were neither unique, nor novel, but were merely documentation, or compilation of existing material, or existing techniques, freely available, or widely practised, there was no question of confidentiality. However, plaintiff did not claim exclusivity in respect of any particular technique or process. Thus, seeds in question were in respect of commercial crop would not in any manner detract from circumstance that nature of protection sought, that confidentiality, affects all classes of seeds. Therefore, plaintiff was unable to establish, prima facie, its claim for copyright protection in databases, claimed by it. It was also found that it had not shown that information, which it claims to be exclusive, was capable of protection, qualifying as "confidential information". So, ex-parte injunction granted at an earlier stage of proceeding, had to be vacated.

The Delhi High Court justified its above decision by explaining Sections 2(o), 2(y) and 14 of the Copyright Act 1957. The Court stated: "Indian law has recognized that compilation of databases is entitled to copyright protection". However, the law mandates that the work claiming protection ought to be original. Copyright law does not also grant (the author of a literary work) protection on ideas and facts.[86] It is the creative expression of an idea or fact which gets rewarded by law, through copyright monopoly for a specified period. The law does not, however, protect every expression, but grants recognition and protection to expressions that are "original". This standard is incorporated through Section 13, in respect of every class of work. A literary work, in order to qualify as a work, in which copyright can subsist must therefore be original. However, mere labour (Sweat of the Brow) or investment of manpower and resources is not a substitute for originality. Sequences obtained from nature (e.g., the sequence for a gene) cannot per se, be original. The microbiologist or scientist involved in gene sequencing "discovers" facts. There is no independent creation of a "work", essential for matching the originality requirement. Such a scientist merely copies from nature-genetic sequence that contains codes for proteins. Therefore, there is no minimum creativity. So long as a researcher constructs a DNA sequence based on a sequence discovered in nature, there is no independent creation, no minimum creativity and thus no originality.[87]

In Dr. Reckeweg v. Adven Biotech,[88] the Court held that a work, in order to be called "original" must contain at least a "Modicum of Creativity". In that sense, there must be intellectual originality and creativity. The level of such creativity, of course, would vary from case to case to render the work copyrightable. The Court noted that the originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i. e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually non-existent. Such works are incapable of sustaining a valid copyright. Dealing with the question of copyright in compilations, the Court held that there could be no copyright on facts, which form the compilation, but only on the arrangement of those facts, if a minimal level of creativity could be established. Similarly, copyright could subsist on the manner of expression of facts only if such "Modicum of Creativity" were established. In this regard, the Court observed:

To this end, copyright assures authors the right to their original expression, but encourages others to build freely

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70 AIR 2008 SC 809: 2008 (1) SCC 1. See also, Super Cassettes Industries Limited v. Mr. Chintamani Rao, 2012 (49) PTC 1 (Del); Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd., 2011 (45) PTC 70 (Del); Dr. Reckeweg and Co. Gmbh. v. Adven Biotech Pvt. Ltd., 2008 (38) PTC 308 (Del).

71 *Feist Publications Inc.* v. *Rural Telephone Service Co. Inc.,* 18 USPQ 2d. 1275; *Matthew Bender* and Co., *Inc.* v. *West Publishing Co.,* 158 F. 3d 674 (2nd Cir. 1998); *Key Publications, Inc.* v. *Chinatown Today Publishing Enterprises, Inc.,* 945 F. 2d. 509.

72 *CCH Canadian Ltd.* v. *Law Society of Upper Canada,* 2004 (I) SCR 339 (Canada).

73 (1991) 199 US 340. The US Supreme Court in *Feist Publications Inc.* v. *Rural Telephone Service Co. Inc.,* 499 US 340 (1991) observed: "The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. See *Harper and Row* at pp. 547-49. 'Original', as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), *and that it possesses at least some minimal degree of creativity.* M. Nimmer and D. Nimmer, *Copyright* at 2.01[A], [B] (1990) (hereinafter Nimmer). *To be sure, the requisite level of creativity* is *extremely low; even a slight amount will suffice*. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. *Id.* at 1.08[C][I]. *Originality does not signify novelty;* a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable ... "

74 The court observed: "The selection, coordination, and arrangement of Rural's white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural's white pages are entirely typical. Persons desiring telephone service in Rural's service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data

upon the ideas and information conveyed by a work. This principle, known as the idea-expression or fact-expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

Law mandates that not every effort or industry, or expending of skill, results in copyrightable work, but only those which create works somewhat different in character involving some intellectual effort and a certain degree of "Modicum of Creativity".[89] In Sap Aktiengesellschaft v. Mr. Sadiq Pasha Proprietor,[90] the defendant illegally obtained or installed licence and was using pirated or infringing software products belonging to the plaintiff, as plaintiff had not granted him a valid licence. The issue was whether, there was infringement of copyright of software programme of the plaintiff and therefore whether, the plaintiff was entitled to injunction against defendants? The software programmes developed and marketed by plaintiff are "computer programmes" within the meaning of Section 2(ffc) of the Indian Copyright Act, 1957 and are also included in the definition of a "literary work" under Section 2(o) of the Copyright Act. It is also alleged that both India and Germany are signatories of the Berne Convention, Universal Copyright Convention and TRIPS Agreement and, therefore, rights of the plaintiff companies are protected in India under Copyright Act. In this case,[91] the Delhi High Court held that as per Section 51 of the Copyright Act, copyright work could be infringed when any person without licence granted by owner of the copyright or registrar in contravention of the conditions of licence does anything, of which exclusive right to do was conferred upon the owner of copyright. However, as per evidence on record, it was proved that no license was issued by the

provided by its subscribers and lists in alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity". 499 US 340 (199) at p. 362.

75 See *Mason* v. *Montgomery Data, Inc.,* 967 F. 2d 135 (5th Cir. 1992).

76 See, *CCC Information Service* v. *Maclean Hunte Reports,* 44 F. 3d 61 (2d Cir. 1994).

77 Section 52(1)(a) reads : "a fair dealing with a literary, dramatic, musical or artistic work, not being a computer program, for the purpose of (1) private use …"

78 See, for example, *Civic Chandran* v. *Ammini Amma,* 1996 PTR 142; *Hubbard* v. *Vosper.* (1972) 2 WLR 389; *Sony Corporation v. Universal City Studios, Inc., 464* US 417 (1984).

79 464 US 417. In this case, the court examined whether home video taping for time shifting constitutes infringement of copyright.

80 *Sony Corp*. v. *Universal City Studios Inc.,* 464 US 417.

81 AIR 2008 SC 809: 2008 (1) SCC 1.

82 (2004) SCC 13: 2004 (1) SCR 339 (Canada). The Canadian Supreme Court in *CCH Canadian Ltd*. v. *Law Society of Upper Canada,* 2004 (I) SCR 339 observed: "I conclude that the correct position falls between these extremes. For a work to be 'original' within the meaning of the *Copyright Act,* it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practiced ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an 'original' work".

(I) Anton Piller Order

According to Paragraph 2 of Article 50 of the TRIPS Agreement, judicial authorities must be empowered, where appropriate, to adopt provisional measures without the defendant being heard (inaudita altera perte), in particular where delay is likely to cause irreparable damage to the right holder or where there is a demonstrable risk of evidence being destroyed. Paragraph 2 of Article 50 states:

"The judicial authorities shall have the authority to adopt provisional measures inaudita altera perte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed".

This is similar to the Anton Piller order followed in the United Kingdom and other commonwealth countries, whose purpose is to preserve evidence by preventing its destruction or concealment by an alleged wrongdoer. The owners of the protected works in India too, have been seeking orders similar to Anton Piller orders against proprietors in "sound recordings", "cinematograph films" and "video recordings". In view of the rampant video and record piracy in India, it is necessary to statutorily provide these powerful procedural weapons in the armory for copyright protection. The Anton Piller order is similar to the ex parte interlocutory order/injunction to take an inventory of the articles etc. passed in an ordinary suit. In Gujarat Bottling v. Coca Cola Company,[93] the Supreme Court held that the grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising this discretion, the court applies the following tests: (i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his request for an interlocutory injunction were disallowed. It further held that the decision to whether grant an interlocutory injunction should be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation is contested and uncertain. Relief by way of interlocutory injunction is granted to the plaintiff in order to mitigate the risk of injustice during the period before the uncertainty can be resolved (i.e. at the full hearing). The court held that:

"*The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies. In order to protect the defendant while granting an interlocutory injunction in his favour the court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial.*"[94]

The court passes ex parte interlocutory injunction in the form of Anton Piller orders in suitable cases.[95] Proceeding on the same lines, the Kerala High Court in National Garments v. National Apparels,[96] held that for an interlocutory injunction to restrain the defendant, until the hearing of the action, the principle applicable is slightly different from the principle applicable in ordinary cases. For a temporary order in an action for passing off, the plaintiff need not in general show a strong prima facie case. However, the prima facie case that is required to be shown must be something more than a case that will avoid the action being struck out as frivolous or vexatious. Generally stated "even if the chance of success at the trial are only 20 per cent", the interim relief sought for is required to be granted. There is another reason for the grant of the interlocutory injunction under such circumstances. Such an order would stop infringement without delay. Not only has it been cleared from experience that a successful motion for interlocutory injunction "normally puts an end to the litigation and the infringement, with a great saving in expense compared

83 *Sega Enterprises Ltd.* v. *Richards and Anr.,* 1983 FSR 73.

84 *Apple Computer, Inc.* v. *Franklin Computer Corporation*, 714 F. 2d 1240: 1253 (3d Cir. 1983).

85 2011 (125) DRJ 173.

86 *Baker* v. *Seldon* , [1879] 101 US 99; *Nichols* v. *Universal Pictures Corporation*, 45 F.2d (2d Cir. 1930); *R. G. Anand* v. *Delux Films,* AIR 1978 SC 1613: (1978) 4 SCC 118.

87 Mattel, Inc. v. Mr. Jayant Agarwalla , MIPR 2008 (3) 298: 2008 (38) PTC 416 (Del); Dr. Reckeweg v. Adven Biotech, 2008 (38) PTC 308 (Del); Servewell Products v. Dolphin, 2010 (43) PTC 507 (Del).

88 2008 (38) PTC 308 (Del) .

89 Chancellor v. Narendera Publishing House, MIPR 2008 (3) 402: 2008 (38) PTC 385 (Del).

90 179 (2011) DLT 709: 2011 (46) PTC 335 (Del).

91 Sap Aktiengesellschaft v. Mr. Sadiq Pasha Proprietor, 179 (2011) DLT 709: 2011 (46) PTC 335 (Del).

92 Dayaram v. Sudhir Batham, JT 2011 (12) SC 174: 2011 (11) SCALE 448; *Pazhassi Raja Charitable Trust* v. *Union of India* , AIR 2010 SC 310: (2010) 13 SCC 285; *Sardar Associates* v. *Punjab and Sind Bank,* AIR 2010 SC 218: (2009) 8 SCC 257; *Atma Linga Reddy* v. *Union of*

with a full trial" and that is the reason why the law insists upon a hearing of such a motion in every case. It is also clear from the treatise of Kerly[96] that:

"*in extremely urgent cases an ex parte injunction may be obtained before the full hearing of the motion or an Anton Piller order, for inspection of the defendant's premises without prior warning and discovery of his records, may be obtainable*".

In Buegrus Europe Limited v. Vwean Industries,[98] the Calcutta High Court examined the scope and validity of the Anton Piller[99] type ex parte orders issued in India. The plaintiff filed a suit for infringement of the copyright in his artistic design and requested for ex parte temporary injunction and recovery of records. This was refused by the lower court and on appeal the single bench of the High Court passed an interim ex parte injunction. The court also appointed a Special Officer authorizing him to enter into the premises of the defendant as mentioned in the cause title and any other premises within the power and control of the defendant and to inspect the same and seize all goods, papers, documents, challans and invoices showing orders of the products. The period of the order was for 14 days and the court directed the plaintiff to issue notice to the defendant. It was contended by the defendant that the order was obtained through misrepresentation since the design was registered and the cancellation proceeding is pending. It was also contended that the design was in practice for a period of ten years. According to the defendant as per Section 15 of the Copyright Act once the design was registered there was no protection for the same under the Copyright Act and in this context the order of search issued for violation of copyright needed to be cancelled. The plaintiff relied on Anton Piller orders and argued for the continuation of the orders. After examining various cases[100] based on Anton Piller orders, the court concluded:

"Going by the aforesaid well-settled principles this court holds that there was lack of bonafides and good faith in the pleadings on the basis of which an ex parte order of injunction on the line of Anton Piller was obtained from this Court. From the discussion made in the earlier part of this judgement it is clear that utmost good faith of the plaintiff is the condition precedent from granting an injunction on the lines of Anton Piller. Admittedly good faith on the part of the plaintiff is lacking. The Court at an ex parte stage accepted the pleading to be true and correct and passed the order. But if there had been a full disclosure of facts, the Court might not have passed the order. That the pendency of

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India, 2008 (9) SCALE 745: (2008) 7 SCC 788; *Arunima Baruah* v. *Union of India*, (2007) 5 SCR 904: (2007) 6 SCC 120; *Swamy Atmananda* v. *Sri Ramakrishna Tapovanam,* AIR 2005 SC 2392: (2005) 10 SCC 51.

93 AIR 1995 SC 2372: (1995) 5 SCC 545. See also, *Zenit Mataplast P. Ltd.* v. *State of Maharashtra,* 2009 (12) SCALE 432: (2009) 10 SCC 388; *M. Gurudas* v. *Rasaranjan,* AIR 2006 SC 3275: 2006 (9) SCALE 275; *Ramdev Food Products* v. *Arvindbhai Rambhai Patel,* AIR 2006 SC 3304: (2006) 8 SCC 726; *M. P. Housing Board* v. *Anil Kumar Khiwani*, AIR 2005 SC 1863: (2005) 10 SCC 796; *M.P. Housing Board* v. *Anil Kumar Khiwani,* AIR 2005 SC 1863: (2005) 10 SCC 796; *Hindustan Petroleum* v. *Sri Sriman Narayan,* AIR 2002 SC 2598: (2002) 5 SCC 760.

94 See, *State of Assam* v. *Barak Upatyaka D.U. Karmachari Sanstha*, AIR 2009 SC 2249: (2009) 5 SCC 694; *Adhunik Steels Ltd.* v. *Orissa*

premises without prior warning and discovery of his records, may be obtainable."

(ii) John Doe Order

The term "John Doe Injunction" (or John Doe Order) is used to be described as an injunction sought against someone whose identity is not known at the time of filing of the suit.[105] It is basically a simple ex-parte interim injunction with the added benefit that the plaintiff is given liberty to add to the array of parties, infringers who have been identified after the filing of the suit. These orders are an exception the general rule which requires the defendant to be identified prior to the filing of a law-suit. The ex-parte interim injunction then applies against even the later defendants. The original version of the "John Doe" order was usually combined with an "Anton Piller" order which used to allow for the seizure of any infringing material.[106] The concept of the "John Doe" order evolved to overcome difficulties copyright owners encountered in ascertaining specific defendants, enabling them to institute ex parte infringement suits against unknown persons belonging to an identifiable class who upon identification would be impleaded and presented with the opportunity to defend themselves analogues to any civil proceedings,[107] while the "Anton Piller" order is a form of discovery preservation granted on an ex-parte application.[108]

The "John Doe" orders are granted by English, American, Canadian and Australian Courts frequently. "John Doe" orders enabling the order to be served upon persons whose identity is unknown to the plaintiff at the time the action was commenced, but whose activity falls within the scope of the action. This form of naming a party is considered a mere "misnomer", and as long as the "litigating finger" is pointed at such person then the misnomer is not fatal.[109] The origin of the "John Doe" orders, can be traced way back to the reign of England's King Edward III, when such orders were used to refer to unidentifiable defendants.[110] Thereafter, "John Doe" orders were granted mainly by US and Canadian Courts. Recently, India has started using this unique concept under the alias "John Doe/Ashok Kumar" orders to punish class of unknown infringers.

The first "John Doe" copyright injunction in UK was EMI Records Ltd. v. Kudhail.[111] In this case the plaintiff alleged that copyright infringement of certain cassette tapes by street traders, very few of whose names could be found, and thus sought a "John Doe" order against all members of an identifiable class (defined as traders selling goods bearing the pirate brad name "Oak records") to restrain them from engaging in the counterfeiting. The Court held that the plaintiffs have been able to established the existence of a group sharing a common interest, although the individual members are unidentifiable due to the groups secrecy, justifying the grant of an ex parte relief. Thus, prima face "John Doe" orders can be safely be regarded as an ingenious and judicious approach to copyright protection. It balances interest of copyright owners and potential infringers since it acts as a shield providing preventive and expeditious remedy to the former which is only enforceable against the letter upon acts of infringement actually being perpetrated and the owner having ascertained identity of the respective John Does. Initially, "John Doe" orders were primarily used by broadcasters to protect their copyrights from infringement by known and unknown cable operators during sporting events. The orders were enforced through the issuance of blanket search and seizure directives and /or appointment of policemen to assist broadcasters. The test adopted in UK to grant "John Doe" copyright injunction as laid down in Bloomsbury Publishing Pls v. Newsgroup Newspapers Ltd.,[112] is as follows:

I The plaintiff must show a good, arguable case;

ii The order must clearly indicate what the defendant/s can and/or cannot do;

iii The order must identify the defendant/s against whom it is made with respect to their works or an identifiable class;

iv The injunction will only be enforceable against a person who once made aware of the order, understands that it applies to him.

In US the first case in which a "John Doe" copyright injunction was granted was Billy Joel et al. v. Various John Does. In this case a "John Doe"[113] order was granted to prevent the unauthorised sales of merchandise bearing Billy Joel's name outside the venues where he was to conduct his concerts which were negatively impacting revenue generation from sales by authorised vendors inside the concert venues. The court held that notwithstanding the general inability to grant an injunction against unknown persons the plaintiff has satisfied that court that such an injunction is needed in the given facts and circumstances . In order to ascertain the identities of the unauthorised vendors the court directed that copies of the restraining order where to be served on all those whose merchandise was seized, such person reveal their names in order to be added as parties to the suit and appear in court to contest the action. John Doe orders are used in Canada

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Manganese and Minerals Pvt. Ltd., AIR 2007 SC 2563: (2007) 7 SCC 125; *Mahendra and Mahendra Paper Mills Ltd.* v. *Mahindra and Mahindra Ltd.*, AIR 2002 SC 117: (2002) 2 SCC 147; *Colgate Palmolive (India) Ltd.* v. *Hindustan Lever Ltd.*, AIR 1999 SC 3105: (1999) 7 SCC 1; *Power Control Appliances* v. *Sumeet Machines,* 1994 (1) SCALE 446: (1994) 2 SCC 448.

95 Ganesan v. M. Sundararaja Thevar, 2000 (1) CTC 545: (2000) 1 MLJ 121.

by owners of intellectual property rights to preserve evidence against infringers. Additionally, the rise of the Internet has also brought an explosion of "John Doe" lawsuits.[114] The nature of the unique orders has been summarized by Reed J. in Fila Canada Inc. v. Doe,[115] as follows:

"The order, which is sought, is what is known as a "rolling" Anton Piller order. As is obvious from the style of cause, when these orders are obtained from the Court neither the identity nor the address of the persons against whom they will be executed are known. On some occasions one or two persons may be identified as named defendants but they will have no necessary connection to the Jane and John Does against whom the order will be executed. The known defendants are allegedly infringing intellectual property rights belonging to the plaintiff but in different places, at different times and in different circumstances. These "rolling" orders can be distinguished from defendant-specific Anton Piller orders. While defendant-specific Anton Piller orders may also include Jane and John Doe defendants, in general, the latter will be connected to the named defendants…."

Drawing the inspirations from the foreign jurisdiction, the "John Doe" order was recognised in Taj Television v. Rajan Mandal[116] case in India. In this case the plaintiff owned the ten sports channel and the broadcasting rights to some of the major global sporting events, including the matches of the football World Cup. The plaintiff had entered into agreements with various cable operators in the country to transmit the channel but there were a large number of unlicensed cable operators who were wrongfully transmitted the channel, some of whom had been identified. Accordingly, at the time of the World Cup, the plaintiff instituted a suit to obtained ex parte relief against named and unnamed cable operators to restrain them from infringing the plaintiff's broadcasting rights under Section 37 of the Copyright Act, 1957. Under Rule 1, Order 39 of the Code of Civil Procedure, 1908 prima facie case,[117] balance of convenience[118] and possibility of irreparable injury[119] are requirements of ex party temporary injunction. Besides, Section 151 of the Code

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96 AIR 1990 Ker 119.

97 David Kitchn (ed.), *Kerly's Law of Trade Marks and Trade Names*, Sweet and Maxwell, London (2011) at paras. 15-66.

98 2005 (1) CHN 106: 2005 (30) PTC 279 (Cal) 2005. See also, *CISOCO Technologies* v. *Shrikanth*, 2005 (31) PTC 538 (Del.).

99 *Anton Piller KG* v. *Manufacturing Process Ltd.*, (1976) Ch. 55: (1976) RPC 719.

100 *Systematic Ltd.* v. *London Computer Centre Ltd.*, (1983) F.S.R. 313.

101 *Buergrus Europe Limited* v. *Vwean Industries Eng. Co.*, 2005 (1) CHN 106: 2005 (30) PTC 279 (Cal).

102 *Buergrus Europe Limited* v. *Vwean Industries Eng. Co.*, 2005 (1) CHN 106: 2005 (30) PTC 279 (Cal).

103 A IR 2007 SC 1717: (2007) 4 SCC 795. See also, *M.V. Al Quamar* v. *Tsavliris Salvage*, AIR 2000 SC 2826: (2000) 8 SCC 278; *Sundaram Finance* v. *NEPC India Ltd.*, AIR 1999 SC 565: (1999) 2 SCC 479; *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*, AIR 1967 SC 1030: (1967) 1 SCR 105.

104 AIR 1990 Delhi 19: 38 (1989) DLT 54.

105 *EMI Records Ltd* . v. *Kudhail,* (1985) FSR 36: (1983) Com LR 280.

plaintiff by downloading any other channels not registered under the down linking guidelines till further orders.

ii It is further directed that till the present order is vacated or modified, the direction shall operate against the defendants, their agents, representatives, franchises, sub-operators or any person claiming under them an injunction.

iii Further, injunction in terms of serial No. (i) above is passed against un-named and undisclosed persons who may be likewise committing breach of the rights of the plaintiff by resorting to illegal tapping of DTH (Direct to Home) connections by linking the same to the distribution networks.

iv The Superintendent of the concerned police station(s) are directed to render assistance to the Plaintiff should any be required for purposes of enforcement of the present order as it the obligation of the police authorities and the state to enforce judicial orders passed.

v The plaintiff shall comply with the provisions of the proviso to Rule 3 of Order 39 of the Code of Civil Procedure, 1908 within a period of one week from today.

(iii) Damages including punitive damages

For infringement of copyright in any type of work recognized in intellectual property law damages, accounts of profit[125], Anton Piller Order[126] as well as criminal remedies are available. Now question arises: When can punitive damages be awarded in case of infringement of intellectual property rights? The fact that a lot of energy and resources are spent in litigating against those who infringe the intellectual property rights of others. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, in the case of a trademark use the well-reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity or in the case of a software use, the pirated software thereby depriving the copyright owner of the revenue to which he is entitled through sale of license to use that software and then avoid payment of damages by remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark/pirated software, which, if he is using for business purposes, can be computed only on the basis of his account books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court. The Calcutta High Court in C. M. Agarwalla v. Halar Salt and Chemical Works,[127] observed:

"Damages are deemed as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another whether the act is a breach of contract or a tort or put more shortly damages are the recompense given by process of law to a person for the wrong that another has done to him. Punitive damages are intended to be in solatium to the plaintiff and in terrorem to the public."

In Time Incorporated v. Lokesh Srivastava,[128] the Delhi Court expressly recognized a third type of damages as punitive damages, apart from compensatory and nominal damages. The Court held that the award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities. Regarding punitive damages, in Time Incorporated v. Lokesh Srivastava,[129] the Delhi High Court also observed that punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In Hero Honda Motors Ltd. v. Shree Assuramji Scooters,[130] the Court noticing that the defendant had chosen to stay away from the proceedings of the Court felt that in such case punitive damages need to be awarded, since otherwise the defendant, who appears in the Court and submits his account books would be liable for damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books. In Microsoft Corporation v. Ms. K. Mayuri,[131] the Delhi High Court emphasized the need to award punitive damages in case of blatant infringement of copyright. In an ex parte final order preventing the defendants from the unauthorized loading of the Microsoft Windows and Microsoft Office, the Court reasoned thus:

This Court has no hesitation in saying that the time has come

106 See Hayhurst Gordon W, "Ex parte Anton Piller Orders with John Doe Defendents", 9(9) *European Intellectual Property Review,* (1989) 257.

107 See Juhi Gupta , "John Doe Copyright Injunction in India", 18 *Journal of Intellectual Property Rights* (2013), pp. 351-359.

108 Souvik Bhadra and Arka Majumdar, "Anton Piller Order in UK and Its Possible Implications in India, 12 *Journal of Intellectual Property Rights*, (2007) pp. 488-496.

109 *Jackson* v. *Bubels,* 28 (1972) DLT. 500 (B. C. C. A.) ; *Dukoff* v. *Toronto General Hospital,* (1986) 54 O. R. 50 (H.C.).

when the Courts dealing actions for infringement of trade name, copyright, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them.

The court in this case awarded Rupees five lakh as compensatory damages against a claim of Rupees 26.72 lakh by the plaintiff-and another Rupees five lakh as punitive damages. Though the reasoning is a welcome move, one would wonder whether the amount of Rupees five lakh would "spell financial disaster" to the defendant who made a profit of Rupees 26.72 lakh. In Microsoft Corporation v. Deepak Raval,[132] the Court observed that in our country, the Courts are becoming sensitive to the growing menace of the piracy and have started granting punitive damages even in cases where due to absence of the defendant, the exact figures of sale made by them under the infringing copyright and/or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities. In Larsen and Toubro Limited v. Chagan Bhai Patel,[133] the Court observed that it would be encouraging the violators of intellectual property, if the defendants notwithstanding having not contested the suit are not burdened with punitive damages.

4. Conclusion

In India, patents, trademarks and designs are protected under traditional intellectual property legislations. Besides, under sui generis system of intellectual property law, the geographical indication of goods and plant varieties and farmers' rights are protected. The Copyright Act 1975 is the law governing copyright protection in India. It extends protection to computer program me under the category of literary works provided they constitute "original literary works". The words "computer" and "computer programme" have been graciously defined in the Act [Sections 2(ffb), 2(ffc)]. The fact that computer programmes are utilitarian works is well imbibed in the definition by using the words "a set of instructions" and "capable of causing a computer to perform a particular task or achieve a particular result". The word "expressed" asserts that even while utilitarian works are

110 Merriam-Webster, *What's In A Name?* (1996).

111 [1985] F. S. R. 36.

112 [2003] EWHC 1087 Ch.

113 499 F. Supp. 791 (1980).

114 Jeff Berryman, "Thirty Years After: Anton Piller Orders and the Supreme and Federal Courts of Canada", (2) 3 *Journal of International Commercial Law and Technology* (2007).

115 [1996] 3 F.C. 493 (T.D.).

116 [2003] F. S. R. 22.

117 For the concept of "prima facie case", see, *Kalyan Singh Chouhan* v. *C. P. Joshi*, 2011 (1) SCALE 718: 2011 (1) UJ 453 (SC); *Skyline Education Institute (Pvt.) Ltd.* v. *S. L. Vaswani*, AIR 2010 SC 3221: (2010) 2 SCC 142; *Athar Hussain* v. *Syed Siraj Ahmed*, AIR 2010 SC 1414 : 2010 (1) SCALE 95; *Kashi Math Samsthan* v. *Srimad Sudhindra Thirtha Swamy,* AIR 2010 SC 296: (2010) 1 SCC 689; *Zenit Mataplast P. Ltd.* v. *State of Maharashtra*, 2009 (12) SCALE 432: (2009)10 SCC 388

118 For the concept of "balance of convenience" see *Bhiaru Ram* v. *Central Bureau of Investigation,* 2010 (7) SCALE 718: [2010] 9 SCR 554; *Sonu Babu Bhambid* v. *Dream Developers*, JT 2009 (13) SC 397: [2009] 11 SCR 1176; *Mandali Ranganna* v. *T. Ramachandra,* AIR 2008 SC 2291: (2008) 11 SCC 1; *Ramdev Food Products Pvt. Ltd.* v. *Arvindbhai Rambhai Patel*, AIR 2006 SC 3304: (2006) 8 SCC 726.

119 For elaborate discussion on "irreparable injury" see *Chhattisgarh State Electricity Board* v. *Central Electricity Regulatory Commission*, [2010] 4 SCR 680: 2010 (4) UJ 1755 (SC); *Jaswant Kaur* v. *Subhash Paliwal*, 2009 (14) SCALE 695: (2010) 2 SCC 124; *Shridevi* v. *Muralidhar*, 2007 (12) SCALE 234: [2007] 11 SCR 375; *M. Gurudas* v. *Rasaranjan*, AIR 2006 SC 3275: (2006) 8 SCC 367.

[1]20 AIR 1962 SC 527: [1962] Supp 1 SCR 450.

[1]21 AIR 2012 Delhi 151: 189 (2012) DLT 105.

122 MIPR 2009 (1) 165: 2009 (39) PTC 208 (Del).

123 2010 (43) PTC 332 (Del).

124 CS (OS) 384/2011: Decided on 18. 02. 2011.

125 *Green Valley Biscuit Pvt. Ltd.* v. *Madhabi Biscuit Pvt. Ltd.*, 2005 (1) GLT 556: 2005 (31) PTC 438(Gau).

126 *Mohit Bhargava* v. *Bharat Bhushan Bhargava,* AIR 2007 SC 1717: (2007) 4 SCC 795; *Bucyrus Europe Limited* v. *Vulcan Industries Engineering Company,* 2005 (1) CHN 106: 2005 (30) PTC 279 (Cal).

127 AIR 1977 Cal 356.

128 116 (2005) DLT 599: 2005 (30) PTC 3(Del). See also, Press Trust of India Limited v. Navbharat Press, 190 (2012) DLT 235: 2012 (50) PTC 316 (Del); United Biotech (P) Ltd. v. Schon Pharmaceuticals Ltd., MIPR 2010 (1) 189: 2010 (42) PTC 103 (Del).

129 116 (2005) DLT 599: 2005 (30) PTC 3 (Del).

130 125 (2005) DLT 504: 2006 (32) PTC 117 (Del).

131 MIPR 2007 (3) 27: 2007 (35) PTC 415 (Del). See also, Hindustan Lever Ltd. v. Satish Kumar, 2012 (50) PTC 338 (Del); Surya Food and Agro Ltd. v. Priya Gold Tea Company, 2011 (46) PTC 162 (Del); United Biotech (P) Ltd. v. Schon Pharmaceuticals Ltd., MIPR 2010 (1) 189: 2010 (42) PTC 103 (Del); *Microsoft Corporation* v. *Kiron,* MIPR 2007 (3) 214: 2007 (35) PTC 748 (Del) .

132 MIPR 2009 (1) 194: 2009 (39) PTC 538 (Del).

133 MIPR 2009 (1) 194: 2009 (39) PTC 538 (Del).

Compensation to Victims: Legislative Provisions and Judicial Approach

*Srishty Banerjee**

ABSTRACT ♣

Social justice, the signature tune of our Constitution has its overtones in the Criminal Justice System too. Consequently administration of criminal justice system is to be geared towards the same goal of social justice. The purpose of the criminal justice system is to protect the rights of an individual against the intentional invasion by the criminal who violates the basic norms of the society. The rights of victims should be recognised by law. The accused is responsible for the reparation of any harm caused to the victim. However, it might be that the accused, being too poor, is unable to make any payment or otherwise unable to compensate the victim. In such a situation, the State that has failed to protect the life, liberty and property of its citizens should compensate the victim for loss and suffering.

Keywords: Victim, Compensation, Criminal Procedure Code, Constitutional Remedies.

1. Introduction

The aim of the Criminal Justice System is to protect the rights of individuals against the intentional invasion by criminals who violate the basic norms of the society. The fair and effective administration of Criminal Justice System is the corner stone of a free society and an essential component in building public confidence in the government institutions. Criminal Justice system was devised more than a century ago to protect the rights of the innocents and punish the guilty. In a modern welfare state, in order to ensure that innocent persons may not be victimized, the accused has been granted certain rights and privileges i.e. while victims are entirely overlooked in misplaced sympathy for criminal.[1]

The assumption that by punishing the offender the victim receives 'justice' is of dubious value today because of the decreasing number of successful investigations and the still smaller number of convictions in the criminal justice system. If the victim gets back his lost property he is lucky; if he is not harassed and humiliated in the investigative and trial procedures he should thank his stars. Given the sickening delay, corruption and technicalities in proof, many victims tend to keep away from reporting crimes and sometimes take recourse to private vengeance. Either way, the criminal justice system suffers, as it is not being able to prevent crimes or to punish the guilty when crimes occur in society. The long-term implications of the situation are indeed alarming for public security, human rights and governmental accountability[2]. Ironically, the "guilty man is lodged, fed, clothed, warmed, lighted and entertained in a model cell at the expense of the State, from the taxes that the victim pays to the treasury[3]. Criminal Law has always discouraged the acts or omissions which in general can affect right *in rem* and violators have always been punished with strict sanctions but the crime rate is not falling and State is in regular quest to preserve social solidarity and peace in society. The initial focus of criminologists was only on the aspect of punishment but the focus started shifting when they encountered with the fact that the person who is victim of crime is getting nothing out of the whole process of criminal justice system or is getting only the so called satisfaction by seeing the offender punished. Therefore, jurists, penologists, etc. in all countries started giving their full attention to the cause of victim in the form of compensation, and hence the whole debate started about ways, means and extent of compensation.

There are five possible statutes (statutory provisions), under which compensation may be awarded to victims of crime. They are: the Fatal Accidents Act, 1855; the Motor Vehicles Act, 1988; the Criminal Procedure Code, 1973; the constitutional remedies for human rights' violations; the Probation of Offenders Act, 1958.[4]

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1 Dr. Purvi Pokhariyal,"Post U.N. Declaration on Victims" scenario in India – Assessment of victim's position in India, Human Security Report, 2005 (Feb., 15, 2013), www.indlaw.com.

2 N.R. Madhava Menon, "Victim Compensation Law and Criminal Justice: A Plea for a Victim-Orientation in Criminal Justice" in K.I.VIBHUTE, "CRIMINAL JUSTICE SYSTEM", 96-99 (ed., 2004)

3 K.D. Gaur Commentary on Indian Penal Code (Universal Law Publishing Co. 2006).

4 K.D. Gaur, "Justice to Victims of Crime: A Human Rights Approach" in K.I.Vibhute, "Criminal Justice System", (ed., 2004)

United Nations General Assembly in 1985 adopted a Declaration of the Basic Principles of Justice for the Victims of Crime and Abuse of Power'. The declaration envisages the basic norms to be adhered to for the recognition of victim's rights like right to information, treatment, restitution and compensation.

2. Meaning of Victim of Crime and Compensation to Victim of Crime

The U.N. Declaration of Basic Principle for Victims of Crime and Abuse of Power, 1985 defines 'victims' as persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights." Clause A (2) widens the ambit, to include, "immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent 'victimization'[5].

According to section 2 (wa)[6] of the Code of cCriminal pProcedure (Amendment) aAct, 1973:

"Victim means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression victim includes his or her guardian or legal heir".

The word 'Compensation' in literal sense means 'a thing that compensates or is given to compensate (for); a counterbalancing feature or factor; amends, recompense; specially money given to compensate loss or injury, or for requisitioned property.

3. Universal Concern for the Rights of the Victim

After realizing the gravity of the problem the United Nations General Assembly adopted a "Declaration of the Basic Principles of Justice for the victims of Crime and aAbuse of Power"[7]. The Declaration envisages the basic norms to be adhered to for the recognition of victims' rights to information, treatment, restitution, and compensation. Among the basic principles are:

i Victims to be entitled to the mechanisms of justice and

5 http://www.un.org/documents/ga/res/40/040r034/htm (last updated Feb. 15, 2013)

6 As amended by the Code of Criminal Procedure (Amendment) Act, 2008

7 United Nations General Assembly Declaration of Basic Principles of Justice for Victim and Abuse of Power adopted by resolution 40/34 of 29 November 1985.(Feb. 17,2013 http://www.un.org/documents/ga/res/40/a40r034.htm.

8 Principle 4

9 Principle 5

10 Principle 7

11 Principle 8

12 Principle 12 & 13

13 Sec. I-A states that, 'Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances amount in law to felony or other crime. Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor administrator or representative of the person deceased.'

convicted.

ii It is subjected to recovery of fine from the accused when fine is part of sentence.

iii When fine is not part of the sentence, a magistrate is is may order any amount to be paid by way of compensation for any loss of injury by reason of the act for which the accused person has been sentenced.

iv In awarding the compensation, the magistrate has to consider the capacity of the accused to pay.

The Criminal Procedure Code, 1973 (Cr.P.C) has for long recognized the principle of victim compensation. Section 250 authorizes Magistrates to direct complainants or informants to pay compensation to people accused by them without reasonable cause. Again Section 358 empowers the court to order a person to pay compensation to another person for causing a police officer to arrest such other person wrongfully. Finally, Section 357 enables the court imposing a sentence in a criminal proceeding to grant compensation to the victim and to order the payment of costs of the prosecution. Sub-section (1) of Section 357 of the Cr.P.C empowers the court to award compensation to the victims of crime out of the fine in the following four cases: first, meeting proper expenses of prosecution; secondly, compensation to a person or his heirs for the loss or injury caused by the offence when he can recover compensation in a civil court; thirdly, compensation to persons entitled to damages under the Fatal Accidents Act, 1855; and fourthly, compensation to a bona fide purchaser of property which being the subject of theft, criminal misappropriation, cheating, etc. is ordered to be restored to the person entitled to it.

Compensation under sub-section (1) can be ordered only where the court imposes a fine and the amount of compensation is limited to the amount of fine. No expenses or compensation can be ordered, if no fine has been imposed or when a person is dealt with under Section 360 of the Cr.P.C, 1973 (i.e. when a person is released on probation of good conduct or after admonition) and fine is imposed.[17]

Sub-section (3) of Section 357, Cr.P.C,[18] empowers a criminal court, at its discretion, to order the accused to pay by way of compensation a specified amount to victims of the offence even if 'fine' does not form part of the sentence imposed on him. Prior to the inclusion of this sub-section, a court could award no compensation unless a substantive sentence of fine was passed by it. Now, by virtue of this provision, a Court is empowered to pass a compensation order of a specified amount, unlike hitherto, not limited to the amount of fine imposed on, or recovered from the offender. Further, it is not allowed to award imprisonment in case of the non-payment of compensation awarded under Section 357(3) of the Cr.P.C.[19] The provision, thus, not only recognizes the need to compensate victims of crime even when no sentence of fine is imposed but also adds a new positive dimension to the philosophy of compensating them.

It may be noted that sub-section (3) of Section 357 is a new provision which was not available under Section 545 of the repealed Criminal Procedure Code of 1898. The new provision is not conditioned on a sentence of fine. In other words, the power to award compensation is not ancillary to other sentence, but it is in addition thereto. There is no maximum limit to the amount of compensation. It is left to the discretion of the court to decide in each case depending on its facts and circumstances.[20]

Apart from invoking Section 357 of the Cr.P.C, the victim may approach a higher court under Section 482, Cr.P.C, to claim compensation, which empowers a higher court to exercise its inherent power in the interest of justice. However, the Supreme Court has not favored invoking of such a power in view of the existing statutory provisions under Section 357 of Cr.P.C. In Palaniappa Gounder v. State of Tamil Nadu[21] the court said:

"If there is an express provision in a statute governing a particular subject-matter, there is no scope for invoking or exercising the inherent powers of the court because the court ought to apply the provisions of the statute. Hence, the application made by the heirs of the deceased for compensation could not have been made under Section 482 since Section 357 expressly confers powers on the court to pass an order for payment of compensation."[22]

Nevertheless, the Supreme Court in the Bodhisattwa Gautam case[23], on its own awarded interim compensation to the respondent—a rape victim, while exercising its inherent power. The accused (a lecturer), had married the victim—his student, by putting vermilion on her forehead before God and accepted her as his wife and impregnated her twice resulting in abortion on both the occasions, and later refused to recognize her as his wife. It directed the petitioner to pay a sum of Rs 1000 every month to the

14 R.V.Kelker, Criminal Procedure, 5th edn. 2008, p 614-619, EASTERN BOOK COMPANY, Lucknow.

15 *Id.*at 622.

16 *Id.*at 615

17 Sec. 5 of the Probation of Offenders Act, 1958, empowers the court to require released offenders to pay compensation and costs.

18 It says: 'When a Court imposes a sentence, of which fine does not from a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.'

19 Sibi v. Vilasani, (1999) Cri LJ 878 Ker.

respondent as interim compensation during the pendency of the criminal case and also directed the petitioner to pay arrears of compensation at the same rate from the date on which the complaint was filed till the date of order. Relying on its earlier decision in the Delhi Domestic Working Women's Forum case[24] a Division Bench comprising Justices Kuldeep Singh and S. Sagir Ahmed observed:

"*If the court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation. The jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offence of rape which is an offence against the basic human rights and also the fundamental right of personal life and liberty.... . Unfortunately, a woman in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have therefore, been the victim of tyranny at the hands of men with whom they, fortunately under the Constitution enjoy equal rights*."

However, it is pertinent to note that the trial courts have seldom resorted to the powers conferred on them under Section 357, Cr.P.C, liberally. Perhaps taking note of the indifferent attitude of subordinate courts, the Apex Court in the Hari Kishan case[25], directed suggested the attention of all courts to exercise the provisions under Section 357 of the Cr.P.C liberally and to award adequate compensation to the victim, particularly when an accused is released on admonition, probation or when the parties enter into a compromise. The Court highlighted the importance of Section 357(3) of the Cr.P.C in the following words:

"Section 357 of Cr.P.C is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. This section of law empowers the Court to award compensation while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power to award compensation is not ancillary to other sentences but it is in addition thereto. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward

20 K.I. Vibhute, "Justice to Victims of Crime: Emerging Trends and Legislative Models in India" in K.I.VIBHUTE, "CRIMINAL JUSTICE SYSTEM", (ed., 2004).

21 (1977) 2 SCC 634: 1977 SCC (Cri) 397: AIR 1977 SC 1323. In this case, the son and two daughters of the deceased filed an application before the High Court under Section 482 of the Criminal Procedure Code praying that the accused be asked to pay to them, as heirs of the deceased, compensation to the sum of Rs 40,000 for the death of their father.

22 *Ibid.*, at 1325 (AIR).

23 Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490.

24 Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14. For comments see, K.I. Vibhute: "Victims of Rape and their Right to Live with Human Dignity and to be Compensated: Legislative and Judicial Responses in India", 41 JILI 222 (1999),

25 Hari Krishna and State of Haryana v. Sukhbir Singh, (1988) 4 SCC 551: AIR 1988 SC 2127.

26 *Ibid*, at 2137 (AIR).

the accused is let off with admonition or released on probation.[31] But this power is circumscribed in the sense that in such cases there should be provision for grant of probation.

The POA empowers a trial court, at its discretion, to release an offender after due admonition (in certain specified offences) and on probation of good conduct in suitable cases. The Act also enables the court, directing release of an offender under Sections 3 and 4, at its discretion, to grant 'reasonable compensation' to any person for 'loss or injury' caused to him by commission of the offence and 'costs' of the proceedings as the court thinks reasonable. Section 5 of the POA empowers the court, releasing an offender after admonition or on probation of good conduct, to grant compensation and costs in appropriate cases. The phraseology of this section makes it amply clear that such a power vests only with the court releasing an offender and is purely at its discretion. Even an appellate court or the High Court cannot interfere unless it is of the view that the lower court has exercised such power capriciously and unreasonably.[32]

4.5 The Constitutional Remedies against Violation of Human Rights

The principle of payment of compensation to the victim of crime was evolved by Hon'ble Supreme Court on the ground that it is duty of the welfare state to protect the fundamental rights of the citizens not only against the actions of its agencies but also for hardships on the victims on the grounds of humanitarianism and obligation of social welfare, duty to protect its subject, equitable justice etc. It is to be noted that compensation by the State for the action of its official was evolved by the Hon'ble Court against the doctrine of English law: "King can do no Wrong" and clearly stated in the case of Nilabati Behra v State of Orissa[33] that doctrine of sovereign immunity is only applicable in the case of tortuous act of government servant and not where there is violation of fundamental rights and hence in a way stated that in criminal matters (of course, if there is violation of fundamental rights) this doctrine is not applicable.

Rudal Sah v State of Bihar[34] is the most celebrated case where the Hon'ble Supreme Court directed the state to pay compensation of Rs. 35,000 to Rudal Sah who was kept in jail for 14 years even after his acquittal on the ground of insanity and held that it is violation of Article 21 done by the State of Bihar. The case of Bhim Singh v State of J&K[35] is another important case where Bhim Singh an MLA was arrested by the police only to prevent him to attended the Legislative Assembly, the Hon'ble Court not only entertained the writ petition of his wife but also awarded the compensation of Rs. 50,000 to be paid by the state. On the issue of brutal use of force and misuse of authority by the police outside the police station case of SAHELI v Commissioner of Police[36] is landmark where the son of Kamlesh Kumari died due to ill treatment by a Sub-.Inspector of Delhi Police, the Hon'ble Supreme Court directed the Delhi Administration to pay the compensation of Rs 75,000. The next important case is of Gudalure Cherian v UOI[37] where Hon'ble Supreme .Court. following an innovative approach first directed the whole matter to be investigated by the CBI afresh and completion of investigation directed the Govt. of U.P. to first suspend the police officials and medical officers who tried to save the accuse but also directed the state to pay compensation of Rs. 2,50,000 to the victim of rape and Rs 1,00,000 to victim of other crime. The next in the line is the case of Bodhi Satta Gautam v Subhra Chakraborty[38] where the Hon'ble Supreme Court. invented the concept of interim compensation and enforced the part third right against an individual by saying that:

This decision recognises the right of the victim for compensation by providing that it shall be awarded by the Court on conviction of the offender subject to the finalisation of Scheme by the Central Government. If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation, which should also be provided in the Scheme. On the basis of principles set out in the aforesaid decision in Delhi Domestic Working Women's Forum, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape which, as pointed out above is an offence against basic human rights and also the Fundamental Right of Personal Liberty and Life.

In, *Chairman, Railway Board* v. *Chandrima Dass*[39], the Apex Court ordered Rs 10 lakh as compensation for a foreign tourist from Bangladesh who was raped by the Railway employees in the Yatri Niwas at Calcutta on February 26, 1998. Endorsing the Calcutta High Court's view, the Court held that the foreign national is also entitled to the fundamental right to life in India.

27 Law Commission of India, 152nd *Report on Custodial Crimes* (1994)

28 Law Commission of India, *154th Report on the Code of Criminal Procedure, 1973* 1996.63.The Law Commission took note of the existence of a Victim Assistance Fund that had been created in the State of Tamil Nadu.

29 S. Murlidhan, *"Rights of victim in Indian Criminal Justice System."* (March 13, 2013), http://www.iclrc.org/content/content/a0402.pdf.

30 Sec. 28 of THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) BILL, 2008.

31 Power of the court to require released offenders to pay compensation and cost.

5. Fine and Compensation: Difference

In Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. and Anr., [(2007) 6 SCC 528], this court differentiated between fine and compensation, and while doing so, has stated that the distinction between Sub-Sections (1) and (3) of Section 357 is apparent. Sub-section (1) provides for application of an amount of fine while imposing a sentence of which fine forms a part; whereas Sub- Section (3) calls for a situation where a Court imposes a sentence of which fine does not form a part of the sentence. The court further observed:

"Compensation is awarded towards sufferance of any loss or injury by reason of an act for which an accused person is sentenced. Although it provides for a criminal liability, the amount which has been awarded as compensation is considered to be recourse of the victim in the same manner which may be granted in a civil suit." "We must, however, observe that there exists a distinction between fine and compensation, although, in a way it seeks to achieve the same purpose. An amount of compensation can be directed to be recovered as a 'fine' but the legal fiction rose in relation to recovery of fine only, it is in that sense `fine' stands on a higher footing than compensation awarded by the Court."

6. Conclusion

A careful perusal of the provisions discussed above would reveal that there is an urgent need to tackle the problem of victims of crime on many folds. Time has come when a victim should play a major role in the criminal justice system. The State and society must change their attitude towards victims of crime. At the same time, the State as well as courts must look after the interest of the victims of crime compassionately so that justice should be done. Some suggestions in this regard are given below.

Compensation to victims of crime as a form of punishment under Section 53 of the IPC: Compensation or reparation to the victims of crime be included as a form of punishment under Section 53 of the IPC, in addition to the existing provision under the Cr.P.C so that victims of crime could get due justice.

Compensation to victims of sexual assault: As suggested by the Supreme Court in the *Delhi Domestic Working Women's Forum* case, a Criminal Injuries Compensation Board be constituted for the award of compensation to victims of sexual assault, whether or not a conviction has taken place. A comprehensive scheme should be provided for the purpose in consultation with the National Women's Commission and Women's Organizations concerned.

32 Rajeswari Prasad v. R.B. Gupta, AIR (1961) Pat 19.
33 AIR1993SC1960
34 AIR1983SC1086
35 AIR1986SC494
36 AIR1990SC513
37 JT 1991 (4) SC 535
38 1995 SCALE (7)228
39 (2000) 2 SCC 465

Surrogacy in India: Socio-Legal Dimension

*Dr. Kuldeep Singh Panwar**

ABSTRACT

Surrogacy is a method of assisted reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child for others to raise. In India Commercial surrogacy has been allowed and the intended parents may be recognised as the legal parents from birth. Commercial surrogacy is a growing business in India. Surrogacy business is exploiting poor women in a country like India that is already having an alarmingly high maternal death rate. This paper talks about socio-legal issues in the context of surrogacy. Government must seriously consider enacting a law to regulate surrogacy in India in order to protect and guide couples going in for such an option. Without a proper legal framework, Intended parents, Surrogate, Child will invariably be misled and the surrogates exploited.
Keywords- Surrogacy, Commercial surrogacy, ART Bill, Legal framework

1.Introduction

India has emerged as the main surrogacy destination since it legalised commercial surrogacy in 2002. And it is primarily for two reasons. One, surrogacy in India is low cost. The complete package costs just one-third of the total procedure cost in the developed countries. Secondly, the legal environment here is favourable. In fact, there is no law as such to govern surrogacy in India with the Artificial Reproductive Technique (ART) Bill, still pending with Parliament. Because of these reasons there are instances when an intended parent and the child born through surrogacy got caught in legal tangles. The 2008 Baby Manji Yamada case, where the Japanese Embassy refused to issue a passport to the newborn, is one such example that earned a lot of media attention. It is no surprise then those surrogate mothers, who usually come from the lower strata of society, are exploited by being lured to carry out repeated pregnancies or forced to deliver through caesarean method. Sometimes, they are not paid their due.

Vansh Health Care director Prem Kumar explains that: "Before the Indian Council of Medical Research (ICMR) guidelines, surrogacy business was mostly ruled by agents hired by the clinics. These agents lured poor, illiterate women into becoming surrogate mothers and walked away with their commission. However, with the ICMR guidelines in place and the registration of ART Banks which provide surrogates the situation has improved. And this has led to the trend of surrogacy homes providing accommodation to the surrogates during pregnancy. Surrogacy contracts between the two parties have also become a norm to avoid any legal hassles later."

1.1 Meaning of surrogacy

The word "surrogate," is rooted in Latin "Subrogare" (to substitute), which means "appointed to act in the place of."Surrogacy is a method of assisted reproduction whereby a woman agrees to become pregnant for giving birth to a child for others to raise. She may be the child's genetic mother (the more traditional form of surrogacy) or she may be implanted with an unrelated embryo. Altruistic surrogacy is where a surrogate mother agrees to gestate a child for intended parents without being compensated monetarily in any way. In other words, this is in effect a free surrogacy. Whereas, commercial surrogacy is an option in which intending parent offers a financial incentive to secure a willing surrogate. Commercial surrogacy is a controversial method of conception because people, governments and religious groups have questioned the ethics of involving money in a child's birth.[2,3] There can be several reasons behind surrogacy. For instance, intended parents biologically or mentally are not fit to have their child in natural process. The agencies making arrangement for surrogacy for the intended parents often help them to manage the complex medical and legal aspects involved in the process.[4]

1.2 International scenario of surrogacy

Surrogacy in Australia

In Australia, all states (except Tasmania, which bans all surrogacy under the surrogacy Contracts Act 1993)

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1 the hindu.com NEW DELHI, November 3, 2013

2 van Zyl L, van Niekerk A. Interpretations, perspectives and intentions in surrogate motherhood. J Med Ethics 2000;26:404-9. Available from http://www.jme.bmj.com.laneproxy.stanford.edu/cgi/content/full/26/5/404.

3 Committee on Ethics. ACOG committee opinion number 397, February 2008: Surrogate motherhood. Obstet Gyneco

4 Serratelli A. Surrogate motherhood contracts: Should the British or Canadian model fill the U.S. legislative vacuum? George Washington J Int Law Econ 1993;26:633-74

altruistic surrogacy has been recognized as legal. However, in all states arranging commercial surrogacy is a criminal offense.[5]

Surrogacy in South Africa

The South Africa Children's Act of 2005 enable the "commissioning parents" and the surrogate to have their surrogacy agreement validated by the High Court even before fertilization. This allows the commissioning parents to be recognized as legal parents from the outset of the process and helps prevent uncertainty.[6]

Surrogacy in Asian Countries

In Japan, the Science Council of Japan proposed a ban on surrogacy and doctors, agents and clients will be punished for commercial surrogacy arrangements. In Saudi Arabia, religious authorities do not allow the use of surrogate mothers.[7]

In China, Ministry of Health banned surrogacy in 2001. Despite this regulation it is reported that illegal surrogacy "black market" is still flourishing in China. Anxious about such situation, strict legislation has been suggested by the political parties.[8]

Surrogacy in USA

In USA, the surrogacy and its attendant's legal issues fall under state jurisdiction and it differs from state to state. Some states facilitate surrogacy and surrogacy contracts, others simply refuse to enforce them and some penalize commercial surrogacy. In Canada, the Assisted Human Reproduction Act permits only altruistic surrogacy; surrogate mothers may be reimbursed for approved expenses, but payment of any other consideration or fee is illegal.[9]

Surrogacy in Europe

In Sweden, surrogacy is not clearly regulated. The legal procedure most equivalent to it is making an adoption of the child from the surrogate mother. It is illegal for Swedish fertility clinics to make surrogate arrangements.[10]

In Ukraine, Surrogacy is completely legal; however only married couples can legally go through gestational surrogacy.[11]

In Russia, commercial gestational surrogacy is legal and available for willing adults. There has to be a certain medical indication for surrogacy. Foreigners have the same rights as for assisted reproduction as Russian citizens.[12]

In Bulgaria, surrogacy was previously illegal, but as the procedure is still practiced illegally, the government decided to sanction it. Instead of using the term surrogate, though, Bulgaria calls it the "substitute mother."[13]

In Georgia, surrogacy in Georgia Europe is legal but the surrogate mother cannot exercise any parental rights over the child.[14]

Some countries such as Poland and Romania among others have no defined surrogacy laws and it is possible to undergo the surrogacy process in those nations. As it can be seen, laws on surrogacy in Europe are varied and for some countries, vague and non-existent.[15]

1.3 Objective

The objective of this paper is to through the light on socio-legal issues in the context of surrogacy.

2. Indian Scenario of Surrogacy

Since 2002, commercial surrogacy has almost become legal in India and India has become a sort of leader in it. This is the reason that has led critics to allege that surrogacy business is exploiting poor women in a country like India that is already having high maternal mortality ratio.[16] According to estimates, which might be conservative - the business of surrogacy in India is already touching $445-million a year.[17]

5 Legislative Council Standing Committee on Legislation, Parliament of Western Australia, Report on The Surrogacy Bill 2007 (2008) ('Western Australian Report') 5

6 Children's Act, 2005 (Act No. 38 of 2005) Chapter 19: Surrogate Motherhood 297. Effect of surrogate motherhood agreement on status of child in south Africa.

7 Aramesh K. Iran's experience with surrogate motherhood: An Islamic view and ethical concerns. J Med Ethics 2009;35:320-2.

8 Sharma R. An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India. 2007. Available from: http://www.ssrn.com/abstract=997923.

9 Brahams D. The hasty British ban on commercial surrogacy. Hastings Cent Rep 1987;17:16-9

10 Pennings G. Legal harmonization and reproductive tourism in Europe. Hum Reprod 2004;19:2689-94.\

11 Ukraine. On Amendments to Legal Acts of Ukraine Concerning Limitations on Use of Assisted Reproduction Technologies. Draft No. 8282.

12 Svitnev K. Surrogacy and its legal regulation in Russia. Reprod BioMed Online 2010;20 Suppl 3:590

13 Pennings G. Reply: reproductive exile versus reproductive tourism. Hum Reprod 2005;20:3571-2

14 Göran H. "Surrogatmoderskap: Varför- och varför inte?" (in Swedish). Läkartidningen 2010;108:68-9

15 Pennings G. Reply: reproductive exile versus reproductive tourism. Hum Reprod 2005;20:3571-2

16 The Legal status of surrogacy: A globel scenario ,"Pragyan:Journal of Law"Volume 1:issue1,December2011

17 van den Akker OB. Psychological trait and state characteristics, social support and attitudes to the surrogate pregnancy and baby. Hum Reprod 2007

In fact, outsourcing surrogacy is an exploitative practice in India. Currently, no law exists to protect the surrogate mother in case of birth complication, forced abortion etc.

The Ministry of Women and Child Development is examining the issue of surrogate motherhood in India for bringing up a comprehensive legislation. A draft legislation on surrogacy-prepared by the Indian Council of Medical Research (ICMR) has recommended strict penalties for offenders and a tight regulation on Assisted Reproductive Techniques (ART). The draft law restricts the number of embryo transfers, a mother can go through to, 3 times for the same couple. It also adds that no woman should act as a surrogate for more than three live births in her life. In fact, these are the only guidelines framed by the ICMR and the Ministry of Health and Family Welfare in 2005. ICMR guidelines state that "a relative, a known person as well as a person unknown to the couple may act as a surrogate mother, for the couple. In case of a relative acting as a surrogate, the relative should belong to the same generation as the woman desiring the surrogate." The experts believe that surrogacy propels childless couples, needlessly, toward commercial surrogacy. Section 3.10.5 of the guidelines states that "a surrogate should be less than 45 years" being the upper age without mentioning the minimum age to be surrogate. So, does that mean an 18 year old or someone even younger, can become surrogate mother? Before accepting a woman as a possible surrogate for a particular couple, the ART Clinic must ensure (and put on record) that the woman satisfies all the testable criteria to go through a successful full term pregnancy." These guidelines are skewed and thoughtless. The bifurcated role of woman in surrogate arrangements is prompting renewed assessment of the meaning of motherhood and designation of maternal rights.[18,19,20]

3. Surrogacy: Socio-Legal Dimension

The law commission of India has submitted the 228th Report on "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligation of Parties to a surrogacy."[21] The main observations made by the law commission are : Surrogacy arrangements will continue to be governed by contracts amongst parties, but such an arrangement should not be for commercial purposes. A surrogacy arrangement

18 Few Basics from the ICMR Guidelines. Available from: http://www.blog.indiansurrogacylaw.com/2009/01/few-basics-from-the-icmr-guidelines.

19 Niekerk AV, Zyl LV. The ethics of surrogacy: women's reproductive labour. J Med Ethics 1995;21:345-9.

20 National Guidelines for Accreditation, supervision and regulation of ART clinics in India. Available from: http://www.icmr.nic.in/art/art_clinics.htm

21 Law commission of India. Report 228. 2009.

22 Government of India, MOH&FW, ICMR: 2008, ART (Regulatory) Bill, Ch. II, V, VII., Part I. and Schedule I, Part 7 on Forms, 2008.

23 http://www.andrewkimbrell.org/andrewkimbrell/doc/surrogacy.pdf

24 According to Kimbrell (1988)

25 Surrogate Motherhood-Ethical or Commercial, Centre for Social Research (CSR) 2, Nelson Mandela Marg, Vasant Kunj- 110070. Available from: http://www.womenleadership.in/Csr/SurrogacyReport.pdf

26 Singh KK. Human genome and human rights: An overview. J Indian Law Inst 2008;50:67-80

(Regulation) Bill, 2010. The Bill is still pending and not yet enacted into the statute. The proposed law needs proper discussion and debate in the context of social, legal, and ethical aspects. Presently surrogacy is based on contractual agreement de-hor the legal sanction. It is therefore submitted that the Parliament should seriously consider to pass the pending Assisted Reproductive Technology (Regulation) Bill, 2010 after a detailed discussion and examination of the various provisions as soon as possible. It seems that without a foolproof legal framework and effective implementation, intended parents will invariably be misled and the surrogates exploited.

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27 Jadva V, Murray C, Lycett E, MacCallum F, Golombok S. Surrogacy: The experiences of surrogate mothers. Hum Reprod

28 ibid

Euthanasia vis a vis Right to Life

*Vibhuti Jaswal**

ABSTRACT

Article 21 of the Constitution of India Guarantees right to life but Supreme Court in Gian Kaur case has clarified that the Right to Life includes Right to Dignified Life up to end of natural life. It has also clarified that right to die with dignity at the end of life should not be confused or equated with the right to die and unnatural death curtailing the natural span of life. There has been a long debate whether a person, his heir or relative can take decision to end the life of an individual in certain circumstances such as incurable diseases or the person suffering very painful life. Also there are some certain religions like Hindus and Jains where the Samadhi and Santhara are accepted as voluntary mode of ending one's life. However, under Sikh and Muslim religion, voluntary ending of life is not permitted. Various countries have divided Law and Opinion on need and justification of self ending life. Recently Supreme Court in Aruna's case permitted removal of life support under special circumstances.

In this research paper the author seeks to examine in detail Law and Policy of euthanasia in comparative manner, contradictory and critical issues have been also examined in this paper. The author feels that active euthanasia should not be permitted whereas in special circumstances passive euthanasia can be permitted.

Key words: Right to Life, Active euthanasia, Socio-Religious theory, Euthanasia, Passive Euthanasia.

Tell me not, in mournful numbers,
Life is but an empty dream
For the soul is dead that slumbers
And things are not what they seem

Life is real! Life is earnest
And the grave is not its goal;
Dust thou art, to dust returnest,
Was not spoken of the soul.[1]

1. Introduction

Article 21 guarantees the most precious fundamental right, i.e., Right to life. Article 21 lays down, "No person shall be deprived of right or personal liberty except according to procedure established by law." Right to life includes right to live with human dignity. All other rights enumerated under Article 21 through judicial interpretation emerge out of the fountain of human dignity. The Supreme Court in Maneka Gandhi v. Union of India[2] stated:

"[F]undamental Rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent".

The Supreme Court very rightly observed in Gian Kaur v. State of Punjab[3]:

"The "right to life" including the right to live with human dignity would mean the existence of such right upto the end of natural life. This also includes the right to a dignified life upto the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the "right to die" with dignity at the end of life is not to be confused or equated with the "right to die" an unnatural death curtailing the natural span of life".[5]

To give meaning and content to the word "life" in Article

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1 Long fellow, (ed) Yale Book of American Verse (1912), http://www.bartleby.com/102/55.html Accessed on 13th September, 2013 at 12.15AM.

2 AIR 1978 SC 597.

3 (1996) 2 SCC 648.

4 *Id.* at 660.

5 *Ibid.*

21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the right to life.[5] To consider euthanasia vis a vis right to life, different views may be there. One view is that right to die is inherently inconsistent with the right to life, as is death with life.[6] Another view may be that premature termination of life in case of a dying man who is terminally ill or is in a persistent vegetative state may fall within the ambit of right to die with dignity as a part of right to live with human dignity as the process of natural death has already commenced.[7]

The objective of this study is to examine in detail law and policy of euthanasia in comparative manner.

2. Meaning of Euthanasia

The term 'Euthanasia' is derived from the Greek term Eu which means good and Thanatos which means death and Euthanasia means good death.[8] Euthanasia has also been defined as an act of mercy, the easy and the painless death of a patient who has an incurable and intractably painful and distressing disease.[9]

Euthanasia and suicide are different. The Bombay High Court distinguished euthanasia from suicide in Naresh Marotrao Sakhre v. Union of India[10] in the following words:

"Suicide by its very nature is an act of self killing or self destruction, an act of terminating one's own life and without the aid or assistance of any other human agency. Euthanasia or mercy killing, on the other hand, means or implies the intervention of other human agency to end the life".

A distinction can also be drawn between euthanasia and physician- assisted dying, the difference being in who administers the lethal medication. In euthanasia, a physician or third party administers it, while in physician-assisted suicide it is the patient himself who does it, though on the advice of the doctor.[11]

2.1 Religious Views on Euthanasia

There are two Hindu views on euthanasia. From one perspective, a person who relieves others of painful life, performs good karma. From the other perspective euthanasia interrupts the timing of the cycle of rebirth and both the doctor and patient will take on bad karma. The Buddhist view also condemns any act destructive of life. Hindu and Buddhist scholars have also found support for active euthanasia in their traditions by reflecting on the meaning of death as a door to liberation.[12] The Jain faith in totality is not in favour of suicide or euthanasia. However to attain Moksha some Jainas spent the last days of their lives in severe hunger and thirst and exposing their body to severe conditions known as Santhara or Samadhi.[13] The Sikh Gurus rejected suicide and euthanasia as an interference in God's plan.[14] Muslims are also against euthanasia. They believe that all human life is sacred because it is given by Allah. Euthanasia and suicide are not included among the reasons allowed for killing in Islam.[15] Christians are mostly against euthanasia. They raise the argument that life is a gift from God and no human being has the authority to take the life of any innocent person.[16]

2.2 Types of Euthanasia

Euthanasia is of two types: active euthanasia and passive euthanasia. Active euthanasia entails the use of lethal substances or forces to kill a person, e.g., a lethal injection given to a person with a terminal illness who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life, e.g., withholding of antibiotics where without giving it a patient is likely to die, or removing the heart-lung machine, from a patient in coma. The difference between active and passive euthanasia is that in active euthanasia something is done to end the patient's life while in passive euthanasia something is not done that would have preserved the patient's life. Passive euthanasia is further classified as voluntary and non-voluntary. Voluntary euthanasia is

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6 *Ibid*.

7 *Ibid*.

8 Becker and Becker (Eds), *Encyclopedia of Ethics*, 492 (2001).

9 *Butterworths Medical Dictionary*, 626 (999).

10 1995 Cr L J 96 (Bom).

11 *Aruna Rama Chandra Shanbaug v. Union of India*, (2011) 4 SCC 454 at 491.

12 Namita Nimbalkar, "Euthansia: The Hindu Perspective", http://www.vpmthane.org/Publications(sample)/Bio-Ethics/Namita%20Nimbalkar.pdf Accessed on 14th September, 2013 at 7.00pm.

13 S. Settar, *Inviting Death: Indian Attitude Towards Ritual Death*, 115 (989).

14 Nikhil Agrawal, "Euthanasia- A Theological Approach" Available at http://www.legalserviceindia.com/articles/yasia.html Accessed on 14th September, 2013 at 7.30pm.

15 *Ibid*.

16 *Ibid*.

where the consent is taken from the patient. In non-voluntary euthanasia the consent is unavailable on account of the condition of the patient, e.g., when the patient is in coma or is otherwise unable to give consent.[17]

3. Position in other countries

Netherlands

Netherlands was the first country to legalise euthanasia. Euthanasia in the Netherlands is regulated by the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002. It states that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with the criteria of due care. Euthanasia of children under the age of 12 remains technically illegal.[18]

Switzerland

Assisted suicide is legally permitted and can be performed by non-physicians. However euthanasia is illegal.[19]

Belgium

Belgium became the second country to legalise practice of euthanasia in September 2002.[20]

UK, Spain, Austria, Italy, Germany, France

In none of these countries euthanasia or physician-assisted death is declared legal. In January 2011, the French Senate defeated by a 170 to 142 vote on a Bill seeking to legalize euthanasia. In England, in May 2006, a Bill allowing physician-assisted suicide was blocked and never became law.[21]

United States of America

Active euthanasia is illegal but physician-assisted death is legal in the States of Oregon, Washington and Montana.[22]

4. The Euthanasia Controversy

4.1 Views opposing euthanasia

Those who invoke the sanctity of human life contend that it always affords a reason for a human life to be protected against intentional killing and that 'this constitutes a decisive reason against legislation.'[23] Robert Young

17 *Supra* note 11, at 491- 492.

18 *Id*. at 492.

19 *Id*. at 494.

20 *Ibid*.

21 *Id*. at 495.

22 *Ibid*.

23 Robert Young, *Medically Assisted Death*, 62 (2007).

24 *Id,* at 68.

25 *Id*. at 84- 85.

26 *Id*. at 88.

27 Kannamma Raman, "The Right to a Dignified Death- Need For Debate", *IJME* 4(1) (1996).

28 Cited in "Potential Dangers of Physician- Assisted Suicide and Euthanasia". Available at http://www.nightingalealliance.org/cgi bin/home.pl?article=96 Accessed on 14th September,2013 at11.30pm.

individual liberty. The constitution guarantees the fundamental rights and freedoms to people where the positive right includes the negative right. The right to life should include within it the right not to live. People should not be forced to stay alive. It is the right of an individual to make a choice whether to live or not to live.[36]

One practical argument in favour of euthanasia is that if option to die in case of people facing terminal illness is allowed, family members may save unproductive medical expenses and it may add to medical funds of the state to help other needy people. It may help many poor people who die due to non-affordability and non-availability of medical health.[37]

In brain death cases, resorting to euthanasia may help in donating organs before the body organs become non-functional. For example, in the case of a three year old brain dead girl Tamanna who had met with a road accident in 2009 in Bangalore, ending her life led to saving three other lives with timely transplant of her organs through a well coordinated effort by doctors.[38]

The proponents of legalizing euthanasia take euthanasia as a rational decision given the circumstances of terminal illness, pain, increased disability and continuously becoming burden on the family.[39]

5. Different Situations Regarding Euthanasia

The whole issue revolves around three types of cases discussed below:

Firstly, people who want to die and commit suicide, even though suicide is a private individual act of ending one's own life. Even though the act of suicide is an offense against life, he is not punished because the person who commits suicide is no more. Even an attempt to commit suicide is not punishable in many countries because such persons need sympathy and compassion for recovering from depressing state. [40]

Secondly, there are people who intend to die but need assistance in achieving death due to helpless condition arising out of infirmity caused by physical or mental illness, disease, old age or such other condition.[41]

Thirdly, there are people who cannot communicate their willingness to die because of physical or mental disability, terminal illness or coma and need euthanasia. This is the case which involves the main controversy.[42] For dealing with rights of unconscious patients, there may be two situations. Firstly, the unconscious patient might have decided himself under appropriate condition and before becoming incompetent.[43] Every State in America now recognizes advance wishes in the form of Living Wills or Health Care Proxies. Living Will is a document stipulating that specified medical procedures should not be used to keep the signer alive in certain specified circumstances. Health-Care Proxy is a document appointing someone else to make life and death decision for the signer when he no longer can.[44] Secondly where the patient doesn't express his wish, an individual's incapacity together with an absence of advance directive should not serve as basis for denying him the rights of freedoms which competent patients enjoy in the exercise of their right to privacy.[45] If someone did not indicate his wishes, the relative might ask whether he would have wanted to die or to be killed if he had thought about it.[46] There can also be application of principle of best interest of the patient. In an English case[47], the court held that if any person due to accident or some other cause becomes unconscious and cannot give consent to medical treatment then the medical men must act in the best interests of the unconscious patient and there for it cannot be treated as crime. The court also observed that existence of a vegetative state with no prospect of recovery is not in the interest of the patient. It is ultimately for the court to decide as to what is in the best interest of the patient by giving weightage to the wishes of close relatives and friends and opinion of medical practioners.

The 17th Law Commission commented on Airedale's case in the following words:

"The above judgment of the House of Lords in Airedale

29 *Ibid.*

30 Sujata Pawar, "Right to Die, How For Right? Judicial Respones" 2010 *Cr L J*, 280- 288 at 284- 285 (Journal Section).

lays down a crucial principle of law when it says that withholding or withdrawal of life support to a dying patient merely amounts to allowing the patient to die a natural death and that where death in the normal course is certain, withholding or withdrawal of life support is not an offence".[48]

6. Indian Legal Position

In India, both forms of euthanasia are illegal. Murder is punishable under Section 302 of the Indian Penal Code. Under exception 5 of Section 300 of Indian Penal Code culpable homicide is not murder when the person whose death is caused is above the age of 18 years and suffers death with his own consent. The consent must be informed consent of a person who is major and is of sound mind. The first part of Section 304 punishes voluntary active euthanasia and the second part punishes voluntary passive euthanasia. Non- voluntary and involuntary euthanasia would be struck by proviso one to Section 92 of the Indian Penal Code. Passive euthanasia would be construed as abetment to suicide punishable under Section 306 of Indian Penal Code. The Law Commission in its 196th report proposed "Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill 2006." Such legislation while approving the passive euthanasia introduced the safeguards to be followed in the case of such patients who are not in a position to express their desire or give consent. This is the consequence of the Supreme Court's approval of passive euthanasia in Aruna's case. The Hon'ble Minister of Law and Justice after referring to the observations made by the Supreme Court requested the Commission "to give its considered report on the feasibility on making legislation on euthanasia taking into account the earlier 196th report of the Law Commission. The main features of the Bill are:

(I). The attending medical practitioner will have to obtain the experts' opinion from an approved panel of medical experts before taking a decision to withdraw medical treatment to such patients. It would be open to the patients, relations etc to approach the High Court for an appropriate declaratory relief.[49]

(ii). A terminally ill but competent patient has a right to refuse treatment including discontinuance of life sustaining measures and the same is binding on the doctor provided that the decision of the patient is an

54 1987 Cr L J 743 (Bom).

55 *Id*. at 752.

56 1988 Cr L J 549 (A..P).

57 AIR 1994 SC 1844.

58 *Id*. at 1868.

59 *Supra* note 3.

60 *Id*., at 952.

61 *Id*. at 955.

62 *Supra* note 11.

63 *Supra* note 48 at 25.

It needs to be mentioned that long back in 1971 the Law Commisision in its 42nd report pleaded for obliterating Section 309 from the statute book. The Law Commission in its 210th report also recommended the repeal of section 309 of IPC so that the attempt to commit suicide would be decriminalized.[64]

In Aruna's Case the Supreme Court discussed the issue of euthanasia in detail. Aruna was a staff nurse working in King Edward Memorial Hospital. In 1973, she was attacked by a sweeper who wrapped a dog chain around her and yanked her back with it. He tried to rape her but finding that she was menstruating, he sodomized her. To immobilize her he twisted the chain around her neck. The next day she was found in an unconscious condition. The neurologist found that she had plantars' extensor which indicates damage to the cortex or some other part of the brain. It happened 36 years ago and now Aruna was 60 years of age. The Hon'ble Supreme court dismissed the plea for Aruna. Aruna was not brain dead. She had some brain activity. She met most of the criteria for being in a permanent vegetative state and there was no probability of her coming out of it. While rejecting active euthanasia the court legalized passive euthanasia that is withdraw or discontinue life support system.

In this case, the Supreme Court held that the view in Rathinam case that right to life includes right to die is not correct.[65] The Report also observed that the general legal position all over the world seemed to be that while active euthanasia is illegal unless there is legislation permitting it passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained.[66]

Referring to passive euthanasia, Supreme Court observed that there is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in a permanent vegetative state (PVS) or who is otherwise incompetent to take a decision in this connection. The Supreme Court very rightly held:

"[We] are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject".[67]

The Supreme Court clearly laid down that a decision has to be taken to discontinue the life support either by the parents or the spouse or other close relatives, or in the absence of any of them such a decision can be taken even by a person or a body of person's acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bonafide in the best interest of the patient. Even if a decision is taken by the near relatives or doctors or next friend to withdraw life support such a decision requires approval from the High Court. This is necessary as the possibility of mischief being done by relatives or by others for inheriting the property of the patient cannot be ruled out.[68] The Supreme Court applied the doctrine of parens patriae (father of the country). In the opinion of the court and in the case of incompetent person who is unable to take a decision whether to withdraw life support or not, it is the court alone, as parens patriae which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight.[69]

When such an application is filed before the High Court, the Chief Justice of the High Court should constitute a bench of two judges who should decide to grant approval or not. Before doing so the bench should seek the opinion of a committee of three reputed doctors to be nominated by the bench after consulting such medical authorities as it may deem fit. Preferably one of the three doctors should be a neurologist, one should be a psychiatrist and third should be a physician. For this purpose a panel of doctors in every city may be prepared by the High Court in consultation with the State Government/ Union Territory and their fees for this purpose may be fixed.[70]

In the present case, the Supreme Court noted that Aruna's parents were dead and close relatives were not interested in her. KEM Hospital staff have been looking after her day and night for so many long years and they have clearly expressed their wish that Aruna should be allowed to live. The Court held that assuming KEM Hospital staff at some future time changes its mind, then they would have to apply to the Bombay High Court for approval of the decision to withdraw life support.

7. Conclusion

Be that as it may, euthanasia vis a vis right to life has evoked a response against adopting active euthanasia. In the present scenario, the society is at the mercy of crime being committed by its own members and the state is struggling hard to give protection to its subjects and punish

64 *Supra* note 11 at 487.

65 *Id.* at 491.

the wrongdoers. Under these circumstances, the plea for active euthanasia, which involves active role on the part of third party in granting freedom from life (which may not be worth living), stands on a very weak footing. At the same time it cannot go unnoticed that the bond in the family system is on the breaking point now a days. If unfortunately anybody due to some accident or disease goes into coma and is converted into vegetative state, there is every possibility that there will be none in the family to look after him. Everyone is not like Arun Shanbaug who was taken care by the hospital staff only. In view of the above, a valid argument can be built in favour of passive euthanasia. The Apex Court has also affixed its seal on it. It is the need of the hour that the recommendations of the Law Commission in its 196th report should be accepted and legislation be passed by the Parliament.

The Juvenile Justice Act and Public Interest Litigation in India

Monifa Crawford *

ABSTRACT

This article examines the provisions of the Juvenile Justice Act and the issues of implementation. The latter part of the article discusses whether HAQ: Center for Child Rights may initiate a Public Interest Litigation (PIL) action against the Government of India for violations of the rights of Juveniles "in conflict with the law."

Keywords: Juvenile, Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, Juvenile Justice Board, Public Interest Litigation, Child Rights.

1. Introduction

"So long as little children are allowed to suffer, there is no true love in this world."[1] Justice is everybody's right. Justice for children is to be ensured by adults because they cannot lobby for themselves. Juvenile justice policy in India is largely governed by the constitutional mandate under Article 15 that guarantees special attention to children through necessary and special laws and policies that safeguard their rights. The Rights to Equality, Protection of Life and Personal Liberty and the Right Against Exploitation are written in Articles 14, 15, 16, 17, 21, 23, and 24 of the Indian Constitution. The Constitution of India recognizes the vulnerable position of children and their right to protection.[2]

India has the distinction of having the largest child population of any country in the world, with approximately 450 million children under the age of 18.[3] In early 2000, India recognized its unique obligation to one particular segment of that child population through the landmark Juvenile Justice (Care and Protection) Act of 2000 ("JJ Act"). The law governs the treatment of children "in conflict with law". These are children who would traditionally be described as juvenile offenders in the United States.[4] In India, children entering the juvenile justice system frequently face grave threats to their individual rights, yet their plight is often ignored. Police abuse is very common.[5] Children languish in the system for years, either as residents of the country's decrepit detention facilities, without access to meaningful education or employment opportunities, or as the subject of endless proceedings that needlessly draw them away from school or work and serve as a significant financial drain on the child's family.[6]

The Juvenile Justice (Care and Protection of Children) Act (2000), amended in 2002 and 2006, revamped the old Juvenile Justice Act, bringing together all aspects of interaction between these children and the legal system.[7] It was originally written in response to recommendation of the U.N. Committee on the Rights of the Child recommendation that India should incorporate the aims of the Convention on the Rights of the Child ("CRC") into domestic legislation.[8] The law is far reaching in its scope and intent, covering areas such as adoption, abuse, neglect, and children in conflict with the law. The Juvenile

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1 Devashish Konar, *Juvenile Justice as a Part of Child and Adolescent Care*, JIACAM Vol. 1, No. 3, Article 3.

2 G.S. Bajpai, *Making it Work: Juvenile Justice in India*, Dept. of Criminology & Forensic Science.

3 UNICEF, India – Statistics, http://www.unicef.org/infobycountry/india_statistics.html#0 (last visited March 1, 2011).

4 The Juvenile Justice (Care and Protection of Children) Act, of 2000. The JJ Act defines "juvenile in conflict with law" as a " juvenile who is alleged to have committed an offence;" the act defines "offence" as an offence punishable under any law for the time being in force;" and "juvenile" as "a person who has not completed eighteenth year of age." JJ Act, ch. 1, §§ 2(k)-(l).

5 In person interview coordinated by Monifa Crawford of the Charlotte School of Law with Parul Thukral, Program Coordinator, HAQ: Center for Child Rights, in New Delhi India (Dec. 21, 2011). HAQ: Centre for Child Rights works towards the recognition, promotion and protection of rights of all children. It aims to look at the child in an integrated manner within the framework of the Constitution of India, and the UN Convention of the Rights of the Child, which India ratified in 1992, and contribute to the building of an environment where every child's rights are recognized and promoted without discrimination. http://www.haqcrc.org/about-us.

6 Kethineni & Klosky, *Juvenile Justice and Due Process Rights of Children in India and the United States,* 15 INT'L CRIM. J. REV. 131, 138-139.

7 Ministry of Women and Child Development, Government of India, Building a Protective Environment for Children (2006). P. 22.

8 Rickard & Szanyi, *Bringing Justice to India's Children: Three Reforms to Bridge Practices with Promises in India's Juvenile Justice System*. UC Davis Journal of Juvenile Law & Policy. Vol. 14: 1.

Justice (JJ) Act, like the aforementioned international agreements, aims to preserve the dignity and best interests of a child.[9]

The amended JJ Act created a separate entity from the traditional justice system: the Juvenile Justice Board ("JJB").[10] This entity was designed to be a legal body that is more sensitive to the needs of children. Each JJB consists of a three-person panel with one magistrate and two social workers. [11] JJBs typically meet one to three times a week, and proceedings generally consist of brief hearings before the child and his/her family with reports by probation officers and occasional witnesses.[12] In addition to the creation of the JJB, the amended JJ Act includes such provisions as the right to speedy proceedings[13] and the creation of child-friendly police units.[14]

The recent reforms to India's juvenile justice system hail a new commitment to the country's international obligations regarding its children and a change in the philosophy guiding the treatment of some of India's most marginalized youth.[15] However, there is evidence that these reforms are yet to trickle down to the local level where they would actually have a real impact on the experience of children in the system.[16] For many children in India, the promise of a more just and equitable system remains elusive.[17] At the ministerial level, the implementation of juvenile justice was not found satisfactory.[18] It is stated "….these policies and legislations for children have on the whole suffered from weak implementation, owing to scant attention to the issues of child protection, which results in scarce

9 General goal of the Convention on the Rights of the Child, Nov. 20, 1989.

10 JJ Act, *supra* note 3, arts 4-7. JJBs were first established by the JJ Act of 2000, the first of which were established in January 2003. JJBs have not yet been established in some districts. The JJB board is the authoritative body that interprets the JJA and ensures the justice system is compliant.

11 JJ Act, *supra* note 3, ch. 2§ 4(2) (indicating that a JJB "shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman").

12 The JJ Act does not require the JJB to sit for a specified number of sessions.

13 Inquiries are generally required to be completed within four months. JJ Act, *supra* note 3, ch. 2 § 14.

14 *Id* at ch.5, § 63.

15 See *supra* note 8, p. 112.

16 *See e.g.,* M.R. Deepthi, *India sends exaggerated reports to UN on child rights; NGOs oppose*. 2012 Diligent Media Corporation Ltd. (Quoting "they have simply glorified the state of affairs while the reality is in front of us."

17 See *supra* note 8, p.111.

18 See *supra* note 2, p. 3.

19 *See supra note* 2, p.3.

20 *See supra note* 5, oral interview.

21 *See supra note* 5, oral interview.

22 JJ Amendment Act, 2006. *Amendment of Section 10*: "As soon as a juvenile in conflict with law is apprehended by police, he shall be placed under the charge of the special juvenile police unit or the designated police officer, who shall produce the juvenile before the Board without any loss of time but within a period of twenty-four hours of his apprehension excluding the time necessary for the journey, from the place where the juvenile was apprehended, to the Board: Provided that in no case, a juvenile in conflict with law shall be placed in a police lockup or lodged in a jail."

23 *See supra note* 5, oral interview.

24 Observation Homes are the locations where juveniles in conflict with law are incarcerated pending disposition of their cases or bail release. These Homes are each connected to a Juvenile Justice Board, and hold children from up to four districts within a state. Observation Homes are designed to be less punitive or stigmatizing than a jail, and staff members are prohibited from using weapons or handcuffs on the children.

25 Erika Rickard. *Paying Lip Service to the Silenced: Juvenile Justice in India*. Harvard Human Rights Journal. Vol. 21, p. 161. 2008.

2.4 Presumption of guilt

The "presumption of innocence" is a crucial element of criminal judicial proceedings in India, but becomes complicated in juvenile proceedings.[33] As per the Committee on the Rights of the Child (CRC), the presumption of innocence means that "the burden of proof of the charge(s) brought against the child is on the prosecutor."[34] This is a conflict of interest for the JJB, which does not generally have a separate prosecutor. The JJB therefore acts as both arbiter and prosecutor.[35] Moreover, the fact that guilt and retribution are not intended to be elements of the proceedings means that for any crime, all children receive the same punishment, if any.[36] The impotence of the JJB and the insignificance of its outcomes are criticized by government officials, and have also led to an indifference on the part of all actors in the system as to whether the child actually committed the offense in question.[37] As a result of widespread criticism, the JJB generally finds that children cannot be innocent of a crime. All juveniles, regardless of guilt or innocence, undergo the same experience: waiting, either on bail or in an Observation Home, to be processed and released.[38] There is essentially no type of reformation on the behavior of many juveniles, which may lead them back into the juvenile system.

2.5 Delay in the right to a speedy proceeding

To ensure speedy proceedings, the JJ Act specifies that proceedings "shall be completed within a period of four months from the date of commencement," but with exceptions, if the "period is extended by the Board having regard to the circumstances of the case, and in special cases after recording the reasons in writing for such an extension."[39] This discretion should be abolished as it allows cases to languish in the system indefinitely. Due to the lack of reporting mechanisms, the percentage of cases that last longer than four months is unknown.[40] However, the existence of any such case that does not have proper justification violates the JJ Act.[41] Talks with HAQ representatives reveal that the juvenile system is very congested. Sadly, admission of guilty is one way that the juvenile may quickly proceed to release and admonition. Otherwise, he/she may be stuck with a lengthy delay.

2.6 No likelihood of bail

The JJ Act intends that bail be granted as frequently as possible, regardless of the nature of the offence, only allowing exceptions in those situations where the child's release is "likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice."[42] Despite this provision, magistrates are reluctant to grant bail when they do not have proof of residence, as they have no way of ensuring that the children will return to future hearings.[43] Magistrates grant bail to school children and those parents who can provide landed surety, but are less likely to grant bail to children of day labourers, Children are rarely granted bail, if only extended family rather than parents come to claim them.[44] This has resulted in widespread discrimination against children of different socio-economic backgrounds.

2.7 Police brutality

For nearly all the children who enter the juvenile justice system, the police are the first point of contact.[45] In the United States, police are frequently faulted as a weak link in the juvenile justice system. This criticism focuses on the misuse or abuse of discretion by individual officers, which

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26 *See supra note* 1.

27 *See supra note* 1.

28 Erika Rickard. *Paying Lip Service to the Silenced: Juvenile Justice in India*. Harvard Human Rights Journal. Vol. 21, p. 157.

29 *Id*.

30 *Id*.

31 *Id*.

32 *Id*.

33 *Id* at p. 158.

34 U.N. Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, ¶ 42, U.N. Doc.

35 *See supra* note 28 at p. 158.

36 *Id* at p. 158.

37 *Id* at p. 158.

38 *Id* at p. 158.

39 JJ Act, *art. 14*: "Where a juvenile having been charged with the offence is produced before a Board, the Board shall hold the inquiry in accordance with the provisions of this Act and may make such order in relation to the juvenile as it deems fit: Provided that an inquiry under this section shall be completed within a period of four months from the date of its commencement, unless the period is extended by the Board having regard to the circumstances of the case and in special cases after recording the reasons in writing for such extension."

40 Erika Rickard. *Paying Lip Service to the Silenced: Juvenile Justice in India*. Harvard Human Rights Journal. Vol. 21, p. 159.

41 *Id* at p. 159.

ultimately leads to a substantial number of children coming into contact with the system, which should not be there.[46] The same criticism applies in India, where police are funneling children into a system that is already overworked and under-resourced.[47] Further, they are doing so in a system where false arrest and physical abuse by the police has become a common feature of a child's interaction with law enforcement officials.[48] Thus, a significant amount of abuse occurs even before the child comes into contact with the formal juvenile justice system.[49] Juveniles also tend to be involved in abusive interrogation techniques, sometimes bordering on torture.[50] Police are reputed to have an arrest quota, so they pin cases on children they can torture without repercussions (usually children from poorer backgrounds). The common refrain from children is that if they "make one mistake" by committing one crime, they can be expected to be brought in for questioning by police indefinitely, for any or no cause,[51] which may lead to police brutality. As stated earlier, there are also reports of abuse within the Observation Homes. Lack of supervision and limited staff, combined with a lack of training, strain the relationships between home staff and children.

3. Public Interest Litigation

After reviewing the abuses that are common within the Indian juvenile justice system, this section discusses whether a non-government organization (NGO), such as HAQ: Center for Child rights, may bring a suit against the government as a Public Interest Litigation (PIL).

3.1 Background

PIL was not a sudden phenomenon.[52] It was an idea that

42 JJ Act, *art. 12:* Subsection 1-3: "When any person accused of a bailable or non-bailable offence, and apparently, a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. (2) When such person having been arrested is not released on bail under sub-section (1) by the officer in charge of the police station, such officer shall cause him to be kept only in an Observation Home in the prescribed manner until he can brought before a Board. (3) When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an Observation Home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

43 *See supra* note 40 at p. 160.

44 *Id.*

45 Rickard & Szanyi, *Bringing Justice to India's Children: Three Reforms to Bridge Practices with Promises in India's Juvenile Justice System*. UC Davis Journal of Juvenile Law & Policy. Vol. 14: 1, p. 113.

46 Larry J. Siegel, Brandon C. Welsh & Joseph J. Senna, *Juvenile Delinquency: Theory, Practice, and Law 404* (9th ed. 2006)

47 *See supra* note 45.

48 National Commission for the Protection of Child Rights, Government of India, (2007 Report).

49 *See supra* note 45, p. 115.

50 *See supra* note 40, p. 161.

51 Erika Rickard. *Paying Lip Service to the Silenced: Juvenile Justice in India*. Harvard Human Rights Journal. Vol. 21. Interview done by Rickard with juveniles in Bangalore, India.

52 Ashok Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*. International Environmental Law Research Center. http://www.ielrc.org/content/a0003.pdf

must also be careful to ensure that there is no abuse of the PIL litigation process. Frivolous claims should be guarded against and the judicial system must be prudent to ensure that premature cases do not clog the system. The Court further stated in Raunaq International Ltd. v. I.V.R. Construction Ltd,[68] that:

When a petition is filed as a public litigation... the Court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not merely be a cloak for attaining private ends of a third party or of the party bringing the petition...Even when public interest litigation is entertained the Court must be careful to weigh conflicting public interest before intervening. Intervention by the Court may ultimately result in delay in the execution of the project.

3.3 Remedies

There are many types of remedies which may be given in Public Interest Litigation which include: Interim measures, Appointing a Committee, and Final Orders.[69] Interim measures are measures taken to prohibit a certain violation.[70] For example, one recommended interim measure is to suspend police officers who have been found to abuse juveniles while they are being processed in the system after the arrest. Appointing a committee is another remedy that allows the local Court to take a deeper look at the current issue. In these instances, the Court may appoint a committee, or commissioner to look into the matter, and submit its report.[71] An example of this is the Court appointing a board to review the reports/data that show how many juveniles have actually had the right to a speedy procedure within the juvenile justice system. Final orders are also given by the Court as a way of direction to comply within a stipulated time.[72] I believe that an example of an effective Final Order from the Court is one that promotes the training of all police officers who come in contact with juveniles, to have compliant behavior that is aligned with the Juvenile Justice Act 2000.

3.4 HAQ: Center for Child Rights' Recommendation

The rights of the child have found a reference in Indian legislation, but India is far from recognizing those rights to its children. The operations under the JJA 2000 are replete where judicial bodies did not apply the law correctly. In case of grave offences by children, judges continued to apply the penal law approach and not that included under the JJA 2000.[73] For this reason, and among others stated in this paper, the HAQ should file a PIL on behalf of juveniles since their rights have not been properly protected under the JJA.

Justice is a cardinal principle of the Constitution of India, and being the supreme law of the land, subordinate law cannot afford to ignore this principle. A recommendation for HAQ is to encourage the organization to be persistent in their efforts to changing and challenging the government on oversights. HAQ should also continue to educate the public, volunteers, and law students so that they will have sufficient knowledge about the juvenile justice system. Lastly, I would encourage HAQ to file a PIL, as this will force the government to address this area of concern.

4. Conclusion

The relevant provisions of the JJA leave much to be desired. What has always been a question is who will be responsible for the injustice faced by juveniles in the system. There are rules that are nicely crafted in order to protect the rights of juvenile, but there has not been proper enforcement. Hopefully a future PIL on behalf of HAQ, will

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53 *Id* at p.1.

54 *Id*.

55 *See supra* note 52, p.1.

56 *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161 at 188.

57 *See supra* note 52, p.1.

58 Granville, Austin, *The Indian Constitution: The Cornerstone of a Nation*, Oxford University Press, New Delhi, 1999, p.50.

59 *See supra* note 52, p.1.

60 *Id* at p. 1.

61 Blacks Law Dictionary

62 Divyam Agarwal, *Public Interest Litigation in India*. http://www.1888articles.com/print_article.php?id=07frj78y3

63 *Id* at p.1.

64 *Id* at p.1.

65 *Id* at p.1.

66 *S.P. Gupta v. Union of India* 1981 Supp. SCC 87 at 210.

67 *See supra* note 62. For example, HAQ may file a PIL against the Indian government and include the name of a specific policeman, who may be known to have contributed to police brutality while a juvenile was in custody.

68 *Raunaq International Ltd. v. I.V.R. Construction Ltd,* (1999) 1 SCC 492 at 501. This case was not a PIL.

start the dialogue for a deliberate conversation that is well needed.

69 *See supra* note 62, http://www.1888articles.com/print_article.php?id=07frj78y3.

70 *See supra* note 62, http://www.1888articles.com/print_article.php?id=07frj78y3.

71 *Id.*

72 *Id.*

73 Kumari, Ved. *Juvenile Justice : Securing the Rights of Children During 1998 – 2008.* NUJS Law Review 557 (2009).

Book Review

Law Relating to Human Rights by Prof. S.R. Bhansali, Universal Law Publishing Co. New Delhi 2013, pp.1415+ i-ixii

*Prof. (Dr.) M.K. Bhandari**

The history of Human Rights is co-extensive with history of civilization. The progressive evolution of civilized society is journey in continuum and so also the journey of Human Rights. The notion of natural law, justice, equality, fairness natural justice, all are but the various forms and shades of human Rights Jurisprudence.

But it is equally true that Human Rights as a distinct subject of study, research and enforcement has emerged in the recent past.

There is a vast pool of literature on Human Rights all around the world. But it can be convincingly asserted that the present book under review is one of the most comprehensive treatises on Human Rights. Prof. S.R. Bhansali,[1] who at this advance age of 77 has written a master piece compendium addressing almost all possible dimensions of Human Rights. During his post retirement clan sprawling in 17 years, he has enriched the pool of legal literature with several legal classics.[2] Any young legal scholar can envy, yet emulate his zest and zeal to serve the cause of legal education.

While writing a very illuminating and brilliant forward Hon'ble Justice Dalveer Bhandari[3] has aptly stated[4];

Professor Bhansali has undertaken the arduous and enormously complex task of presenting such a useful compendium on Human Rights. This book fulfills a long felt need for all those who are keen to do research in the field of Human Rights. Legal profession, judicial fraternity and academic world owe a debt of gratitude to the author for producing such a useful book.

This reviewer derives a great sense of pleasure and academic satisfaction in writing a detailed review of ibis massive work. It may help the readers to learn and enthuse themselves to read and possess this work as their precious academic treasure.

In order to deal with all emerging international and national issue and theme of Human Rights, the author has distributed the whole work into VII Parts containing 31 Chapters.

Part I, deals with the concept of right and historical development. Further, the genesis and origin of Human Rights has been traced in oriental[5] and occidental[6] civilization. Views of political thinkers such as Socrates, Plato, Aristotle, Hugo Grotius, Kant, Locke, Blackstone and Dicey are also discussed.[7]

An interesting and useful comparison of the concept of Natural Rights, Human Rights and Fundamental Rights (in India)[8] helps in bringing conceptual clarity about the nature and scope of Human Rights.

Having narrated the historical development and basic foundation of Human Rights, Part II[9] has devoted a considerable space to explain the various international efforts made to strengthen, expand and globalize the Human Rights reach.[10] The United Nations has done commendable work through its specialized agencies in promoting Human Rights. Beginning from Universal Declaration of Human Rights followed by International Bill of Human Rights and ILO conventions, a very sound global system has been established.

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1 Professor S.R. Bhansali served as Dean and Head, Faculty of law, JN. Vyas University from 1984-1994. He was also UGC Emeritus Professor of Law (1995-1997). He has been principle Architect and planner for establishing National Law University at Jodhpur.

2 After attaining superannuation in 1994, Prof Bhansali has written following legal classics: Constitution of India in 2 volumes (2007), Right to Information Act, 2005 (2006), The Protection of Women from Domestic Violence Act, 2005 (2007). The Information Technology Act, 2000 (2011).

3 Justice Dalveer Bhandari is presently Judge, International Court of Justice, The Hague (He has also served as Judge, Supreme Court of India).

4 See. forward of Justice Dalveer Bhandari at P.X of the Book under review.

5 The concept of *Vasudeva Kutambakam* (Taitriyaopanished).The equality doctrine of *Atharva -veda* are some of oldest guiding principles for foundation of human rights.

6 Magna Carta 1215, Petition of Rights, 1628, French Declaration of rights of man, 1789, bill of Rights in US. Constitutions are but somepioneering human rights documents emanating from West.

7 at Pp.13-56 of the Book under review.

8 Ibid, at Pp. 3-9.

9 Part II of the Book contains chapters 3 to 8 in which progressive development of human rights at UN level, and ILO have been discussed in detail. (See Pp. 59-241).

10 Sec also Henry J. Steiner, Philip Alston and Ryan Goodman, International Human Rights in Context, oxford university Press, New York (2008).

Professor Bhansali has painstakingly made a comparative study of International Regime of Human Rights and its compatibility with constitutionally guaranteed Fundamental rights and state's obligation as Directive Principles.[11] This comparative chart will help in properly evaluating and enforcing human rights in India.

Regional Instruments on Human Rights in America, Europe, Africa, Arab and Commonwealth have further supplemented the global efforts of creating International tool and techniques of developing a eco-system of Human Rights in diversified world. Part III deals with regional instruments. A close look at African Charter and European charier reveals that on the issue of implementation and enforcement, the European model has set a very rigorous and effective mechanism Since the Continent of Asia has not, so far, evolved a regional Human Rights system for its countries, the study reveals that the lime is now ripe for evolving a close knit Asian Charter of Human Rights.[12]

Having systematically, explained and evaluated, the international and regional paraphernalia of Human Rights, author has now ventured to address the national eco-system of Human Rights. Part IV[13] has been devoted to study and analyze the position and placement of Human Rights in select National Constitutions.[14] A Comparative study of provisions relating to Human Rights in various national constitutions and statutes reveals that the fundamental rights enshrined under Article 14 to 32 of Indian Constitution along with Directive Principles (Art. 36-51) provide a strong and solid foundation for Human Rights in India. The judicial exploration of Article 21[15] so as to read all conceivable freedoms which make sense of "Human dignity" is a classic example of Supreme Court's, "Craft, Courage and contention". The role of National Human Rights Commission (NHRC) and State Human Rights Commission has been discussed in Chapter 11. Here, this reviewer has found that an empirical data input on NHRC'S role could help in evaluating and re-molding strategies for yet more effective role to be played by NHRC.

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11 Supra note 7 at Pp 88-92.

12 See Yash Ghai: The Asian Perspective on human rights CLEA, conference, Bangalore Jan. 1993 P.i.

13 See. at Pp. 349-594 of the Book under review.

14 Ibid at-Pp. 349-436.

15 See Suresh Mehta - A Comparative study of Right to Life and Liberty in India. USA and England (unpublished Ph.D. thesis conducted under the guidance of Prof. M.K Bhandari. JNV University, Jodhpur 1995).

16 Supra Note. 13 at Pp. 578 and 590-91. For more study on gender Justice, see also. Bhandari M.K. Domestic Violence: Threat for Gender Justice (Published in Dr. Ratin Bandyopadhya, (ed.) Law and Gender Justice, Alfa Publication, New Delhi (2012) at Pp 31-47. Also see Prof. M.K. Bhandari and Dr. M. Bhatt. Legal Aid and Para Legal Volunteer's scheme in India. IBH Publication, Jodhpur (2013).

17 For basic study, sec Dr. T.S N. Shastry. Human rights of Vulnerable and Disadvantaged groups, course group II University of Pune, (2012).

18 Chapter 13 at Pp. 667-744 of the Book under review.

19 Ibid. Chapter 14 at Pp. 745-775.

20 Ibid. Chapter 15 at Pp. 776-807.

21 Ibid. Chapter 16 at Pp. 807-889.

22 Ibid. Chapter 17 at Pp. 890.932. Also see Prof. M.K. Bhandari and Dr. M. Bhatt, Socio- Cultural Rights of Indigenous People: A human rights Perspective, Published in, S. Rajkhowa and Stuti. Dekha (ed.) Economic, Social and Cultural Social and Cultural Rights, 2 vols. EBH Publisher, Guwahti, (2013) (at Pp. 122-139).

The whole work is an outcome of massive study and meticulous research undertaken by Professor S.R. Bhansali.

The Painstaking efforts made in assembling, analyzing and converging as many as 1520 odd cases decided by courts in different jurisdictions of the world has made this Treatise as encyclopedic in nature. The research inputs are superb.

The publisher M/s. Universal Law Publishers have emerged as a pioneering publication house in promoting Human Rights literature. This book is a jewel in their crown. They deserve all praise for this initiative.

The reviewer considers it as a pleasant opportunity to venture into a herculean task of reviewing, such a massive work produced by the great legal scholar, teacher, and educational administrator such as Professor S.R. Bhansali.

This unique treatise on Human Rights, in the opinion of this reviewer, is indispensable and must be read book for all those who are interested in understanding, learning and researching on Human Rights, be they are students, teachers, lawyers, judges, social scientists, political leaders, policy makers, enforcement personnel and social activists.

23 Supra Note. 21. at Pp. 1101-1314.

24 Ibid Pan VII, Pp 1315-1400.

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