RESTORATIVE JUSTICE IN INDIA: AN OVER VIEW

Mr. Girish Kesava Pillai

The traditional process of criminal Justice Administration is unequivocally dominated by the concept of fair trial, and therapeutic and humanitarian drive towards the criminal. It takes all possible efforts to assure the proper punishment is inflicted on the criminal and reform and treat the criminal to re-socialise him to fit into the society. But it is poignant that a similar kind of compassion is not shown to the victims of crime. In fact it is imperative that the criminal justice administration has to take into account three factors namely criminological, penological and victimological aspects of crimes. Whereas the first two categories take into consideration the crime and the criminal, victimology takes into its purview the victim of the crime. Criminology and penology concern themselves with the tracing of the cause of crime and the prevention of the crime. Usually when too much importance is given to these two aspects of criminal law administration, the victims fail to get proper attention. The real plight of the victims of the crimes is aptly echoed in the following words of Gerard Ford, the former President of USA,

> "For too long the law has centered its attention more on the rights of the Criminal than on the victim of Crime. It is high time, we reversed this trend and put the highest priority on the victims and potential victims."[1]

In this regard, it is to be noted that when criminal justice is administered a balancing approach is necessary. The court shall not give excessive importance to either penological aspect or criminological aspect. In the administration of criminal justice, one has to balance the interest of the society as well as the victim. The society has an interest to see that no more crime is committed. It assumes the importance of penology. It requires that proper punishment is to be inflicted on the accused depending on the nature of the crime, antecedents of the accused, etc. It is also important that while the court is inflicting punishment, it shall not forget the victim. The interest of the victim and his kith and kin is also to be

[1] Message to American Congress by President Gerald R. Ford in 1975. Quoted from Ahmed Siddiqui, Criminology - Problems and Perspectives, 4th Edition, Eastern Book Company, P. 504.

protected. The interest of the victim has two limps viz. 1) satisfaction of his vengeance 2) compensating the loss suffered to him. The satisfaction of his vengeance together with the societal interest of inflicting proper punishment and prevention of the crime demands that appropriate punishment is to be inflicted on the criminal. If the system fails to do so, the individual vengeance may take on itself this role thereby causing chaos in the society as such. But today it is unconvinced to assume that the victims get justice by punishing the criminal in the light of decreasing number of convictions[2]. Even in cases were conviction of the offender is done, it cannot be assumed that the victim's interest protected. The punishment of the offender alone will not serve the ends of justice. In rendering proper justice the plight of the victim and his dependents play a significant part. They are also to be appropriately dealt with. It is here that victimlogy and victim's rights assume importance. Victimology takes care of the victim and his dependants, an aspect, which was often overlooked in the past. To quote Krishna Iyer, J.,

> "It is the weakness of our jurisprudence that victims of crime and the distress of the dependants of the victim do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our criminal law"[3].

But, recently due to the change in outlook the victimology and victim rights are piercing its roots slowly into the criminal justice administration[4].Victim rights have been inserted into the criminal law in three distinct ways. Most common law jurisdictions now offer a charter or declaration of victim rights detailing the rights and obligations of government agencies in their treatment of victims by providing modes of criminal injuries compensation that provide standard amounts of compensation for prescribed injuries flowing from an alleged criminal offence; and by providing opportunity to adduce into sentencing proceedings a victim impact statement to detail the harms occasioned as a result of the offence, after conviction but before sentencing[5].Thus giving rise to the concept like Restitutive or restorative Justice.

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[2] Menon, Madhava, NR, "Victim Compensation Law and Criminal Justice: A Plea for a Victim-Orientation in Criminal Law", in Vibhute K.I (Ed): Criminal Justice (Eastern Book Company, 2004) pp362-369

[3] Rattan Singh V.State of Punjab (1979) 4SCC719

[4] Vibhute K I, "Justice to Victims of Crime: Emerging Trends and Legislative Models in India", in Vibhute K.I (Ed): Criminal Justice (Eastern Book Company, 2004) pp370-395

[5] Tyrone Kirchengast,"The Landscape of Victims Rights in Australian Homicide Cases-lessons from International Experience", 31Oxford Journal of Legal Studies(2011)pp133-163

Restorative Justice –The Concept.

The concept of restorative or restitutive justice has taken roots in the criminal justice system during 1970s. The concept of Restitutive or Restorative justice provides a balancing approach by ensuring the participation of all stake holders in criminal justice administration. Definition of Restorative justice given by Tony Marshall is generally accepted. It states:

> "Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future"[6]

Accordingly it is a collective effort where in the state, the offender, the victim and all other stake holders have a meaningful role to play. Restorative justice largely emphasises on the principles such as,

1) Holding the offender accountable in a more meaningful way

2) Repairing the harm caused by the offence

3) Achieving a sense of healing for the victim and the community

4) Reintegrating the offender back into the community, etc.This identifies three central elements in restorative justice: the importance of process, the notion of stakeholders, and the fairly wide-ranging aspirations for outcomes. Restoration is seen as a form of reintegration of the community and of individuals. Outcomes are measured mainly by the satisfaction of the stakeholders in each case. One of the aims of the restorative justice movement is to replace forms of state justice by changing the focus of the term criminal justice itself. There is a shift from assumption that it is a matter concerning only the state and the offender, towards a conception that it includes stake-holders, the victim and the community. It envisages the active participation of victim in the criminal justice process without having the effect of depriving offenders of safeguards and rights that should be assured to them in any processes fair trial[7].

.**International Norms and Standards**

A similar urge can be read in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The General Assembly of the United Nations

[6] Tony Marshall, Restorative Justice: An Overview, http://library.npia.police.uk/docs/homisc/occ-resjus.pdf, visited on 13 May 2012 at 10pm

[7] Andrew Ashworth, "Resposibilities,Rights and Restorative Justice",42 Brit.J.Criminol (2002)578

made a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recognizing the fact that millions of people throughout the world suffer harm as a result of crime and the abuse of power and that the rights of these victims have not been adequately recognized. This Declaration played a vital role in placing a "victim-justice-system" in focus in lieu of the existing "criminal-justice-system". It is considered as the "Magna Carta" of the rights of the victims and envisages a different procedure to relate international norms and standards on criminal jurisprudence to the municipal law and to work together for the overall development of a just and equitable society. It calls for the strengthening and expanding funds for compensating victims of crime including the necessary material, medical, psychological and social assistance through governmental, voluntary, community based and indigenous means. The principles adopted in amply reflect the anxiety of international community. The basic principles adopted by the General assembly inter alia provide that the offenders should make fair restitution to victims, their families or dependents and restitution should be part of the sentencing in criminal cases[8]. It also calls for setting up a national fund to provide monetary compensation to the victim, when monetary compensation is not fully available from the offender[9].

.In Europe, The Council of Europe in 1983, requested Member States to compensate; (a) those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence; and (b) the dependants of persons who have died as a result of such crime[10].Article 4 provides that "compensation" shall cover at least, loss or earnings, medical and hospitalization expenses and funeral expenses, and, in case of dependants, loss of maintenance[11]. The 77th Resolution adopted by the Committee of Ministers of the Council of Europe titled "On the Compensation of Victims of Crime" in the 275th plenary meeting on the Minister Deputies on 28th September, 1977, laid down guiding principles to harmonizing national provisions in the interest of the victims. The important recommendations put forward by the Committee are that (a) the compensation should

[8] Principle 8,UN Resolution No.40/34 of 29 November, 1985

[9] Principle12 and 13 Article 12 of the Declaration provides that if amount of compensation is not fully available from the offender, it shall be the duty of States to provide adequate financial compensation to (a) victims who have sustained bodily injury or impairment of physical or mental health as a result of serious crimes; and (b) the family· in particular the dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization

[10]The European Convention on the Compensation of Victims of Violent Crimes,1983, http://conventions.coe.int/treaty/en/Reports/Html/116.htm accessed on 18 May,2012 at 9.30pm

[11] Ibid

be the fullest and fairest possible, taking into account the nature and the consequence of the injury and; (b) the compensation scheme should provide for the possibility of granting in urgent cases interim awards when there would be delay in determining the compensation. Moreover, member States have to inform the Secretary General of the Council of Europe every five years of the steps they have taken to implement this Resolution[12]. In addition, the Council of the European Framework Decision of 15 March, 2001 on "the Standing of Victims in criminal proceedings" imposes an obligation on the Member States to fulfil the commitment towards a just and equitable criminal justice system[13].

Law in UK and USA

The most significant feature of the British Scheme is its restriction of the payment of compensation to innocent victims. The Board has been required, or has been given discretion, to refuse compensation altogether or to make a reduced award to "unmeritorious" victims who otherwise qualify for compensation. The very concept of the "innocent" victim has given rise to much academic controversy and practical difficulty. State legislatures have actually dealt with this issue in the United States by creating three main categories of victims who, to a greater or lesser extent, fail to qualify as innocent or deserving: (a) the guilty victim; (b) the uncooperative victim, and (c) the financially sound victim[14].These formulae clearly differ as to whether the conduct to be considered must be criminal, tortious, or some other form of misconduct. But all agree that the relevant conduct must both take place at or about the time of the crime which gave rise to the victim's injury and contribute in some way to the infliction of that injury.

In India the existence of provisions likes.265-E (a) and S. 357 and of the Code of Criminal Procedure, 1973[15] and S. 5 of the Probation of

[12] https://wcd.coe.int/com Accessed on 20 May 2012 at 10pm

[13] See Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings in Official Journal of the European Communities http://eur-ex.europa·eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:082:0001:0004:en:PDF accessed on 18May2012 at 9pm

[14] Desmond S. Greer, "A Transatlantic Perspective on the Compensation of Crime Victims in the United States", The Journal of Criminal Law and Criminology (1973-), Vol. 85,pp333-401

[15] See. 357. Order to pay compensation. (I) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, a court may when passing judgment, order the whole or any part of the fine recovered to be applied (a) in defraying the expenses properly incurred in the prosecution; (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court recoverable by such person in a Civil Court. (c) When any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the person who are,

Offenders Act 1958[16] remind us that the victim is not altogether forgotten by the lawmakers. Under Sub Section (1) of S. 357, a Magistrate can award compensation to the victims of a crime if the accused is punished with a sentence of fine or with other sentence of which fine is a part. It is to be from the amount of fine recovered. In any case, the compensation under this sub section shall not exceed the amount of fine imposed. Under this section, the quantum of fine depends on maximum fine awardable for a particular offence and to the extent of powers of the Court to impose fine. However if the Magistrate opts for not imposing a fine, S 357 (3) will be attracted[17]. Under S. 357 (3) of the code, the compensation can be awarded liberally. But it is to be noted that this provision is applicable only if a sentence of fine is not imposed. The object of S. 357 (3) is to provide compensation to persons who are entitled to recover damages from the person sentenced, even though fine does not form part of the sentence[18]. This compensation is payable for any loss or injury either physical or pecuniary. Unlike S. 357 (1) the powers of a Magistrate under S. 357 (3) is unlimited. Though the Code imposes limits for the Magistrate to impose fine, from which a compensation can be awarded under S. 357 (1) of the code, if the Magistrate opts to award Compensation u/s 357 (3) instead of imposing fine, his power is unlimited. But while awarding compensation, the court shall give due regard to the nature of injury, the manner of inflicting the same, the capacity of the accused to pay

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under Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death.
(d) When any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating or of having dishonestly received or retained or of having voluntarily assisted in disposing or, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same, if such property is restored to the possession of the person entitled thereto.
(2) *****
(3) When a Court imposes a sentence, of which fine does not form 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.
(4) *****
(5) ****

[16] See. 5 of probation of Offenders Act 1958; - (1) The court directing the release of an offender under section 3 or section 4, may, if it thinks fit, make at the same time a further order directing his to pay -
(a) Such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence; and
(b) Such costs of the proceedings as the court think reasonable·
(2) *******
(3) *********

[17] Supra n. 11

[18] Sarwan Singh V State of Punjab 1978 Cr. L.J. 1598, See also Rachhpal Singh V.State of Punjab,(2002)6SCC462 and State of Punjab V. Gurmeet Singh,(2002)6SCC663

and the justness of claim by the victim[19]. In such cases the Court may allow reasonable period for payment of compensation. The compensation can be allowed to be paid in instalments also. If the accused is making default in payment of compensation, the court may enforce the order by imposing sentences.

At this point it is fascinating to evaluate the judicial attitude in interpreting these provisions. The judiciary was at times reluctant to combine the punishment of fine with death penalty of life imprisonment[20]. But a different attitude can be observed in Guruswamy V State of T.N[21], where the Appellant had murdered his father and brother, Supreme Court reduced the punishment from death to life imprisonment and imposed a fine of Rs. 10000 and directed it to be paid to the dependants of the victim. A casual look at this and subsequent cases reveals that often Supreme Court has adopted an attitude to reduce severe punishment and impose fine to compensate the dependants of the victim. In Jacob George V. State of Kerala[22], the trial court acquitted a homeopath, who caused death of a woman while causing miscarriage due to his negligence. The said acquittal was reversed by the High Court and awarded sentence of 4 years imprisonment and imposed a fine of Rs. 5000/- .The High court directed that a sum of Rs. 4000/- is to be paid to the children of the deceased towards compensation for the loss of their mother. The Hon'ble High Court refused to give him benefit of probation. Hence, the accused preferred an appeal under Art 136 of the Constitution before the Supreme Court. The Supreme Court rightly upheld the conviction. But in the quest for rendering justice to the dependants of the victim, unfortunately the court sidelined the true meaning of penology. The theories of punishment got a shabby treatment at the hands of the court. The view expressed by the court that only in cases where death penalty is provided the retribution can have its full play, gives a new facet to the retributive theory of punishment[23]. The preventive and deterrent theories also got a similar treatment from the Hon'ble court. According to the court, the reformative aspect has achieved its purpose by keeping the appellant inside the prison boundaries for about two months, which enabled him to know the trauma, which one suffers in jail, which would make him to refrain from such activities in future. The Supreme Court modified the

[19] Harkisan V Sukhbir Singh 1989 Cr. L.J. 116 at p. 120
[20] Palaniappa Gounder V State AIR 1977 SC 1323
[21] (1979) 3 SCC 799
[22] 1994 Cr.L.J. 3851; See also Madhukar Chander V. State of Maharashtra 1993 Cri LJ3281 (Bom .C.)
[23] Id at P. 3555.

sentence by reducing the substantive sentence to one already under gone by the accused and enhanced the fine to Rs. 1 Lakh. The Court went on to observe that if the fine were not paid within 6 months; the original punishment would be reviving. Here it is to be noted that the court in its discourse had already opined that the sentence already undergone was capable of fulfilling the purpose of punishment. Now the question arises as to what is the purpose of such a revival?

The next question, which poses in mind about the judgment, is that of the revival of original punishment. It means that the court is not taking away punishment that is imposed by the High Court, but it is making a substitution of punishment. In fact a perusal of the existing law reveals that, in case of default in payment of fine 1/4 of the maximum imprisonment provided for that offence can be imposed. In the present case under reference, the offence is under S. 314 of I.P.C. for which the maximum punishment provided is 10 years imprisonment with or without fine. Therefore, the maximum sentence that can be imposed in case of default is only 3 years and 3 months imprisonment. The imprisonment cannot exceed the limits prescribed under S. 65 of I.P.C[24]. This provision is not envisioning the revival of punishment. The section is not providing the power to impose an additional term to the substantive part of imprisonment[25]. But, imprisonment is simply for non-payment of fine and if a part of it is remitted proportionate reduction can be given in imprisonment also. Therefore the court clearly erred in holding that in case of non-payment of fine the imprisonment will revive. It is bewildering to see that it may give rise to the presumption that the wealthy and influential culprit can purchase sentence according to their convenience. Anyhow, it cannot be read into any part of the procedure that for awarding compensation the court can take into consideration the financial status of the accused or his reputation. In the name of victim compensation, there is no power to substitute compensation in place of substantive a punishment

24 S. 64 of I.P.C. - Sentence of imprisonment for non payment of fine - In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only in which the offender is sentenced to a fine, It shall be competent to the court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence.

Sec 65. -Limit to imprisonment for non payment of fine when imprisonment and fine awardable - The term for which the court directs the offender to be imprisoned in default of payment of a fine shall not exceed one fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

25 Sibi V. Vilasini, 1999 CriLJ 878(Ker)

In Deelip Singh alias Dilip Kumar v. State of Bihar[26], the Supreme Court observed that though there is no evidence to establish beyond reasonable doubt that the accused made a false or fraudulent promise to marry, there can be no denial of the fact that the accused did commit breach of the promise to marry, for which the accused is prima facie accountable for damages under Civil law. The accused was prepared to pay a sum of Rs. 50,000/- by way of monetary compensation irrespective of acquittal. Though the said amount is not an adequate compensation, the Supreme Court was not inclined to call upon the accused to pay more for more than one reason: firstly, the accused has been in Jail for about two years by now; secondly, the accused belongs to a backward class and his family is not affluent though they have some agricultural lands; lastly, the incident took place about 15 years back and in the supervening period, the prosecutrix as well as the accused is married and he has two children. In these circumstances, the Supreme Court accepted the offer of the accused. In Baldev Singh v. State of Punjab[27] , the Apex court extracted the following passage highlighting the importance of restitutive justice under S 357 occurring in B. B. Mitra's Code of Criminal Procedure:-

> "Section 357 (a) Scope ..... The power of Court to award compensation to victims under Section 357 is not ancillary to other sentences but is an addition thereto. It is a measure of responding appropriately to crime as well as of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes, a step forward in our criminal justice system. Therefore, all Courts are recommended to exercise this power liberally so as to meet the ends of justice in a better way. Any such measure, which would give the victim succour, is far better than a sentence by deterrence. Sub-section (3) of Section 357 provides for ordering of payment by way of compensation to the victim by the accused. It is an important provision and it must also be noted that power to award compensation is not ancillary to other sentences but it is in addition thereto.....In awarding compensation the Court has to decide whether the case is fit one in which compensation has to be awarded. If it is found that compensation should be paid then the capacity of the accused to pay compensation has to be determined. It is the duty of the Court to take into account the nature of crime, the injury suffered, the justness of the claim for

[26] Deelip Singh @ Dilip Kumar v. State of Bihar (2005 (1) SCC 88)
[27] 1995(6)SCC593,1996AIR372

compensation and other relevant circumstances in fixing the amount of compensation"[28].

The Court, while upholding the conviction of the appellants, directed to pay by way of compensation a sum of Rupees 35,000/- each to the wife of the deceased and her children for the irreparable loss due to the death of Balbir Singh at the hands of the accused persons who have been convicted and sentenced to the term of imprisonment already undergone by them. The court directed to pay the same within a period of 3 months from date of order and If it is not so paid, the amount shall be recovered by the persons entitled to the amount from the appellants as if the direction is a decree passed against them by Court. The court also said that If not recovered, the accused shall suffer the balance of the term of imprisonment as imposed by the trial Court, which shall stand revived. The Supreme Court observed that in some cases award of compensation to the victim serves better purpose than deterrent punishment to the offender. However, it may be noted that the power to award compensation is not ancillary to other sentence but it is in addition thereto[29]. Therefore, it is evident that the court is having no power to substitute compensation with any other forms of punishment.

In Suresh Balkrishna Nakhava V. State of Maharashtra[30], the prosecutrix, aged about 15, was raped by the appellant several times. Due to the threat of the accused, the prosecutrix never informed any body about these incidents. The trial court convicted the accused. While the appeal was pending before the High court the wife of the accused stating her poor background and her attempt to settle the matter filed an affidavit. She swore before the High Court that she sold her ornaments to adequately compensate the victim and the accused is the sole bread-winning member of the family. She pleaded that if the accused were sent to prison, wife children and aged parents would starve. In an attempt to balance the interest of the victim and interest of the dependents of the accused, court awarded sub minimum sentence provided under S. 376 of I.P.C. and directed to deposit Rs. 4/- lakhs raised by the wife of the accused for the future maintenance of the victim. Here also it is incredulous that the philosophy of the proviso under S. 376 of I.P.C. is protected or

[28] B. B. Mitra's Code of Criminal Procedure - 18th Edition (1995) at pp 1240-1241

[29] Supra n. 15 at pp. 10and11.

[30] 1998 Cr.L.J 284; See also Kunhimon V. State of Kerala 1998 Cri L.J. 493 (Ker). Where the court enhanced the fine and directed the accused to pay compensation to the victim with out touching sentence awarded by trial court.

not. It is doubtful whether the court can take into consideration the amount deposited by the wife of the accused in the bank for the maintenance of the victim or the fact of adoption of the child born out of the incident in a wealthy family are ample reasons for awarding a sub minimum sentence. This kind of reduction in sentence has been widely disapproved by the victim rights movement. Jeremy D. Andersen states:

> "Although the victims' rights movement generally stresses retribution, and such notions do appear throughout criminal law sentencing, it is unclear why its use requires the reduction of criminal sanctions, as is seen in practice"[31].

This sort of interpretation happens in judicial decision making since there is no alternate way for doing justice to the victim of crime in India at present except S. 357 of Cr PC and S. 5 of the Probation of Offenders Act which is used so sparingly by the Courts. It is to be noted that section S. 357 of Cr. P.C. or S. 5 of the P.O. Act will be operative only when the accused is convicted. It is all the more known, how difficult it is to have a conviction in criminal cases since even an iota of doubt can result in the acquittal of the accused. Therefore it the need of the day to develop a comprehensive scheme to effectively compensates the victims of crimes. In the Delhi Domestic Working Women's Forum case[32] the Supreme Court of India had called upon the need to setup a Criminal Injuries Compensation Board for rape victims within 6 months. The Supreme Court had suggested that this board should give compensation whether or not a conviction takes place. The Supreme Court explained the justification for this proposal as under-

> "It is necessary, having regard to the Directive Principles contained under Article 38(I) of the Constitution of India to setup Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss.

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[31] Jeremy D. Andersen, "Victim Offender Settlements,General Detterence,and Social Welfare", The Harvard John M. Olin Discussion Paper Series:http://www.law.harvard.edu/programs/olin_center/papers/pdf/402.pdf visited on12may2012 at 10pm.See also Alan T. Harland, "Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts", 30 UCLA L. REV. 52, 126 (1982),where the author summarises the views of different commentators as follows:

"Although the view of restitution as an alternative to incarceration is widely held, it is usually unclear whether the defendant in such a case is to be spared imprisonment because restitution mitigates culpability, or because incapacitation, deterrence, or desert regrettably have been balanced against rehabilitative hopes or concern for recovery by the victim. To some commentators, imprisonment appears to be simply overused, and a community disposition involving restitution constitutes a sufficiently severe penalty. Other commentators conclude that restitution can operate as an effective deterrent. Several writers view restitution as being an integral part of, if not synonymous with, retribution. To that extent, restitution can serve as a symbolic "pay[ment of one's] debt to society."

[32] (1995) I SCC 14

> Some, for example are too traumatised to continue in employment. Compensation for victims should be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction takes place. The board will take into account pain, suffering and shocks as well as loss of earnings due to pregnancy and the expenses of the child but if this occurred as a result of the rape. In the present situation, the third respondent will have to evolve such scheme as to wipe out the fears of such unfortunate victims….."[33]

In Bodhisattwa Gautam's case[34], The Supreme Court again reiterated the above decision and further laid down that interim compensation should be awarded to the victim in fit cases and there should be provision for the same in the scheme. The law commission of India in its 154th Report made a detailed analysis of the need to incorporate restorative justice in the criminal procedure in India. The Law Commission of India which made an examination of acid attack cases again underlines the urgent need for a scheme of compensation for the victims since in such cases the victims need to undergo multiple surgeries costing Lakhs of Rupees and are also in urgent need of rehabilitation as they often need financial help to exist as may not be able to seek employment. The Law Commission in its 226th Report proposes that a law known as "Criminal Injuries Compensation Act" be enacted as a separate Law by the government. This law should provide both interim and final monetary compensation to victims of certain acts of violence like Rape, Sexual Assault, Acid Attacks etc. and should provide for their medical and other expenses relating to rehabilitation, loss of earnings etc. Any compensation already received by the victim can be taken into account while computing compensation under this Act. Consequent on the recommendations of the Law Commission of India, The Criminal Procedure Code has been amended to incorporate S, 357A to slot in a scheme of victim compensation.S2 (wa) introduced into the Code define a "victim" to mean 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 includes his or her guardian or legal heir. 357A provides for Victim compensation scheme. Accordingly, Every State Government has to prepare a scheme in co-ordination with the Central Government for providing funds for the purpose of compensation to the victim or his dependents

[33] Ibid
[34] 1996 AIR 922, 1996 SCC (1) 490

who have suffered loss or injury as a result of the crime and who, require rehabilitation. The District Legal Service Authority or the State Legal Service Authority has been given the power to decide the quantum of compensation; they can exercise this power when the court makes recommendation to pay compensation. If the trial Court after conclusion of the trial is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation. The scheme is also extended to the cases where the offender is not traced or identified, but the victim is identified, and where no trial takes place. In such cases the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation. The State or the District Legal Services Authority can award the compensation after conducting an enquiry which is to be completed within two months. It is also having power to order for immediate first-aid facility or medical benefits to be made available free of cost to alleviate the suffering of the victim or any other interim relief. S 265E (a) deals with the power of the court to award compensation where of plea-bargaining happens. As it is a newly incorporated provision the impact of it in the actual working of compensatory jurisprudence is yet to be seen.

The new law limits the judicial discretion in awarding compensation. It is creating an additional remedy in cases which are covered under S 357 and a new remedy in case the offender is not identified and in cases where the prosecution results in acquittal or discharge. In cases which are coming before the court the court can exercise its discretion to recommend for additional compensation if the compensation awarded under s357 is not sufficient. The court can also make recommendation to pay the compensation in fit cases even if there is acquittal or discharge. But the quantum of compensation is to be determined by the Legal Service Authority. In case the court process is not involved, i.e. where accused cannot be identified, the full discretion vests with the legal service authority. The new law does not create clarity in law. It is only a piecemeal legislation. Evidently the power of court to recommend for additional compensation can be exercised only in cases where the court is imposing a fine or where the court feels that the offender is not capable of paying adequate compensation. However in such cases the victim has no right to approach the Legal Service Authority for compensation or for enhancement of compensation. But if the offender is not identified the victim/dependant will get a right to approach the

Authority without any involvement of the Court. This seems to be an anomaly in the law to be appropriately remedied as it is irrational and illogical to make such a distinction. There must be a common authority who is competent decide all such cases of compensation. They also does not provide for any effective participation of the Victim in the Criminal Justice Process as envisaged by the restorative justice movement, thus making it an incomplete code. The new amendment also does not provide for any uniform scheme of compensation throughout India. It is left to the discretion of each individual state to formulate the scheme there by making it a disparate one if implemented.

Conclusion

It is high time that the spirit of restitutive justice is to be carried further to develop a parallel and effective remedy by a separate legislation under which the victim should be able to seek compensation before a court of law irrespective of whether the accused is convicted or not[35]. The law must also provide for the resources to meet the needs of victim. It is also desirable to keep a part of the prison wages earned by the criminal for the welfare of the victim of the crime committed by him.The possibility of an Insurance Scheme in line with the Public Liability Insurance can also be probed into as it is the bounden duty of the state to protect the life and liberty of every individual and in case of the failure to discharge it satisfactorily to compensate the victim and his dependents. This type of change in law may advance the cause of the victim long way forward.The objectives of victim right movement should properly reflect in any new legislation. The legislature could have tried to incorporate the elements of restitution, though it has debatable merits and demerits[36] in the light of decreasing number of convictions. The new amendment to the Criminal Procedure code is highly unsatisfactory and need to be revised according to the new outlook in the criminal Justice System and new set of international norms. The state should bring about a comprehensive scheme which is balancing the rights of the victim as well as the accused instead of piecemeal legislation.

[35] See for example, the l' action civile under Arts.2, 3,85,86,89,90,91,114 to121, etc of French Criminal Procedure Code, 1957

[36]See generally Supra,n.7

CHANGING FACETS OF EMINENT DOMAIN

-By Dr. P. Sree Sudha,
Faculty of Law,
Dr B. R. Ambedkar University, Srikakulam,
LLD Scholar NLSIU Bangalore,
E mail ID: sudha.p1975@gmail.com

Abstract:

One can safely assert that land is perhaps the greatest gift that God has bestowed on human beings. All activities of man whether social, political or economic, revolve around the beneficial enjoyment of land. Similarly, all endeavors of the Govt. in infusing growth and development into the economy are also closely linked to land. Acquisition of land by the Government which is popularly known as *eminent domain* is something that has existed since the British Raj. The British Govt. forcibly acquired several acres of lands to facilitate their plans of introducing the railway system in India. Back then, the compensation to be paid for such acquisition of land was under the control of an arbitrator, whose decision on the compensation would be final. To circumvent such lacunas taking its toll on the public revenue, the Land Acquisition Act, 1870 was enacted. Under this Act the controller was bound to refer all cases in which either the owners of land complained against the compensation or one failed to come before him, to the court. This took lot of time and wasted money. Thus the 1984 Act was enacted, whereby, inter alia, the controller's award of compensation could not be challenged except under certain circumstances. The recent developments at Kalinga Nagar in Orissa, Singur in West Bengal and then at Raigad in Maharashtra has again drawn the attention of the country to the question of compulsory acquisition of land by the Government. With a burgeoning population and a growing economy [notwithstanding the economic crisis that the world is seeing today], the demand for land both for industry and for infrastructure is only on the increase. The existing Land Acquisition Act, 1894, is inadequate to address these concerns. Recently the Supreme Court said that the State was the biggest land grabber, depriving farmers of their livelihood for generations. By taking advantage of the land acquisition law, the state was helping the builders. At this scenario the aim of this article is to explain the procedure for land acquisition next section concentrates on the judicial activism towards eminent domain and finally ends with conclusion and suggestions.

Full Paper:

Introduction:

Immoveable property has always been considered a valuable asset from time immemorial. The reason for that is people can gain name and income from that assent and this right is lost when government acquires individuals land for public purpose which is popularly known as *eminent domain* i.e. to allow the State to acquire land for the purpose of the working of the Government more over his right is checked and balanced by the provisions of the Land Acquisition Act, 1894. At a very fundamental level and without being bogged down by legalese, it can perhaps be stated that the State cannot compulsorily acquire the land of a private party, except for a public purpose and such acquisition must be accompanied by the payment of a just compensation.[1] The idea behind this is the working of the Government, the State would need to have the right to acquire land for roads, administrative buildings, power projects, etc. and that therefore, the State must be entitled to acquire and own land at such place as is necessary to make the work of the State efficient and to serve the larger society, even if it means causing some inconvenience to an individual or individuals [whose lands are in fact acquired]. The recent developments at Kalinga Nagar in Orissa, Singur in West Bengal and then at Raigad in Maharashtra has again drawn the attention of the country to the question of compulsory acquisition of land by the Government. Attention to this extremely crucial aspect of governance could not have been more overdue. Compulsory acquisition in India is still governed by the archaic Land Acquisition Act of 1894. With a burgeoning population and a growing economy [notwithstanding the economic crisis that the world is seeing today], the demand for land both for industry and for infrastructure is only on the increase. The existing Land Acquisition Act, 1894, is inadequate to address these concerns. At present the land was taken over by invoking emergency provisions of the Land Acquisition Act by changing the land use from industrial to residential. Within the last decade, large scale public infrastructure projects dams, roads, electrical networks, major events like Olympics, have resulted in millions of people being forcibly evicted city's appearance. Also the definition of 'public purpose' is increasingly stretched to

[1] Sailesh Madiyal on "Land Acquisition in India and Competing Interests", Accessed from the web site: www.salvuspartners.com, Last visited 15ht August 2011

include private purposes. At this scenario the aim of this article is to explain the procedure for land acquisition next section concentrates on the judicial activism towards eminent domain and finally ends with conclusion and suggestions.

What is Eminent Domain?

Eminent domain, broadly understood, is the power of the state to seize private property without the owner's consent. Historically, the most common uses of property taken by eminent domain are public facilities, highways, and railroads.

The Land Acquisition Act -1894 says "the public purpose included provision of village sites, planned development or improvement of existing village sites, provision of land for town and rural planning, provision of land for residential purpose to the poor or landless, educational and housing schemes etc.," and The Land Acquisition Act – 1984 provides[2] that in case of any 'urgency', land can be acquired by the Government within 15 days of publication of notice. 'Urgency' has however not been defined in the Act. This provision effectively sanctions the by-passing of all procedural mechanisms laid down in the Act, and has been routinely grossly misused precisely with such intent.

The proposed Land Acquisition (Amendment) Bill, 2009 does not explicitly mention the poor, and incorporates infrastructure and strategic interests. Most contestably, it includes provision for state acquisition of land for private for-profit companies, with the wording: '...land for any other purpose useful to the general public for which land has been purchased by a person under lawful contract or is having the land to the extent of 70%, but the remaining 30% of the total area required for the project is yet to be acquired'.

In a recent case the Supreme Court held: "Any attempt by the State to acquire land by promoting a public purpose to benefit a particular group of people or to serve any particular interest at the cost of the interest of a large section of people, especially of the common people, defeats the very concept of public purpose."[3]

[2] Section 17(1) of Acquisition Act 1894
[3] Hindu on Nodia Case, dated: 13th March 2011, Accessed from the web site:www.hindu.org, Last visited 12th February 2012

Procedure for Land Acquisition:

The procedure of land acquisition is simple. The Appropriate Government i.e. State Govt. or Central Govt. identifies that it requires a piece of land for public purpose or for a company. It publishes a notification to that effect in the official gazette and the substance thereof is published by the collector in a notice that he places in a conspicuous place of the land ought to be acquired. The notification of the Govt. is also published in 2 newspapers one of which is the regional language of the place where the land to be acquired is situated.[4] Within 30 days of such notification, the persons interested in the land can raise their objection to the Collector, in writing, of any of issue related to the acquisition of the land. The collector shall after making his comments forward it to the Central Govt., whose decision on the matter shall be final.[5] After having gone through the report filed by the Collector,[6] the appropriate government shall publish a declaration of the intention to acquire land in the same manner as mentioned before.[7] The collector shall then issue a notice to the persons interested to an enquiry to be held before him regarding the key aspects on to area of land, compensation etc to make claims and stating that the Govt. intends to acquire the land.[8]Further the Act states[9] that the collector shall make an award under his hand of:

- The true area of the land.
- The compensation, which in his opinion should be allowed for the land, and
- The apportionment of the said compensation among the persons interested.

This award shall be made only after conducting an enquiry[10] and after obtaining the prior approval of the appropriate government. After having made compensation, the govt. can take possession of the land. The land shall then vest with the govt. without any encumbrances. [11]In cases of urgency, the Govt. can acquire the land without paying compensation- though compensation will have to be paid eventually.[12] The compensation

[4] Section 4[1] of Land Acquisition Act 1894
[5] Section 5A of Land Acquisition Act 1894
[6] Section 5A of Land Acquisition Act 1894
[7] Section 6 of Land Acquisition Act 1894
[8] Section 9 of Land Acquisition Act 1894
[9] Section 11 of Land Acquisition Act 1894
[10] Section 9 of Land Acquisition Act 1894
[11] Section 16 of Land Acquisition Act 1894
[12] Section 17 of Land Acquisition Act 1894

to be paid is the market value of the land as it exists on the date of the 1st notification.[13] Also, it is important to mention here that the land has to be acquired within a period of 2 years from the date of the first notification under section 4, failing which, the whole procedure will have to followed again .[14]

The above mentioned procedure is general; following section concentrates on the fundamentals of the legal aspects of land acquisition in India. Conceptually, the genesis of the State's power to acquire a land belonging to a private party lies in the *right of eminent domain*. The right of eminent domain is the right of the sovereign state, through its regular agencies, to re-assert its authority, either temporarily or permanently, over any portion of the soil of the state, including private property, without its owners consent on account of public exigency or for public good. This principle finds its way into the codified law of India, by virtue of the Land Acquisition Act, 1894, which prescribes the circumstances under which the State can acquire a private person's land, the procedure to be followed etc.[15]

The objective of the acquisition is perhaps the most contentious question from 1894. The Land Acquisition Act is vague on this point and it attracts interference by politicians and vested interests. Therefore, the comprehensive discussion on this subject in the recent Supreme Court judgment, ***Daulat Singh vs First Land Acquisition Collector,***[16] is instructive. In this case, the West Bengal government wanted to acquire a plot for housing the office of the deputy commissioner of police. The government has ultimately won the decades-old case in the Supreme Court. One of the points argued was whether the acquisition was for a "public purpose". The term has been defined in the Land Acquisition Act, but it is not exhaustive. Some of the grounds for acquisition are: provision of land for planned development from public funds in pursuance of any scheme of the government, provision of land for a corporation owned and controlled by the state and provision of land for any other scheme of development sponsored by the government, or with the prior approval of the appropriate government, by the local authority.

[13] Section 4 of Land Acquisition Act 1894
[14] Section 11A of Land Acquisition Act 1894
[15] The Forty-fourth Amendment to the Constitution of India inserted Article 300-A which states that "No person shall be deprived of his property save by authority of law." The same amendment simultaneously deleted the fundamental right to property which was uptil then included in Article 19(1)(f) and 31.
[16] JT 2002 (1) SC 290

The principle has survived with some modifications even now. Article 39 of the Constitution, in the Directive Principles of State Policy, enjoins the state to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good. The laws made with such objectives must be for public purpose. Several judgments, not only of the Supreme Court, but also of the English and American courts, have found that the term public purpose is difficult to define. In the present judgment, the Supreme Court said: "Public purpose is bound to vary with times and prevailing conditions in the community or locality and, therefore, the legislature has left it to the state (government) to decide what 'is public purpose' and also to declare the need of a given land for the purpose. The legislature has left the discretion to the government regarding public purpose. The government has sole and absolute discretion in the matter." In one of the earliest decisions of the Supreme Court, ***State of Bihar vs Kameshwar Singh***[17] a Constitution bench admitted that the expression public purpose was not capable of a precise definition and has no rigid meaning. The point to be determined in each case is whether the acquisition is in the general interest of the community as distinguished from the private interest of an individual. Who will judge whether the acquisition is for a public purpose? In the first instance, the government is the best judge in this matter, according to the Supreme Court in the present judgment. "But it is not the sole judge. The courts have jurisdiction and it is their duty to determine the matter whenever a question is raised whether a requisition order is or is not for a public purpose," the judgment emphasized, citing precedents. It also pointed out that though the government was the best judge in this matter, the rule is subject to one exception, namely, where there was a colourable exercise of the power, the declaration would be open to challenge at the instance of the aggrieved party. What is the degree of public purpose which would justify the acquisition? According to the Supreme Court judgment in ***Babu Barkya vs State of Bombay***[18] it is any purpose in which "even a fraction of the community may be interested or by which it may be benefited." However, in ***Satya Narain vs District Engineer***,[19] it was clarified that a pure business undertaking though run by the government cannot be

[17] AIR1952 SC 252
[18] 1960 AIR 1203
[19] 1962 AIR 1161

classified as public service. If the activity is such that it can be carried on by a private individual, it would not qualify for the term public service or purpose. However, the ambiguity and vagueness of public purpose continue to dominate land acquisitions. The Mysore expressway row reached the Supreme Court, which gave its green signal some time ago. In another case reeking of politics, the small car project in Singur [20]is also caught in land acquisition pangs. In view of the futility of litigation, if Land Acquisition can be defined as the action of the government whereby it acquires land from its owners in order to pursue certain public purpose or for any company. This acquisition may be against the will of the owners but compensation is paid to the owners or persons interested in the land. This can be distinguished from an outright purchase of land from the market. Land acquisitions by the government generally are compulsory in nature, not paying heed to the owner's unwillingness to part with the land.

Land Acquisition for Public Purpose:

Land Acquisition literally means acquiring of land for some public purpose by government/government agency as authorised by the law from the individual landowners after paying some compensation in lieu of losses occurred to land owners due to surrendering of his/their land to the concerned government agency.[21] The "public purpose" includes "industrial and other infrastructural developmental needs for the common good of the citizens," a two judge Bench of Justices C K Thakker and D K Jain said. It upheld the acquisition of vast tracts of agricultural and other lands by Andhra Pradesh Government in Ranga Reddy district adjoining Hyderabad city. Upholding the acquisition, the apex court said the State being a sovereign power under the doctrine of "*Eminent Domain*" as provided under the 1894 and Acquisition has inherent rights to acquire land by paying suitable compensation to those displaced.[22]

[20] Tata Motors to Approach Supreme Court on Singur Issue: Accessed from the web site: http://www.livemint.com/2011/06/27233128/Tata-Motors-to-approach-Suprem.html, Last visited 12th March 2012

[21]Alterman, R. (2007) The "Legitimate Public Purpose" for Land Expropriation. http://www.tkk.fi/Yksikot/Kiinteisto/FIG/pdf-files/Alterman_presentation.pdf, Last visited 12th March 2012

[22]Accessed from the web site: http://www.financialexpress.com/news/sc-favours-land-acquisition-for-public- purpose/358448/ , Last visited 12th March 2012

Amidst the debate over acquiring agricultural lands for special economic zones (SEZs), the Supreme Court has held that the Government as a "sovereign power can acquire land for public purpose." [23]

The concept of public purpose cannot remain static for all time to come. The concept, even though sought to be defined under Section 3(f) of the Act, is not capable of any precise definition. The said definition, having suffered several amendments, has assumed the character of an inclusive one. It must be accepted that in construing public purpose, a broad and overall view has to be taken and the focus must be on ensuring maximum benefit to the largest number of people. Any attempt by the State to acquire land by promoting a public purpose to benefit a particular group of people or to serve any particular interest at the cost of the interest of a large section of people especially of the common people defeats the very concept of public purpose. Even though the concept of public purpose was introduced by pre- Constitutional legislation, its application must be consistent with the constitutional ethos and especially the chapter under Fundamental Rights and also the Directive Principles.

In construing the concept of public purpose, the mandate of Article 13 of the Constitution that any pre-constitutional law cannot in any way take away or abridge rights conferred under Part-III must be kept in mind. By judicial interpretation the contents of these Part III rights are constantly expanded. The meaning of public purpose in acquisition of land must be judged on the touchstone of this expanded view of Part-III rights. The open-ended nature of our Constitution needs a harmonious reconciliation between various competing principles and the overhanging shadows of socio-economic reality in this country.

Therefore, the concept of public purpose on this broad horizon must also be read into the provisions of emergency power under Section 17 with the consequential dispensation of right of hearing under Section 5A of the said Act. The Courts must examine these questions very carefully when little Indians lose their small property in the

[23] At its meeting held on the 6th of April, 2008, the EGoM framed guidelines as per which approvals for pending SEZ Applications would not be given if the State Government was compulsorily acquiring lands for such acquisition. The compulsory acquisition of lands for SEZs is a critical issue since under the Special Economic Zones Act, approval for an SEZ can be given only on the applicant having a minimum amount of land. Private players would normally find it difficult to acquire such huge tracts of land privately, unless the Government compulsorily acquires it for them. The EGoM at its meeting referred to above also limited the maximum size of SEZs to 5000 Hectares.

name of mindless acquisition at the instance of the State. If public purpose can be satisfied by not rendering common man homeless and by exploring other avenues of acquisition, the Courts, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice. While examining these questions of public importance, the Courts, especially the Higher Courts, cannot afford to act as mere umpires. In this context we reiterate the principle laid down by this Court in ***Authorised Officer, Thanjavur and another vs. S. Naganatha Ayyar and others***[24] wherein the Court held: ".....It is true that Judges are constitutional invigilators and statutory interpreters; but they are also responsive and responsible to Part IV of the Constitution being one of the trinity of the nation's appointed instrumentalities in the transformation of the socio- economic order. The judiciary, in its sphere, shares the revolutionary purpose of the constitutional order, and when called upon to decode social legislation must be animated by a goal-oriented approach. This is part of the dynamics of statutory interpretation in the developing countries so that courts are not converted into rescue shelters for those who seek to defeat agrarian justice by cute transactions of many manifestations now so familiar in the country and illustrated by the several cases under appeal. This caveat has become necessary because the judiciary is not a mere umpire, as some assume, but an activist catalyst in the constitutional scheme." In other words public purpose must be viewed through the prism of Constitutional values as stated above. The judicial pronouncements on this aspect are numerous, only a few of them may be noted here. ***In DLF Qutab Enclave Complex Educational Charitable Trust vs. State of Haryana and Ors*** [25] The apex Court construed the statute on Town Planning Law and held "Expropriatory statute, as is well known, must be strictly construed."[26] The same principle has been reiterated subsequently by a three-Judge Bench of this Court in ***State of Maharashtra and Anr. vs B.E. Billimoria and Ors***[27] in the context of ceiling law.[28] These principles again found support in the decision of this Court in ***Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Coke and Chemicals Ltd. and Ors***[29], wherein

[24] (1979) 3 SCC 466,
[25] (2003) 5 SCC 622
[26] See para 41 page 635.
[27] (2003) 7 SCC 336
[28] See para 22 at page 347 of the report
[29] (2007) 8 SCC 705

this Court construed the status of a person's right to property after deletion of Article 19(1)(f) from Part III. By referring to various international covenants, namely, the Declaration of Human and Civic Rights, this Court held that even though right to property has ceased to be a fundamental right but it would however be given an express recognition as a legal right and also as a human right .

While discussing the ambit and extent of property right, the apex Court reiterated that expropriatory legislation must be given strict construction.[30] In the background of the aforesaid discussion, this Court proceeds to examine the scope of a person's right under Section 5A of the Act. Initially, Section 5A was not there in the Land Acquisition Act, 1894 but the same was inserted long ago by the Land Acquisition (Amendment) Act, 1923 vide Section 3 of Act 38 of 1923. The history behind insertion of Section 5A, in the Act of 1894 seems to be a decision of the Division Bench of Calcutta High Court in ***J.E.D. Ezra vs The Secretary of State for India and ors***[31]. In that case, the properties of Ezra were sought to be acquired under the pre amended provision of the Act for expansion of the offices of the Bank of Bengal. In challenging the said acquisition, it was argued that the person whose property is going to be taken away should be allowed a hearing on the principles of natural justice. However the judges found that there was no such provision in the Act. . In order to remedy this shortcoming in the Act of 1894, an amendment by way of incorporation of Section 5A was introduced on 11th July, 1923. The Statement of Objects and Reasons for the said Amendment is as follows: "The Land Acquisition Act I of 1894 does not provide that persons having an interest in land which it is proposed to acquire, shall have the right of objecting to such acquisition; nor is Government bound to enquire into and consider any objections that may reach them. The object of this Bill is to provide that a Local Government shall not declare, under section 6 of the Act, that any land is needed for a public purpose unless time has been allowed after the notification under section 4 for persons interested in the land to put in objections and for such objections to be considered by the Local Government."[32]The said amendment was assented by the Governor General on 5th August, 1923 and came into force on 1st January, 1924.

[30] See para 53 to 57 at pages 731 to 732 of the report
[31] 7 C. W. N. 249
[32] Gazette of India, Pt. V, dated 14th July, 1923, page 260

The importance and scheme of Section 5A was construed by this Court in several cases. As early as in 1964 apex Court in ***Nandeshwar Prasad and Ors vs. U.P. Government and Ors*** *Etc*.[33] speaking through Justice K.N. Wanchoo (as His Lordship then was) held "...The right to file objections under Section 5A is a substantial right when a person's property is being threatened with acquisition and we cannot accept that that right can be taken away as if by a side-wind....." In that case the Court was considering the importance of rights under Section 5A *vis-`-vis* Section 17(1) and Section 17(1)(A) of the Act. [34]

The same view has been reiterated by another three-Judge Bench decision of this Court in ***Munshi Singh and Ors. vs Union of India*** [35] the apex Court held that Section 5A embodies a very just and wholesome principle of giving proper and reasonable opportunity to a land loser of persuading the authorities that his property should not be acquired. This Court made it clear that declaration under Section 6 has to be made only after the appropriate Government is satisfied on a consideration of the report made by the Collector under Section 5A. The Court, however, made it clear that only in a case of real urgency the provision of Section 5A can be dispensed with.[36]

In ***Hindustan Petroleum Corporation Limited vs. Darius Shahpur Chennai and ors.,***[37] the apex Court held that the right which is conferred under Section 5A has to be read considering the provisions of Article 300-A of the Constitution and, so construed, the right under Section 5A should be interpreted as being akin to a Fundamental Right. This Court held that the same being the legal position, the procedures which have been laid down for depriving a person of the said right must be strictly complied with. In a recent judgment of this Court in ***Essco Fabs*** [38], the apex Court, after considering previous judgments as also the provisions of Section 17 of the Act held: "Whereas sub-section (1) of Section 17 deals with cases of 'urgency', sub-section (2) of the said section covers cases of "sudden change in the channel of any navigable river or other unforeseen emergency." But even in such cases i.e. cases of 'urgency' or 'unforeseen emergency',

[33] AIR 1964 SC 1217
[34] See para 13 at page 1222 of the report
[35] (1973) 2 SCC 337
[36] See para 7 page 342 of the report
[37] (2005) 7 SCC 627
[38] (2009) 2 SCC 377

enquiry contemplated by Section 5-A cannot ipso facto be dispensed with which is clear from sub-section (4) of Section 17 of the Act." The Court, therefore, held that once a case is covered under sub-section (1) or (2) of Section 17, sub-section (4) of Section 17 would not necessarily apply. "54. In our opinion, therefore, the contention of learned counsel for the respondent authorities is not well founded and cannot be upheld that once a case is covered by sub- sections (1) or (2) of Section 17 of the Act, sub-section (4) of Section 17 would necessarily apply and there is no question of holding inquiry or hearing objections under Section 5-A of the Act. Acceptance of such contention or upholding of this argument will make sub- section (4) of Section 17 totally otiose, redundant and nugatory." This Court also held that in view of the ratio in ***Union of India vs. Mukesh Hans*** [39] sub-section (4) of Section 17 cannot be pressed into service by officers who are negligent and lethargic in initiating acquisition proceedings.

Further the Supreme Court on July 05, 2011 said that the state was the biggest land grabber, depriving farmers of their livelihood for generations. By taking advantage of the land acquisition law, the state was helping the builders. 'It is anti-people,' the court said. [40] The apex court bench of Justice G.S. Singhvi and Justice A.K. Ganguly said that farmers' lands were being acquired in the name of public interest and being given to builders to construct luxury houses, which had nothing to do with the requirement of the common man. The court made the comment during the hearing on a batch of petitions by a number of builders challenging the Allahabad High Court verdict that quashed the takeover of land in three villages of Shahberi, Surajpur and Gulistanpur in Uttar Pradesh's Greater Noida district. Justice Singhvi said farmers deprived of livelihood after the acquisition of their lands were left with two options - either to live in slums or to take recourse to criminal activities which we get to witness every day.

When senior counsel P.P. Rao appearing for one of the builders said that farmers' lands were acquired for public purposes, Justice Ganguly wondered whether the houses being built by 'reputed builders' were meant for the common man and to satisfy their needs. Referring to the broachures of the builder represented by Rao, Justice Ganguly said that you have promised to provide swimming pool, ayurdevic massage parlour and

[39] (2004) 8 SCC 14

[40]For details see: 'Supreme Courts Slams U. P. Over Land acquisition', Accessed from the web site: http://www.hindu.com/2011/06/28/stories/2011062860910100.htm, The Hindu dated June 28th 2011

spa, health club, badminton court and commercial centre. Are these meant for the common man?

When Rao referred to the public purpose as defined under the Land Acquisition Act, Justice Ganguly asked the counsel to forget what was said in the statute but go by how Mahatma Gandhi had described the common man and the spirit of the same enshrined in the constitution.

Justice Singhvi noted that not only the land use was changed from industrial to residential but the builders were given 10 years' time to pay the amount that they had bid for buying the lands. Justice Singhvi said that on the other hand farmers whose lands were acquired would have to either accept the paltry compensation or engage in decades of litigation to secure their rights. In the instant case, farmers whose land was acquired were paid a compensation of about Rs.800 per square yard whereas it was sold to builders for Rs.10, 000 per square metre.

Advocate P Narasimhan, appearing for the Shahberi land-owners, said: "The time has come for redefining public purpose for land acquisition. Public purpose is only when there is access for the entire public to the benefits arising out of the acquisition, and for this the public trust doctrine must be applied."[41]

The Way forward:

The only way forward in this matter can be firstly to repeal the age-old British act and grant the communities their right to plan development by empowering local democratic institutions, as also to accept or reject any proposal, from the state or investors, which forces land acquisition on them. Then only, in this new economic era, conflicts over land, water and minerals can be avoided and a truly democratic society and equity across generations envisioned.[42] In years to come we will regret this historic

[41]Supreme Court Scraps Greater Noida Land Acquisition' http://www.hindustantimes.com/Supreme-Court-scraps-Greater-Noida-land-acquisition/Article1- 717988.aspx, Hindustan times , Last visited 5th February 2012

[42] Norell, L. (2007) Is the market value a fair and objective measure for determining compensation for compulsory acquisition of land? Accessed from the web sire: http://www.tkk.fi/Yksikot/Kiinteisto/FIG/pdf-files/07092007Norell, Last visited 5th February 2012

opportunity to come up with a more comprehensive development planning act, which can restrict change of land use and protect agricultural land for future food security.

In a recent case the Supreme Court held: "Any attempt by the State to acquire land by promoting a public purpose to benefit a particular group of people or to serve any particular interest at the cost of the interest of a large section of people, especially of the common people, defeats the very concept of public purpose."[43]

Conclusion:

From last decade government is compulsorily acquiring land for large-scale public infrastructure projects - dams, roads, electrical networks, major events like Olympics, have resulted in millions of people being forcibly evicted city's appearance. Also the definition of 'public purpose' is increasingly stretched to include private purposes. At this scenario land acquisition processes in India needs reform. Violent protests and politicization of anti acquisition protests, while most undesirable, are only likely to increase unless the Government acts fast and in a manner as to inspire confidence amongst the public. Undoubtedly, some recent decisions of apex court indicate that the Government has woken up to the issue and is determined to act the decision of the Empowered Group of Ministers [EGoM] on Special Economic Zones, the introduction of the Land Acquisition [Amendment] Bill, 2007 being cases in point. This determination must be followed through to avoid unsavory incidents of the sort witnessed in the last few years. It is a beautiful piece of legislation but still it has few lacunas. Acquisition and valuation part of rural land is still ambiguous. Main chunk of land is brought in rural areas, so proper valuation is needed if private entities want to avoid further litigation.[44] One part where local organization consultation is brought is a good step. It will redress all person grievances. It's high time and we need to work on our legislation as fast as we could as many foreign investments is going out of India due to land acquisition issue. 'There is no end to perfection' an English proverb correctly says. There must be

[43] 'Supreme Courts Slams U. P. Over Land acquisition', Accessed from the web site: http://www.hindu.com/2011/06/28/stories/2011062860910100.htm, The Hindu dated June 28th 2011

[44] Mattson, H. (2007). Institutional aspects of land acquisition processes. Accessed from the web site: http://www.tkk.fi/Yksikot/Kiinteisto/FIG/pdf-files/08092007Mattsson, Last visited: , Last visited 5th February 2012

flexibility in the rules as per the people's requirement. A common consensus must be reached because the ultimate aim of any rule is country's welfare. The financial and land loss of the poor people must be minimized at any cost to preserve the faith of people in their govt. Better late than ever. India enacted new Land Acquisition Act. A number of important projects are held up on account of delays in Land acquisition. Many cases are pending in courts. Public purpose must be based on a larger perspective and the proper guidelines to be framed to define public purpose. Agricultural lands have to be avoided as far as possible. Deployment of small holders of land owners may face a huge problem. If India has to compete with China on industrialization we need a progressive legislation on Land Acquisition. Politics should not be the reason. If the purpose of the Land Acquisition Bill is to protect the land owners, it is not good enough because it does not protect owners of small holdings of land who are vulnerable to exploitation by the land mafia. The Bill must be implemented in a so that the Political role can be minimized greater level. A Special Tribunal National wise should be formed with all the Executive Power under President and Governors of the state For the Land Acquisition policies Drafting and Implementation. It must be Free from Local as well as Higher Party Politics. Finally it is concluded that judicial activism is vibrant in land matters, (***Noida case, Delhi***) the need of the hour is the administrators should implement the new Legislation in a people friendly manner.

Public Health and Right to Health in India: Evaluation of Gap Between Policy And Implementation

DR. S.P. SRIVASTAVA*

Abstract

India's policy towards health has been traditionally identified by the provision of primary healthcare as the states responsibility. However, gross reality with regard thereto is full with contradictions. On the one hand, India is known as the world's fastest growing economy, on the other WHO survey put India at the bottom in terms of public health spending, 171 out of 175 countries. For a country of 121 crore population, India spends 5.2% of its GDP on healthcare compared to say, 16% in the US and 13% in Sweden. Of this, only 0.9% is spent by the government while the private players account for the remaining 4.3%. The health care system of India has flaws, both at the conceptual and operational levels. This paper is an attempt to examine the truth about public health mandate and reality of Government initiatives. In this paper researcher has analyze international mandate of right to health and its constitutional status in India. It has examined the initiatives of government of India with regard to public health. This paper has been summed up with emphasis on India requires a new organisational framework that provides a mandatory clear and simple accounting and liability based on transparency. Here we need a compulsory health insurance protection for Indians by government initiatives. Here researcher emphasized that India needs continuous monitoring and appraisal system, with the option of regular course corrections.

1. INTRODUCTION

Worldwide, nations are seeking viable answers to the question of how to offer a health care[1] system[2], which can provide universal access to health care for their citizens. We need to remember, if the human race is to survive and progress, preservation of good health[3] is a

*** Assistant Professor (Sr. Grade), Amity Law School, Affiliated to GGSIP University, Delhi. The author may be contacted at: sp_sri@rediffmail.com.**

[1] Health care is defined as the maintaining and restoration of health by the treatment and prevention of disease especially by trained and licensed professionals (as in medicine, dentistry, clinical psychology, and public health. *See*, http://www.merriam-webster.com/medical/health%20care (last accessed on 10 October, 2011).

[2] A health care system is the organization of people, institutions, and resources to deliver health care services to meet the health needs of target populations, available at: http://en.wikipedia.org/wiki/Health_care_system (last accessed on 06 November, 2011).

[3] The World Health Organisation (WHO) defines health as a dynamic state of complete physical, mental, spiritual and social wellbeing and not merely the absence of disease or infirmity. A literature review on definitions of "health" found that "health" is not as readily articulated as one might assume. At present, it is not clear if "health" refers to the individual, the community, the environment, or all of these at one time. quoted in Martin Sprenger, "Issues at the interface of general practice and public health: primary health care and our communities", available at: http://priory.com/fam/gppublic.html. (last accessed on 14 July 2010).

Also See, In *C.E.S.C. LTD. etc*. v. *Subhash Chandra Bose and Ors*., AIR1992 SC573, where, The Hon'ble Court said that, '*the term 'health' implies more than an absence of sickness. Medical care and health facilities not only project against sickness but also ensure stable man power for economic development. Facilities of health and medical care generate devotion and dedication to give the workers' best, physically as well as mentally in productivity. It enables the worker to enjoy the fruit of his labour, to keep him physically fit and mentally alert for leading a successful, economic, social and cultural life. The medical facilities, are therefore, part of social security and like gilt edged security, it would yield immediate return in the increased production or at any rate reduce absenteeism on grounds of sickness, etc. health is thus a state of complete physical, menial and social well being and nut merely the absence of disease or infirmity.* (Para 6)

must.[4] Healthy living conditions and good quality health is not only a necessary requirement it is also recognised as a fundamental right[5] for each and every individual and do play crucial role for socio-economic maturity of the nation. Diseases and mishaps have had their grip over humans ever since they came into existence. The disablement, disfigurement and loss of life caused due to illness has alarmed human race. Almost in every second day a new disease is emerging and has posed a serious threat before policy framers and doctors. India has relatively poor health outcomes, despite having a well-developed administrative system, good technical skills in many fields, and an extensive network of public health institutions for research, training and diagnostics.[6] Even sometimes few States in India failed to provide appropriate facility in their primary health centre. Latest in this series are Gorakhpur district of Uttar Pradesh[7] and health condition of West Bengal.[8] It is argued that the multiple sources are causing such agonies both external and internal ranging from natures' wrath to lack of proper hygiene.

India's policy towards health has been traditionally identified by the provision of primary healthcare as the states responsibility.[9] However, gross reality with regard thereto is full with contradictions. On the one hand, we have the much hyped BRIC report[10], on the other, WHO survey put India at the bottom in terms of public health spending, 171 out of 175 countries. It is less than even some of the sub-Saharan African Countries, a study conducted in 2007-2008 has revealed. For a country of 121 crore population, India spends 5.2% of its GDP on

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[4] Justice R. K. Abichandan, *Health as Human Right - - - Role Of Courts in Realisation of the Right*, available at: http://gujarathighcourt.nic.in/Articles/health.htm (last accessed on 13 July 2010).

[5] Right to Health is fundamental Right under Article 21 of the Indian Constitution. Moreover Article 25 of the UDHR 1948 lays down that everyone has the right to a standard of living, adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care.

[6] Monika Das and Manju Rani, *India's Public Health System How Well Does It Function at the National Level*?, 1World Bank Policy Research Paper 3447, (November 2004).

[7] The vector of Japanese encephalitis (JE) has been found around Gorakhpur region since 1978 and some of the eastern UP districts bordering Varanasi, including Ghazipur and Jaunpur. It is worth mentioning that till date there is no specific treatment for Japanese encephalitis identified by ministry of health. *See*, *Brain fever scare causes health dept to up ante*, Times of India, September 29, 2011.

[8] The infant deaths in West Bengal continue unabated with 6 more infant deaths at the Malda district hospital. The disturbing trend has come to the focus when the state saw as many as 11 crib deaths at the famous B C Roy Children's Hospital last month alone in a rerun of the 18 crib deaths in June. The hospital superintendent said that the reason for the deaths was lack of infrastructure and the infants were underweight at the time of admitting to hospital. **See,** *Mamata's West Bengal kills more infants; 6 children dead*, Times of India, November 10, 2011, available at: http://news.oneindia.in/2011/11/10/west-bengal-sees-more-infant-deaths-6-deaths-in-malda.html (last accessed on 12 January12).

[9] Srabanti Mukherjee, *A Study on Effectiveness of NRHM in Terms of Reach and Social Marketing Initiatives in Rural India*, 42(4) *European Journal of Scientific Research* 573 (2010).

[10] See, GOLDMAN SACHS, BRIC REPORT (BRAZIL, RUSSIA, INDIA CHINA) (2009). available at: http://www2.goldmansachs.com/our-thinking/index.html (last accessed on 25 July 2010).

healthcare compared to say, 16% in the US and 13% in Sweden. Of this, only 0.9% is spent by the government while the private players account for the remaining 4.3%.[11]

Moreover, poor public health conditions take economic tolls of the country in various ways, including reduced attractions for investors and tourists, cumbersome unnecessary expenditures on combating diseases. Moreover, the poor pay a price in debility, reduced earning capacity, and death while the rich suffer little mortality from diseases, but nevertheless suffer repeated episodes of morbidity.

This paper is an attempt to examine the truth about public health mandate and reality of Government initiatives. This paper has been structured in five major parts excluding introduction and conclusion. Part II has a discussion on the question of why public health action is needed. Here researcher has focused on public health movement, reason behind it and its relation with sanitation and movement thereof. Secondly in Part III situation of legal status of health care is examined. Here an attempt is made to analyze international mandate of right to health and compare its counterpart constitutional status in India. Part IV of this paper examines the judicial response of the apex court of India in respect to public health and health care in India. In Part V researcher has tried to look for reality of public health in India under the head of Public Health beyond Legal Status. This part has portrait the gap between legal status and policy implementation of India. Part VI is an attempt to analyze shortcomings of government efforts. Here researcher summed up that the health care system has of India flaws, both at the conceptual and operational levels.

2. BACKGROUND

Why public health action? Everyone comes up with a different answer. The mission of public health is to bring to bear in a synthesized way all available scientific, educational, and social skills, knowledge and discoveries so that they become operative promptly as agents for the betterment of individual, family, and community health.[12] The modern public health movement a broad-scale, concerted community action is of more recent origin. It has grown out of the great social changes of the industrial revolution and out of the great political struggles that have brought more and more freedom and opportunity to the

[11] *See*, http://www.who.int/social_determinants/survey/ (last accessed on 20 July 2010).

[12] Ruth B. Freeman, *Impact of Public Health on Society*, 76(4) Public Health Reports 277 (April 1961). available at: http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1929696/pdf/pubhealthreporig00100-0007.pdf.(last accessed on 12 July 2010).

peoples of the world.[13] By maintaining public health, we think of development of individual as well as society.[14]

In most of the developing countries, mainly there are three reasons of health problems that affect a large majority of population are contaminated water supply[15], inadequate sanitation[16] and untreated solid wastes. In the absence of proper sanitation, people suffered from high levels of infectious diseases leading to high incidences of morbidity and mortality.[17] It is estimated in several research that the problem of poor sanitation will become more serious in the years to come as the city population continues to grow rapidly.[18] Despite the efforts and investment many low-income countries continue to suffer from inadequate and unsafe sanitation India falls one of those countries.

Despite the global commitments, the improvements made by many countries during the last one decade are very poor and the constraints identified are: financial difficulties, institutional problems, inadequate human resources, and lack of political commitment, insufficient community involvement, inadequate operation and maintenance, lack of

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[13] *Ibid.*

[14] Wherever men have lived together, they have set up regulations to govern their health practices. However, many of our professional statements are vague or limited in the concept of public health that they present to the public. Descriptions of programs tell what is to be done and what is done, but rarely is there any mention of why public health action is so essential.

[15] *See*, INTERIM REPORT OF TASK FORCE 7 ON WATER AND SANITATION, (MILLENNIUM PROJECT INTERIM REPORT Feb 2004). Clean water for domestic purposes is essential for human health and survival; indeed, the combination of safe drinking water, adequate sanitation and hygienic practices like hand washing is recognized as a precondition for human health and for overall reductions in morbidity and mortality rates, especially among children. At least 1.1 billion people lack access to safe water, and 2.4 billion lack access to basic sanitation, a silent humanitarian crisis that each day takes thousands of lives, robs the poor of their health, thwarts progress toward gender equality, and hamstrings economic development, particularly in Africa and Asia. *See Also*, ASIAN YOUTH EXCHANGE PROGRAM, (OKINAWA 2009), available at: http://ayepo.go.jp/2009_Declaration.pdf (last accessed on 14July 2010). Across Asia, half a billion people lack access to clean water. The majority of those who die as a result of drinking dirty water are children under 5 years old.

[16] Nearly two billion people in Asian countries lack access to basic sanitation. Across our region, more children die from diarrhea than HIV/Aids. *Id*. at 4.

[17] WHO, *Facts and figures: Water, sanitation and hygiene links to health* (2004), available at http://www.who.int/water_sanitation_health/publications/factsfigures04/en/ (last accessed on 25September 11).

Dr. Lee Jong wook, Director-General, World Health Organization, said, "Water and Sanitation is one of the primary drivers of public health. I often refer to it as Health 101." This means that once we can secure access to clean water and to adequate sanitation facilities for all people, irrespective of the difference in their living conditions, a huge battle against all kinds of diseases will be won.

[18] Sanitation (sewage, seepage, night soil, grey water and other forms of waste water and their sludges) can contain faecal matter responsible for a broad range of diseases that include diarrhoea, dysentery, gastroenteritis, cholera and intestinal worms like hook worm and ascariasis, tapeworm, threadworm and whipworm, hepatitis, typhoid, polio and range of fevers due to blood parasites.

hygiene education, poor water quality, people's attitudes towards sanitation and insufficient information and communication.[19]

2.1. Concept of Public Health

Public health is a population–based concept for addressing the causes and the prevention of disease among demographic groups rather than among individuals. Public health emphasizes the prevention of disease and a population–based understanding of its causes. Public health services[20] reduce a population's *exposure* to disease through such measures as sanitation and vector control. Basic to public health is the health of the individuals that make up the public.[21] It is an essential part of a country's development infrastructure.[22] Public health services are having key role in reducing a population's *exposure* to disease; for example through assuring food safety and other health regulations; vector control; monitoring waste disposal and water systems; and health education to improve personal health behaviors and build citizen demand for better public health outcomes.

2.1.1. Why do We Need Public Health System?

Poor public health conditions take economic tolls[23] in various ways, including reduced attraction for investors and tourists;[24] continued expenditures on combating diseases which should have become history; and labor productivity foregone. The poor pay a high price in debility, reduced earning capacity, and death. The rich suffer little mortality from communicable diseases, but nevertheless suffer repeated episodes of morbidity which are reflected in high rates of stunting amongst their children.[25] The German pathologist Rudolf Virchow stated that all epidemics had social causes—most typically poverty,

[19] (WHO/UNICEF 2000).

[20] Public health services produce "public goods" of incalculable benefit for facilitating economic growth and poverty reduction. Consider, for example, the long-term growth possibilities generated by draining the swamps around which Washington DC was built. And conversely, consider the global economic costs imposed by the avian flu and SARS epidemics, emanating from poor poultry-keeping and health practices in a few Chinese localities.

[21] Freeman, *Supra* Note 6, p. 278.

[22] Monika Das Gupta, *Public Health in India: An Overview*, World Bank Policy Research Working Paper No. 13787 (Dec. 2005), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=873895 (last accessed on 23 April 2010).

[23] DAVID A. GUNNARSSON, et al, HEALTH ECONOMICS AS A TOOL FOR LEADERS, WHO Regional Office for Europe Copenhagen, 2003, available at: http://www.lachealthsys.org/documents/events/antigua06/Libro_OMS_Economia_Salud_Zollner_Stoddart_6.pdf. (last accessed on 27 July 2010).

[24] In the past many a times we have witnessed that various countries have taken restrictive measure for preventing occurrence of contagious disease from outside the country; such as bird flu, swine-flu, etc.

[25] Monica *Supra* Note 18.

hunger, and poor housing. Virchow believed that improving social conditions would have a positive effect on public health. This important early perspective plays a significant role in today's thinking about public health, especially when there are major health disparities among social classes within an individual society or between rich and poor countries.

2.1.1.1. *Public Health and Sanitation*

Public Health services play a critical role in promoting, restoring or maintaining the health status of a population whether they do so effectively depends on which services are provided and how they are organized. These services basically take the form of healthcare infrastructure, manpower facilities relating to supply of clean drinking water, sanitation and hygiene besides a host of other inter-related activities.[26] Due to lack of proper sanitation, water is contaminated, environment is polluted, and vector is increased resulting in major health hazards. Every year more than five million people die from illness linked to excreta disposal and improper hygiene practices.[27] Inadequate sanitation and unsafe water would result in fewer deaths each year from diarrhoea among children and fewer episodes of diarrhoea annually. Malaria continues to be a major killer in the Indian context, though initial efforts aimed at malaria eradication brought down the cases from estimated 75 million to a record 100, 000 cases in the sixties. Despite medical advancement and the efforts of various anti-malaria programmes, we still struggle with malaria patient in many states.[28] In addition, filariasis and scistosomiasis are spread to humans indirectly by mosquitoes and snails respectively which depend on excreta for their life-cycles. Many possibilities for transmission can be attributed – faecal material may drain into a water source, hands may not have been washed after defecation or before handling food, flies or other insects may transmit infective organisms from faeces to food etc. Since the organism responsible for most water and sanitation related diseases are present in the faeces or urine of infected persons, the sanitary disposal of excreta is most important. Sanitation (sewage, septage, night soil, gray water, and other forms of waste water and their sludges) can contain faecal matter responsible for a broad range of

[26] REPORT OF THE WORKING GROUP ON PUBLIC HEALTH SERVICES (INCLUDING WATER & SANITATION) FOR THE ELEVENTH FIVE-YEAR PLAN (2007-2012), p. 4.
[27] (WHO 2001)
[28] Dr. B. Suresh Lal, *A Study on Sanitation and Women's Health Problems in Rural Areas*", in ENVIRONMENTAL CONCERNS OF ECONOMIC DEVELOPMENT 396 (N. Linga Murthy and T. Jyothi Rani ed. Serials Publications, New Delhi, 2008).

diseases that include diarrhoea like dysentery, gastroenteritis, cholera and intestinal worms like hookworm and ascariasis, tapeworm, threadworm and whipworm, hepatitis, typhoid, polio and range of fevers and blood parasites. Despite serious impact of sanitation condition on health it seems in many of the states municipal corporation has badly performed or awaken only after the occurrence of health issues.

3. LEGAL STATUS OF RIGHT TO HEALTH AND HEALTH CARE

3. 1. International Mandate

Health care and right to health has been accorded priority by various international instruments. Global community treat health as the part international human rights perspective as reflected in ICESCR.[29] According to the General Comment 14 of the Committee for Economic, Social and Cultural Rights, 'the right to health requires availability, accessibility, acceptability, and quality with regard to both health care and underlying preconditions of health.' The Committee interprets the right to health, as defined in Article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

In 2002, the UN Committee on Economic Social and Cultural Rights provided States with guidelines on the Right to Water, as a component of Article 11 of ICESR. In 2007 the UN appointed an Independent Expert on Right to Water and Sanitation to study the human rights obligations related to water and sanitation and make recommendations to the Human Rights Council.

In July 2010 the UN General Assembly adopted a resolution and under which in paragraph 1 Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;".[30]

On 30 September 2010, the UN Human Rights Council, a subsidiary body of the UN General Assembly, adopted by consensus resolution on "Human Rights and access to safe drinking water and sanitation."[31]

[29] Article 12 of the International Covenant on Economic, Social and Cultural Rights 1966.
[30] A/RES/64/292, (2010).

Operative Paragraph 2 "Recalls General Assembly resolution 64/292 of 28 July 2010, in which the Assembly recognized the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;"

Operative Paragraph 3 is the critical paragraph: it "affirms that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity; ". This is crucial. By clarifying that the right to water and sanitation is included in the right to an adequate standard of living, which itself is enshrined in a large number of legally binding treaties, the right to water and sanitation becomes legally binding and equal to all other economic, social and cultural rights.

Operative Paragraph 6 "reaffirms that States have the primary responsibility to ensure the full realisation of all human rights, and that the delegation of safe drinking water and/or sanitation service delivery to a third party does not exempt the State from its human rights obligations".

On the basis of international mandates it could be inferred that the obligation to ensure that everyone has access to safe clean water and adequate sanitation rests with governments. The human right to water and sanitation guarantees all people the right to sufficient quantities of safe, physically accessible and affordable drinking water and sanitation.

3.1.1. *Indian Constitution and Right to Health*

The Constitution of India does not explicitly mention that right to health and healthcare is a guaranteed right. In late 1970s, the Supreme Court began to give an expanded meaning to the term 'life' appearing in Article 21. In India the right to health as a fundamental right grew as an offshoot of environmental litigation initiated by environmental activists regarding the environment issues. Undoubtedly the right to environment was crucial because a polluted environment affects public health. A pollution free environment as a fundamental right presupposes right to health as a fundamental right. Logically, the explicit recognition of the fundamental right to health should have preceded the fundamental right to good environment. Over the years it has been accepted that life does

[31] A/HRC/15/L.14

not only mean animal existence but the life of a dignified human being with all its concomitant attributes. This would include a healthy environment and effective health care facilities.

The obligation on the State to ensure the creation and the sustaining of conditions congenial to good health is cast by the Constitutional directives contained in Articles 39(e) (f), 42 and 47 in Part IV of the Constitution of India. Securing the health and strength of workers including men , women and the tender age children by ensuring that the right of individuals are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength.[32] The opportunities and facilities are maintained in a healthy manner and in conditions wherein the freedom and dignity and individual(s) are protected against exploitation, moral and material abandonment.[33] Right to a healthy environment safeguards human life itself under two aspects, namely, the physical existence and health of human beings and the dignity of that existence, the quality of life that renders it worth living. The State is required to make provisions for just and humane conditions of work and for maternity benefit.[34]

The Constitution (Forty Second Amendment) Act 1976 explicitly incorporated environmental protection and improvement as part of State policy through the insertion of Article 48A. Article 51A (g) imposed a similar responsibility on every citizen "to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for all living creatures."In addition to the Constitution, there are five main instruments in the Indian legal system that deal with regulation of health care and safeguarding individuals against medical negligence.[35]

4. JUDICIAL RESPONSE TO RIGHT TO HEALTH IN INDIA

The development of jurisprudence in this branch has been the reverse. The right to unpolluted environment was recognized as a right in the first instance and from that followed the right to public health, health and health care. Hon'ble Supreme Court of India has adopted that the maintenance of health, preservation of the sanitation and environment is implicit within the purview of Article 21 of the Indian Constitution as it

[32] The Constitution of India Article 39(e).
[33] *Ibid.* Article 39(f))
[34] *Ibid.* Article 42.
[35] Law of Torts; Consumer Protection Act, 1986; Indian Penal Code,1860; Indian Medical Council Act, 1956; Indian Contract Act, 1872.

adversely affects the life of the citizen and it amounts to slow poising and reducing the life of the citizen because of the hazard created if not checked. In *Municipal Council, Ratlam* v. *Vardhichand & Ors*,[36] the municipal corporation was prosecuted by some citizens for not clearing up the garbage. The corporation took up the plea that it did not have money. While rejecting the plea, the Supreme Court through Justice Krishna Iyer observed, "The State will realize that Article 47 makes it a paramount principle of governance that steps are taken for the improvement of public health as amongst its primary duties."[37] A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability.[38]

In *Virender Gour* v. *State of Haryana,*[39] the hon'ble Supreme Court has held that environmental, ecological, air and water pollution etc should be regarded as amounting to violation of right to health guaranteed by Article 21 of the Constitution. Hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a human and healthy environment. Right to life includes right to good health. It is a constitutional imperative on the part of the authorities to take adequate measures to promote and improve sanitation condition and environment. Life is more than mere animal existence.[40]

In *CERC* v. *Union of India,*[41] as well as in *Kirloskar Brothers Ltd.* v. *Employees' State Insurance Corporation,*[42] the Supreme Court held that the right to health and health care of a worker is a component of the fundamental right to life guaranteed under Article 21 read with Article 39(e), 41 and 43 of the Constitution of India. Moreover, in *Subhash Kumar* v. *State of Bihar*[43], the Supreme Court held that right to pollution free water and air is an enforceable fundamental right guaranteed under Art. 21.

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[36] AIR 1980 1622. See *Also, Citizen Action Committee* v. *Civil Surgeon Mayo (General Hospita, Nagpur and Ors.,* AIR 1986 Bom. 136, where Hon'ble High Court, has observed that Municipal Corporation has responsibility in marinating the civic hospital and the other basic amenities in the city.
[37] *Id* at 1631.
[38] *Id at 1628.*
[39] (1995) 2 SCC 577.
[40] (1995) 2 SCC 577.
[41] (1995) 3 SCC 42.
[42] (1996) 2SCC 682.
[43] AIR 1991 SC 420.

Further, in *M. C. Mehta* v. *Union of India*[44], the Hon'ble Court imposed a positive obligation upon the state to take steps for ensuring to the individual a better enjoyment of life and dignity and for elimination of water and air pollution. It is also relevant to note that as per the judgement of *Vincent Pannikurlangana* v. *Union of India*[45], maintenance and improvement of public health is the duty of the state to fulfil its constitutional obligation casted on it under Article 21 of Constitution.

In *Murli S Deora* v. *Union of India and Ors*[46], Supreme Court of India has recognized the harmful effects of smoking in public and also the effect on passive smokers, and in the absence of statutory provisions at that time, prohibited smoking in public places such as,1. auditoriums, 2. hospital buildings, 3. health institutions, 4. educational institutions, 5.libraries, 6. court buildings, 7. public office, 8. public conveyances, including the railways.

Further, many High Courts have deliberated on the question- Whether the State machinery bound to assure adequate conditions necessary for health? It was held that the State and its machineries are bound to assure hygienic conditions of living.[47] Even few High Court observed that maintenance of health, preservation of sanitation and environment falls within the purview of Art. 21 of the Constitution as it adversely affect the life of the citizen and it amounts to slow poisoning and reducing the life of the citizen because o the hazards created of not checked. The Court held that the Municipality had a statutory duty to remove the dirt, filth etc from the city within a period of six months and clear the city of Jaipur from the date of this judgment.[48]

5. PUBLIC HEALTH BEYOND LEGAL STATUS

The health situation in our country is dismal presently. With an alarming infant and child mortality rate, which take away the life of more than 2 million children every year[49], Government of India and State Governments seriously need to prepare a white paper and

[44] AIR 1988 SC 1037.
[45] AIR 1987 SC 990.
[46] AIR 2002 SC 40.
[47] *Citizens and Inhabitants of Municipal Ward* v. *Municipal Corporation*, AIR 1994 MP 48.
[48] *L.K. Koolwal* v. *State of Rajasthan and others*, AIR 1988 Raj 2. *See Also, B. L Wadhera v Union of India* AIR 1996 SC 2969, where the court observed, the authorities entrusted with the work of pollution control have been wholly remiss in discharge of their duties under the law and that they cannot absolve themselves of their duties on the pretext of financial and other limitations like inefficiency of staff etc.
[49] A. SHUKLA, RIGHT TO HEALTH CARE, (Health Action May 2001).

need to restructure the health machinery in India. The target of year 2000 was to reduce Maternal Mortality Ratio (MMR) to less than 200 per 100,000 live births.[50] However, the MMR remains high even today.[51] Although Reduction of child mortality and improvement in maternal health are the major goals in Millennium Declaration, to which India is a signatory. The most recent estimate of complete immunization coverage indicates that the percentage of children who are fully vaccinated ranges from 13% percent in Nagaland to 91% in Tamil Nadu.[52] The number of people dying of tuberculosis is almost unchanged since independence and remains at 500,000 every year.[53] India accounts for one-fifth of the global TB incident cases. Each year nearly 2 million people in India develop TB, of which around 0.87 million are infectious cases. It is estimated that annually around 330,000 Indians die due to TB.[54] Moreover, India is also facing a resurgence of various communicable diseases such as Cholera, Malaria[55], Brain Fever[56]

[50] Milind Deogaonkar, *Socio-economic inequality and its effect on healthcare delivery in India: Inequality and healthcare*, Electronic Journal of Sociology (2004), available at: http://www.sociology.org/content/vol8.1/deogaonkar.html (last accessed on 06 November 2011).
In contrast in as many as 10 of the 15 major states (Assam, Bihar, Gujarat, Haryana, Karnataka, Madhya Pradesh, Orissa, Rajasthan, Uttar Pradesh and West Bengal) where maternal mortality ratios (MMRs) exceed 400 per 100,000 live births, and three states (Assam, Madhya Pradesh and Uttar Pradesh) where MMRs are as high as 700 or more (Mari Bhat, 2002).

[51] LEENA V GANGOLLI, RAVI DUGGAL AND ABHAY SHUKLA, REVIEW OF HEALTHCARE IN INDIA, (Centre for Enquiry into Health and Allied Themes , Mumbai January 2005).

[52]SURESH SHARMA, IMMUNIZATION COVERAGE IN INDIA, 9WPS E/283/2007 (Institute of Economic Growth University of Delhi 2007), available at: http://www.iegindia.org/workpap/wp283.pdf (last accesses on 06 November 2011).

[53] Ganguli, *Supra* Notes 42.

[54] WHO Indian Office, *Core Programme Clusters, Communicable Diseases and Disease Surveillance Tuberculosis*, available at: http://whoindia.org/en/Section3/Section123.htm. (last accessed on 01 January 2011).

[55] Currently, 80.5% of the 109 billion population of India lives in malaria risk areas. Of this, 4.2%, 32.5% and 43.8% live in areas of high, moderate and low risk to malaria respectively. At present, official figures for malaria in India, available at NVBDCP, indicate 1.5–2 million confirmed cases and about 1,000 deaths annually. According to the WHO South East Asia Regional Office estimates, during 2000-2009, malaria incidence remained between the range 2.16 -2.83 millions and malaria deaths between 3188 - 6978 in SEA Region, the proportion of P. falciparum being 44 – 60% and more than 70% of these cases being reported from India. During 2009, total 2.7 million confirmed malaria cases (Microscopically and RDT) and 3188 malaria deaths were reported in the SEA Region where as estimated malaria cases were around 26 -36 million and malaria deaths between 42300 – 77300. The P. faciparum proportion remained around 60.5% (including RDT positives). Of these, the highest number laboratory confirmed cases were reported from India (1,563,344). However, even these estimates for malaria in India by the WHO have been recently questioned. *See*, http://www.malariasite.com/malaria/MalariaInIndia.htm. (last accessed on 21 September 2011).

[56] The death toll due to the Japanese Encephalitis continues to daily kill a few more people in Uttar Pradesh and seems to be spreading to the neighboring areas like Nepal (has already claimed over 400 lives in eastern UP region this year, with the disease mainly spreading around Gorakhpur region). See, *Brain fever cases cause health dept serious concern*, Times of India, Varanasi, 19 Oct., 2011, available at:

and Dengue[57]. The total number of people living with HIV/AIDS (PLHA) in India is estimated at 24 lakh (19.3 –30.4) in 2009. [58] and within a few years India is likely to overtake South Africa in having the highest number of AIDS cases in the world.[59]

Such statistics should be seen as a clarion call for the government to step in with all earnestness. It goes without saying that there is an immediate need to address these issues before the situations spirals out of control.

6. SHORTCOMINGS OF GOVERNMENTS EFFORTS

Although, maintenance of public health is an indispensable task of every modern welfare state but it is much arduous to accomplish it. The health care system of India has flaws, both at the conceptual and operational levels. However, there is no simple, band-aid solution to the problem. In India major health expenditure is borne by common people. Health Insurance has made very late entry in India. Moreover, common people of India see it with suspicion. There is a need for continuous monitoring and appraisal, allowing for regular course corrections. Unfortunately, health is a prime example where good politics and good policy diverge.[60] One cannot ignore the economic interests of the health education-hospital-pharmaceutical-insurance industries who directly profit from tertiary specialist care, indirectly when public health delivery systems are run down and when the social determinants of health are neglected.[61] The location of health in the State list rather than the concurrent list poses major problems for service delivery.[62] Allocated resources

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http://articles.timesofindia.indiatimes.com/2011-10-19/varanasi/30297084_1_district-malaria-cerebral-malaria-vector-borne-diseases. (last accessed on 06 November 2011).

[57] The threat of dengue looms large with the city reporting three dengue cases in the past one week. The number of cases continues to increase. On Thursday, an 85-year-old person who lives in Hauz Khas was diagnosed with dengue in a private hospital. Doctors said the patient's condition is stable now. The first case of dengue was reported from AIIMS on March 20. Dr Anoop Singh, a PG student in AIIMS, tested positive for the disease. *See*, http://timesofindia.indiatimes.com/c...ow/8123328.cms. (last access on 21 November 2011).

[58] HIV declining in India; New infections reduced by 50% from 2000- 2009; Sustained focus on prevention required. available at:
http://nacoonline.org/upload/HomePage/NACO%20Press%20Release%20on%20HIV%20Estimates.pdf (last accessed on 05 November 2011).

[59] Ying-Ru J. Lo, Padmaja Shetty, D.S.C. Reddy, Salim Habayeb, 'Controlling the HIV/AIDS epidemic in India', available at:
http://whoindia.org/LinkFiles/Commision_on_Macroeconomic_and_Health_Bg_P2__Controlling_the_HIV_AIDS_epidemic_in_India.pdf (last accessed on 06 November 2011).

[60] Professor K.S. Jacob, *For a new and improved NRHM*, The Hindu, 7 August 2011, available at: http://www.thehindu.com/opiion/lead/article2333819.ece (last accessed on 06 November 2011).

[61] *Ibid.*

[62] *Ibid.*

for health flow through various layers of national and local government's institutions on their way to the health facilities.[63] Political and bureaucratic leakage, fraud, abuse and corrupt practices are likely to occur at every stage of the process as a result of poorly managed expenditure systems.[64] Heavy financial burden for the states has led to a progressive strangulation of funds[65] for what ought to be routine public health services, to the point where these are often vestigial at best.[66]

Despite having a well-developed administrative system, good technical skills in many fields, India has relatively poor health outcomes. This suggests that the health system may be mis-directing its efforts, or be poorly designed. five decades after Karnataka state was created out of several contiguous kingdoms and provinces, it has not developed a unified and updated Public Health Act — those for each constituent part from the colonial era are still on the books. In Tamil Nadu, the Madras Presidency's Public Health Act of 1939 is still in place.[67]

7. CONCLUSION

Probing the niche of India's health care system gives us access to various interesting findings. The ones who drafted health care rules and regulations do not have the diligence to monitor the proper implementation of remedial strategies. However, knowledge and enlightenment about the frail health care practices among the commoners have helped the country to overcome some of the major hindrances. They began to recognize the vantages that were in store for them and succeeded in utilizing them somewhere in an effective fashion. However, the methods and goals of public health officials, local governments and members of the public do not match with the object and the role of the state in personal health. Within the discipline of public health there have also been differences in priority, often between lab-based or other scientific work, studies and other factors involved in disease. Despite the court intervention it is evident through the above

[63] FINANCIAL RESOURCES MANAGEMENT, available at: http://www.u4.no/themes/health/healthfinances.cfm (last accessed on 10 October 2011).
[64] *Ibid.*
[65] The Maharashtra council witnessed an uproar on Thursday from the opposition parties over alleged diversion of funds meant for Naxal-hit areas in Gadchiroli. The issue was raised during calling attention motion tabled by Shiv Sena member Diwakar Raote alleging diversion of Rs 25 lakh meant for providing health services to people living in areas affected by the Naxal violence in Vidarbha.
[66] Monica, *Supra* Note 18, at 6-7.
[67] *Ibid.*

discussion sanitation and public health needs refocusing with respect to framing of policies as well even regarding implementation and monitoring of the policies and indicatives of the government. Keeping in view the above discussion, social situation, infrastructural capacity, role of public health policy in guaranteeing human right to health needs a reorientation in order to ensure that constitutional guarantee is not merely a decorative piece for drawing room but live in good health is fundamental right of Indian in India.

Health systems in India require a new organisational framework that provides a mandatory clear and simple accounting and liability based on transparency. Further, I favour decentralization strategy to improve technical as well as allocation efficiency, with the view to enabling broader public participation, improving local oversight of fiscal resources, enhancing public ability to hold decision makers accountable and enhancing the responsiveness of the health system. Moreover, there is a need to measure resource leakages and efficacy of public spending.

Further, an initiatives and strategy is required to ensure that majority Indian have health insurance and Health Insurance providers should be regulated by a government determined rates for hospital expenditure. Here it is necessary to note that almost majority of the private hospitals get subsidized rate land on which hospitals is constructed in India.

The Transmissible Age: The Cistron Patents Effect on Different Classes of Scientific Research

Mr. Vaibhav Parikh and Ms. Aishwarya Mohapatra

I. THE MYRIAD GENE PATENT LITIGATION

A. *DISTRICT COURT: BACKGROUND*

The Plaintiffs, the Association for Molecular Pathology, had moved the District Court of the Southern District of New York, with a claim to declare invalid patents on two important human genes: BRCA1, and BRCA2 (together known as BRCA1/2, or BRCA) or Breast Cancer Susceptibility Genes 1 and 2, under the U.S. Patent Act, 35 U.S.C § 101[1].[2] The patent for these human genes were issued to Myriad Genetics and the University of Utah Research Foundation, by the U.S. Patent and Trademark Office.[3] The claims were directed to the isolated DNA sequences containing all or some of the BRCA genes, and the process of comparing and analyzing these sequences to identify breast or ovarian cancer.[4] As the law currently stands, Myriad Genetics is the only company allowed to test whether a woman has these mutations and the patient is unable to obtain a second opinion by having the test done by another company.

Breast Cancer is the most frequently diagnosed cancer worldwide and is the leading cause of cancer death for women in Britain and the second leading cause of cancer death for women in the United States.[5] Ovarian cancer is the eighth most common cancer in women and causes more deaths in the Western world than any other gynecologic cancer. Awareness of breast cancer has been created throughout the world and scientists throughout the world sought to be the first to identify DNA nucleotide sequences associated with breast cancer.[6] The research facility at Utah was able to track down the BRCA gene by relying on the use of linkage analysis, and combining genetics and demographical studies.[7] Women with BRCA mutations face up to 85% cumulative risk of breast cancer, as well as up to a 50% cumulative risk of ovarian cancer.[8] The existence of BRAC mutations is therefore an important consideration in the provision of clinical care for

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[1] ***35 U.S.C. 101 Inventions patentable.:*** Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.

[2] *Association for Molecular Pathology v. U.S. Patent and Trademark Office*, No. 09-cv-4515, 94 USPQ2d 1683, Page 5

[3] *Ibid.*, Page 5

[4] *Ibid*, Page 6.

[5] *Ibid.*, Page 49

[6] *Ibid.*, Page 50

[7] *Ibid.*, Page 51

[8] *Ibid.*, Page 58

breast and/or ovarian cancer. A patient will not only learn of her risk for hereditary breast and ovarian cancer but also can gain information that is useful for the diagnosis and prophylactic treatment of the same.

Myriad offers multiple forms of BRCA testing to the general public. Its standard test, called Comprehensive BRAC Analysis, originally only consisted of the full sequencing of the BRAC genes and which could, later on, detect virtually all large rearrangement mutations in the BRAC genes.[9] The Myriad tests are available to clinicians and patients at a cost of over $3000 per test.[10]

B. ISSUES & RULINGS

The issues that were disputed were:

1. **The impact of Myriad's patents on BRCA testing**:
   According to the Plaintiffs, Myriad's patents and it being the sole provider of the testing has hindered the ability of the patients to receive the highest quality treatment against breast cancer. The Plaintiffs have also noted a few abnormalities in the genetic testing.[11] They also believe that other labs are in a position to offer more comprehensive testing services, which have better efficiency.
   According to Myriad however, the genetic test conducted by it is of "gold standard", and it continues to improve its testing methods by the day.[12]
2. **The impact of gene patents on the advancement of science and medical treatment**:
   According to the plaintiffs, data sharing is the key to the future of genetic discoveries and bioinformatics, and gene patents impede research aimed at identifying the role of genes in medical conditions. They maintained that the history of data sharing started from the beginning of the Human Genome Project, where the scientists and companies decided to keep it freely available to all.[13] It has been contended that imposing intellectual property rights to genetic material is a tragedy in which the holder of the patent rights prevents any other party from engaging in innovation.[14] Plaintiffs have cited "chilling effects" that gene patenting might have on clinical testing and genetic research.[15]They have also alleged that Myriad has withheld critical data.
   On the other hand, Myriad has counter-argued saying that the very point of patenting the isolated gene is to provide exclusive information to others so they improve upon it.[16]

Presiding Judge, Robert Sweet, had said that the case had presented the challenging question of whether isolated human genes and the comparison of their sequences patentable.[17] The Court

[9] *Ibid.*, Page 60
[10] *Ibid,* Page 60.
[11] *Ibid.*, Page 68
[12] *Ibid.*, Page 69
[13] *Ibid.*, Page 69
[14] Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anti-Commons in Biomedical Research*, 280 Science 698 (1998)
[15] *Ibid.*, Page 74
[16] *Ibid.*, Page 80

decided that Myriad would not be granted a summary judgment, citing cases like *Calotex Corp* v. *Catrett*[18], and held that summary judgment is granted only where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Court laid down landmark scope for 35 U.S.C. § 101. Looking into the case of *Diamond* v. *Chakrabarty*[19], where the Supreme Court held that § 101 should be given a broad reading; the Court maintained that this broad reading was not without limits.[20] It held the composition claims invalid under 101, and said that the "patentable subject matter must be markedly different from a product of nature"[21]

With this the Sweet, J ruled in favour of the Plaintiffs, and denied the cross-motion of Myriad, and the motion of USPTO was granted.

C. FEDERAL CIRCUIT: BACKGROUND & DETAILS

Myriad appealed from the decision of the District Court.[22] The first contention was whether the Court was correct in granting the declaratory judgment. Myriad argued that its challenged composition claims to "isolated" DNAs cover patent-eligible compositions of matter within the meaning of § 101. According to Myriad, the district court came to a contrary conclusion by (1) misreading Supreme Court precedent as excluding from patent eligibility all "products of nature" unless "markedly different" from naturally occurring ones; and (2) incorrectly focusing not on the differences between isolated and native DNAs, but on one similarity: their informational content. Rather, Myriad argues, an isolated DNA molecule is patent eligible because it is, as claimed, "a non-naturally occurring composition of matter" with "a distinctive name, character, and use."[23]

The Supreme Court, however, has also consistently held that § 101, although broad, is not unlimited.[24] The Court's precedents provide three judicially created exceptions to § 101's broad patent-eligibility principles: "laws of nature, physical phenomena, and abstract ideas."[25] Applying this test to the isolated DNAs in this case, the Learned Judges concluded that the challenged claims are drawn to patentable subject matter because the claims cover molecules that are markedly different—have a distinctive chemical identity and nature—from molecules that exist in nature.

Keeping the above in mind, the Federal Circuit affirmed in part and reversed in part.

However, Judge Moore wrote separately to emphasize the distinction between cDNA and isolated DNA. She explained that while cDNA is "markedly different" from DNA found in the human body and is clearly eligible for a patent, isolated DNA presents a closer case of eligibility.

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[17] *Ibid.*, Page 6
[18] 477 US 317, 323 (1986)
[19] 447 U.S. 303, 308 (1980)
[20] *Ibid.*, Page 97
[21] *Ibid.*, Page 111
[22] Ass'n for Molecular Pathology v. USPTO, 653 F.3d 1329 (Fed. Cir. 2011).
[23] *Ibid.*
[24] *Chakrabarty*, 447 U.S. at 309
[25] *Ibid.*

Ultimately, she concurred in the court's opinion to up hold Myriad's composition claims, emphasizing the deference owed to longstanding policy choices of the United States Patent and Trademark Office ("USPTO") that Congress has never challenged.

Judge Bryson dissented from the court's holding that Myriad's claims to isolated BRCA are valid under 35 U.S.C. § 101. Judge Bryson argued that "there is no magic to a chemical bond that requires us to recognize a new product when a chemical bond is created or broken." He described the process of isolating a gene as "akin to snapping a leaf from a tree": merely "plucking the leaf would not turn it into a human-made invention."Judge Bryson disagreed with Judge Moore that any deference was owed to the longstanding policy choices of the USPTO. According to Judge Bryson, the USPTO lacks substantive rulemaking authority with regard to issues such as patentability, and the role of the courts is to interpret the law passed by Congress in accordance with common law precedents.[26]

III. DIAGNOSTIC METHODS

A. DO CISTRON PATENTS CATER CRUCIAL INCENTIVES TO EXCOGITATE, DEVELOP, AND COMMERCIALIZE?

Although there are potent grounds that Cistron patents are crucial, and even requisite, to further the developments and commercialization of therapeutic proteins, the evidence indicates that such patents may be more prejudicial than good in the diagnostic testing domain. More often than not the cost of developing diagnostics is downcast, peculiarly as equated to the cost of developing therapeutic proteins.[27] According to a report on gene patents which egressed last year by the department of health and human services advisory committee on genetics, health and society, it ordinarily costs 'tween $8000 to 10000$ per sequenced cistron to develop a diagnostic screening.[28] A recent study found that "[t]he development of human genome research has been accompanied by a shift of attention from the classical model of discovering loci involved in single-gene disorders (Mendelian traits) to elucidation of multiple genetic factors of small effect involved in common complex diseases."[29] As a result, as scientists continue to investigate diseases that are caused by multiple genes, it will grow increasingly difficult to correlate specific genes with specific diseases. It is therefore possible that the cost of developing a genetic test will increase in the future. A nonpareil ground that the cost of developing a diagnostic method is

[26] *Ibid.*, Page 1380-1381

[27] *See* Rochelle C. Dreyfuss, *The Patentability of Genetic Diagnostics in U.S. Law and Policy* 14 (N.Y.U. Sch. of Law, Pub. Law Research Paper No. 10-68, 2010)

[28] SECRETARY'S ADVISORY COMM. ON GENETICS, HEALTH, & SOC'Y, DEP'T OF HEALTH & HUMAN SERVS., GENE PATENTS & LICENSING PRACTICES & THEIR IMPACT ON PATIENT ACCESS TO GENETIC TESTS 34 (2010) [hereinafter SACGHS], *available at* http://oba.od.nih.gov/oba/sacghs/reports/SACGHS_patents_report_2010.pdf.

[29] Quanhe Yang et al., *How Many Genes Underlie the Occurrence of Common Complex Diseases in the Population?*, 34 INT'L J. EPIDEMIOLOGY 1129, 1129 (2005).

much down casted as compared to the cost of developing a protein drug, since, the FDA does not normally necessitates dearly-won pre commercialized survey for genetic tests.[30] As an outcome, it is comparatively meretricious to carry on correlation cogitation and interpret the determinations into a diagnostic test which can be executed on patients.[31] As R&D overheads are squat for diagnostic tests, a company engrossed in budding such a test is likely to pay for R&D even if it does not have a patent on the gene of curiosity. If the diagnostic test is a success, there is a first-rate chance that the company will make good its R&D costs devoid of needing the market inimitability conferred by a gene patent.[32] Consequently, gene patents possibly will not be crucial to incentivize companies to expand as well as commercialize up-to-the-minute diagnostic methods. a further rationale why gene patents may perhaps not be considered necessary to call forth diagnostic tests is that scientists functioning in scholastic and administration funded labs encompass incentives to develop such tests yet when their effort is not cosseted by a patent.[33] Researchers within university circles plus the public sector are goaded by numerous factors that have nothing to do with patents, together with broad-spectrum methodical inquisitiveness or a vow to plateful patients.[34] Buoyant via these incentives, scholastic and public sector scientists carry out imperative essential research associated to the expansion of diagnostic methods, as well as identifying mutations along with making associations amid genetic persona with syndrome.[35] Furthermore, for the reason that the outlay of developing a diagnostic test is squat, academic and government-funded labs know how to get hold of funding for diagnostic research devoid of getting a gene patent.[36] Prop up in favor of diagnostic research habitually comes within the outline of government grants, openhanded hand outs from patient advocacy groups, or payment for services (such as the administration of a previously-developed genetic test to patients).[37]

Not merely is it frequent for scientists to develop diagnostic methods autonomously of the patent system's monopoly incentives, however there is furthermore substantiation so as to gene patents in point of fact encumber development in this arena. A 2003 study by Mildred Cho along with her contemporaries at the Center for Biomedical Ethics at Stanford University concluded that patents and licenses have had a noteworthy off-putting upshot on the ability of clinical laboratories to develop and endow with genetic tests.[38] Out of 122 labs that were surveyed, seventy-nine had been contacted by a patent or else license owner on the subject of the lab's impending infringement of a patent owing to its administration of a diagnostic test.[39] Thirty of the labs that had received infringement warnings reported that these warnings had deterred the lab from

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[30] SECRETARY'S ADVISORY COMM. ON GENETICS, HEALTH, & SOC'Y, DEP'T OF HEALTH & HUMAN SERVS., GENE PATENTS & LICENSING PRACTICES & THEIR IMPACT ON PATIENT ACCESS TO GENETIC TESTS 34 (2010) [hereinafter SACGHS], *available at* http://oba.od.nih.gov/oba/sacghs/reports/SACGHS_patents_report_2010.pdf.

[31] *See* Rochelle C. Dreyfuss, *The Patentability of Genetic Diagnostics in U.S. Law and Policy* 14 (N.Y.U. Sch. of Law, Pub. Law Research Paper No. 10-68, 2010)

[32] *See* Rochelle C. Dreyfuss, *The Patentability of Genetic Diagnostics in U.S. Law and Policy* 14 (N.Y.U. Sch. of Law, Pub. Law Research Paper No. 10-68, 2010)

[33] See Id.

[34] Id.

[35] Id.

[36] Id.

[37] Id.

[38] Mildred K. Cho et al., *Effects of Patents and Licenses on the Provision of Clinical Genetic Testing Services*, 5 J. MOLECULAR DIAGNOSTICS 3 (2003).

[39] Id. at 4-5.

continuing to offer the test.[40] Several of the surveyed labs reported that their proclivity to develop a new-fangled diagnostic test had been unfavorably affected by the risk of a patent infringement lawsuit,[41] in view of the fact that "holders of gene-based diagnostic patents are active in asserting their intellectual property rights."[42] Regardless of the off-putting outcome of Cho's study, there is substantiation that gene patents do not *as anticipated* thwart the development and commercialization of diagnostic methods. Designed for instance, Johns Hopkins University is loyal to a non-exclusive licensing regime for its gene patents linked to cystic fibrosis, and diagnostic testing for cystic fibrosis is currently accessible in sixty-three labs across America.[43] The commercialization of diagnostic testing for Huntington's disease has been an analogous accomplishment narrative; even though the disease is atypical, nonexclusive licensing of gene patents has led to the broad-spectrum accessibility of testing by over fifty private as well as nonprofit labs.[44] These examples exhibit that gene patents do not get in the way with the goals of the patent system when gene patent holders are dedicated to conscientious licensing schemes. Nevertheless, it is not the prefecture of the patent system to determine what patent holders execute with the intellectual property rights they have been granted by the USPTO.

IV. RESEARCH TOOLS

A. DO CISTRON PATENTS CATER CRUCIAL INCENTIVES TO EXCOGITATE, DEVELOP, AND COMMERCIALIZE?

Rebecca Eisenberg has argued that patents on research tools are not considered necessary to incentivize the development as well as commercialization of downstream technologies.[45] For the reason that patented research paraphernalia — together with gene patents — cannot avert competing firms from manufacturing indistinguishable end products, patents on the final artifact endow with stronger commercial fortification than patents on a gene or supplementary upstream technology.[46] In view of that, "firms that are interested in developing end products for sale to consumers are unlikely to see patents on research tools as a very effective means of promoting their market exclusivity."[47] For that raison d'être, the proscription of gene patents might have

[40] Id. at 5.
[41] *See id.* at 8.
[42] NAT'L RESEARCH COUNCIL, REAPING THE BENEFITS OF GENOMIC AND PROTEOMIC RESEARCH: INTELLECTUAL PROPERTY RIGHTS, INNOVATION, AND PUBLIC HEALTH 131 (Stephen A. Merrill & Anne-Marie Mazza eds., 2006).
[43] Subhashini Chandrasekharan et al., *Impact of Gene Patents and Licensing Practices on Access to Genetic Testing for Cystic Fibrosis*, 12 GENETICS MED. S194, S205 (SUPP. 2010); Rochelle C. Dreyfuss, *The Patentability of Genetic Diagnostics in U.S. Law and Policy* 14 (N.Y.U. Sch. of Law, Pub. Law Research Paper No. 10-68, 2010)
[44] Rochelle C. Dreyfuss, *The Patentability of Genetic Diagnostics in U.S. Law and Policy* 14 (N.Y.U. Sch. of Law, Pub. Law Research Paper No. 10-68, 2010)
[45] Rebecca S. Eisenberg, *Technology Transfer and the Genome Project: Problems with Patenting Research Tools*, 5 RISK: HEALTH SAFETY & ENV'T 163 (1994).
[46] *Id.* at 169.
[47] *Id.* at 170.

petite effect on the behavior of firms that already go all-out to develop and patent ground-breaking downstream technologies. Eisenberg suggests that biotechnology companies might even augment their rates of development and commercialization if gene patents did not act as barriers to the development of beleaguered end products.[48] In the face of Eisenberg's prediction that end product development will swell in the absence of patents on research tools, a quantity of scholars have articulated disquiet that off-putting patent protection to end products will deprive indispensable science research of the financial shore up that it requires.[49] Aaron Kesselheim and Jerry Avorn have argued that restraining fundamental science patenting — by banning gene patents, for exemplar — would budge corporate investment towards ventures that can be quickly plus easily developed into lucrative products.[50] In such a situation, a drug company might focus its efforts on developing a "me-too" drug[51] to a convinced extent than a beyond doubt innovative product that improves upon drugs already on the market.[52] Furthermore, firms would have diminutive incentive to subsidize central scholastic research for the reason that any discoveries would without more ado penetrate the public domain.[53] If fundamental research were to undergo from a lack of adequate funding, fewer upstream discoveries would be through, which in turn would constringe the scope of downstream excogitation.[54]

B. TO WHAT POINT DO CISTRON PATENTS ENCOURAGE AND EASE FOLLOW-ON INNOVATION?

One raison d'être why the patent system does not proficiently smooth the progress of transactions flanked by users of genetic research tools is for the rationale that it is more often than not very thorny to determine the value of a Cistron at the instance of patenting and licensing.[55] As is the case with other research paraphernalia, it is often distorted in the premature stages of investigation whether a gene or its encoded protein will lead to the development of a precious commercial artifact or service.[56] As an upshot of this vagueness on the subject of the ultimate value of a patented gene, the patent proprietor will habitually embrace a reach-through crowned heads proviso in any license concord it offers to third parties.[57] If a license accord has a reach-through royalty proviso, the outlay of the license includes the value of the right to employ the patented technology in case the research tool leads to the development of a runaway success

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[48] *See id.*
[49] Aaron S. Kesselheim & Jerry Avorn, *University-Based Science and Biotechnology Products: Defining the Boundaries of Intellectual Property*, 293 J. AM. MED. ASS'N 850, 853 (2005).
[50] *Id.* at 852–53.
[51] Marcia Angell, *Excess in the Pharmaceutical Industry*, 171 CANADIAN MED. ASS'N J. 1451, 1451 (2004).
[52] Aaron S. Kesselheim & Jerry Avorn, *University-Based Science and Biotechnology Products: Defining the Boundaries of Intellectual Property*, 293 J. AM. MED. ASS'N 850, 853 (2005) at 853.
[53] *Id.*
[54] *See id.* at 852–53.
[55] *See generally* Michael S. Mireles, *An Examination of Patents, Licensing, Research Tools, and the Tragedy of the Anticommons in Biotechnology Innovation*, 38 U. MICH. J.L. REFORM 141, 151–52 (2004) at 165.
[56] *Id.*
[57] *Id.*

commercial product.[58] "For example, an agreement might specify that the supplier of a new receptor will provide the receptor to a researcher for use in seeking new hormones so long as the supplier receives reach-through royalties on any new hormone discovered or invented by the researcher."[59] Consequently, the licensor can capture, "A one hundredth of the sales of the commercial application developed from the research tool, even though the commercial application does not per se include the licensed patented gene."[60] A scientist fascinated in conducting a finicky study may be perturbed if the project he is functioning on requires him to accredit manifold Cistrons. Every Cistron might be governed by a different license with a separate reach-through crowned heads rider, considerably escalating the outlay of the study and eroding the turnover latent of any resulting commercial product.[61] Moreover, the lofty transaction costs linked with negotiating licensing agreements has led to "rising frustration" amid scholastic and industry scientists.[62] To a great extent of this aggravation stems from the impenetrability of precisely gauging the value of a fussy gene,[63] which makes it thorny for institutions to concur on a license that passably protects the interests of both parties. Although in several instances it appears that patented genes and linked reach-through crowned heads licenses hold up entrée to new-fangled technology, there is substantiation symptomatic of that reach-through royalty provisions are not as detrimental to scientific progress as they appear at foremost fleeting look. Some reach through royalty provisions consign a ceiling on the total amount of royalties a licensor may amass from sales of a given viable artifact.[64] In addition, reach-through crowned heads licenses have the pro of making research tools accessible at a trifling up-front cost for use in noncommercial research.[65] An intellectual or public sector scientist, for that raison d'être, has every spur to use patented genes to demeanor crucial research, and the patent owner is entitled to share the affluence if the research yields a marketable product.[66] There is substantiation that research tools are far and wide accessible to scientists betrothed in basic research. Lone study found that barely one percent of academic biomedical researchers in the U.S. reported having to holdup a project as an end result of another's patent; none reported having to discard a project.[67] Another study discovered that scientists no more than infrequently allude to "technology access

[58] *Id.*; *see* Stephen G. Kunin et al., *Reach-Through Claims in the Age of Biotechnology*, 51 AM. U. L. REV. 609, 618 (2002)

[59] See *Id.*

[60] *See generally* Michael S. Mireles, *An Examination of Patents, Licensing, Research Tools, and the Tragedy of the Anticommons in Biotechnology Innovation*, 38 U. MICH. J.L. REFORM 141, 151–52 (2004) at 165.

[61] *Id.* at 165–66.

[62] *See* NAT'L INSTS. OF HEALTH, REPORT OF THE NIH WORKING GROUP ON RESEARCH TOOLS (1998).

[63] *See generally* Michael S. Mireles, *An Examination of Patents, Licensing, Research Tools, and the Tragedy of the Anticommons in Biotechnology Innovation*, 38 U. MICH. J.L. REFORM 141, 151–52 (2004) at 165.

[64] *Id.* at 166.

[65] NAT'L RESEARCH COUNCIL, REAPING THE BENEFITS OF GENOMIC AND PROTEOMIC RESEARCH: INTELLECTUAL PROPERTY RIGHTS, INNOVATION, AND PUBLIC HEALTH 131 (Stephen A. Merrill & Anne-Marie Mazza eds., 2006) at 90.

[66] NAT'L RESEARCH COUNCIL, REAPING THE BENEFITS OF GENOMIC AND PROTEOMIC RESEARCH: INTELLECTUAL PROPERTY RIGHTS, INNOVATION, AND PUBLIC HEALTH 131 (Stephen A. Merrill & Anne-Marie Mazza eds., 2006) at 90-91.

[67] Timothy Caulfield et al., *Evidence and Anecdotes: An Analysis of Human Gene Patenting Controversies*, 24 NATURE BIOTECHNOLOGY 1093 (2006).

issues" as reasons behind a decision to abandon a research project.[68] Such contact issues incorporate "unreasonable" license requisites or the existence of too many patents casing research tools.[69] Some commentators have concluded that precincts restricting access to patented research tools may have to do with a public institution's compliance to acknowledge the market price along with admittance requisites rather than with a private firm's snub to license a gene to the public sector.[70]

In addition, there are two supplementary reasons why several scholars are not fretful on the subject of the effects of gene patents on populace access to research tools. Foremost, scores of genes are in point of fact patented by public sector institutions rather than hush-hush companies.[71] Since publication is "the currency of achievement and professional advancement" in the public sector,[72] any gene patents owned by civic institutions are not as much of expected to impede with the patent system's goal of encouraging follow-on innovation. Subsequent, at hand is substantiation that scholastic researchers face petite or nix real threat of being sued for patent infringement by private firms.[73] There are more than a few reasons for this, including "the intricacy of enforcing patents, owing to the confidentiality of research programs, costs of gone astray goodwill among researchers, costs of litigation, [and] the comparatively diminutive damages to be collected from jamming delve into use."[74]

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[68] NAT'L RESEARCH COUNCIL, REAPING THE BENEFITS OF GENOMIC AND PROTEOMIC RESEARCH: INTELLECTUAL PROPERTY RIGHTS, INNOVATION, AND PUBLIC HEALTH 131 (Stephen A. Merrill & Anne-Marie Mazza eds., 2006) at 123.

[69] Id.

[70] Timothy Caulfield et al., *Evidence and Anecdotes: An Analysis of Human Gene Patenting Controversies*, 24 NATURE BIOTECHNOLOGY 1093 (2006).

[71] Andrew W. Torrance, *Gene Concepts, Gene Talk, and Gene Patents*, 11 MINN. J.L. SCI. & TECH. 157, 161 (2010).

[72] NAT'L RESEARCH COUNCIL, REAPING THE BENEFITS OF GENOMIC AND PROTEOMIC RESEARCH: INTELLECTUAL PROPERTY RIGHTS, INNOVATION, AND PUBLIC HEALTH 131 (Stephen A. Merrill & Anne-Marie Mazza eds., 2006) at 25.

[73] *See* Christopher M. Holman, *The Impact of Human Gene Patents on Innovation and Access: A Survey of Human Gene Patent Litigation*, 76 UMKC L. REV. 295, 324 (2007) at 359.

[74] Timothy Caulfield et al., *Evidence and Anecdotes: An Analysis of Human Gene Patenting Controversies*, 24 NATURE BIOTECHNOLOGY 1093 (2006).

V. CONCLUSIONS AND POTENTIAL SOLUTIONS

A. CONCLUSIONS

The preceding scrutiny demonstrates that there are scores of intricate factors that ought to be painstaking before legislators or adjudicators craft a decision on the subject of the patentability of genes. The incongruent effects of gene patents on dissimilar types of scientific delve into advocate that an all-or zilch solution — either permitting or segregating all gene patents — might not be the superlative way to determine the up to date debate. in its place, legislators and policymakers ought to consider a narrower tailoring of the law that recognizes that a cost-benefit analysis can errand or disservice gene patents, depending on the category of scientific research in question. The *Myriad II* jury ought to have well thought-out how its decision concerning the patentability of genes would impinge on scientific development outside the framework of isolated *BRCA1/2*.

With respect to restorative proteins, it is perceptible that gene patents are imperative for incentivizing the development of new-fangled drugs; furthermore it is likely that the benefits of gene patents offset the costs. For the reason that R&D for protein drugs is expensive, pharmaceutical as well as biotechnology companies are dubious to invest in the development as well as commercialization of such drugs devoid of assurance that their products will have the benefit of at least some souk exclusivity.[75] This market distinctiveness, nevertheless, does not necessarily have to be offered by the patent system. Under the up-to-the-minute regulatory regime for biologics established by the PPACA, market inimitability for a therapeutic protein drug is awarded by the FDA to a certain extent than by the patent system.[76] It remains to be seen whether the novel regime will trim down the importance of gene patents to pharmaceutical companies developing protein drugs.

Compared to the noteworthy role they play with regard to salutary drugs, gene patents materialize to be less vital for incentivizing progress, commercialization, and follow-on research in the pinpointing testing arena. for the reason that diagnostic tests are reasonably despicable to develop,[77] the monopoly incentives provided by the patent system are less important to call forth up-to-the-minute and enhanced diagnostic methods. In addition, public sector researchers have scores of incentives other than patents to develop as well as commercialize diagnostic tests, such as wide-ranging scientific snooping or a binder to helping patients.[78] There is moreover a somber concern that the catastrophe of the anticommons will encumber significant original developments in the diagnostic arena.[79] Although the tribulations anticipated by the tragedy of the anticommons have not yet reached the magnitude predicted by the conjecture, such problems will likely be

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[75] *See* Frederic M. Scherer, *The Economics of Human Gene Patents*, 77 ACAD. MED. 1354 (2002).

[76] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 7002, 124 Stat. 119, 807 (2010) (codified at 42 U.S.C.A. § 262(k)(7)(A) (West Supp. 2010)).

[77] Rochelle C. Dreyfuss, *The Patentability of Genetic Diagnostics in U.S. Law and Policy* 14 (N.Y.U. Sch. of Law, Pub. Law Research Paper No. 10-68, 2010) at 15.

[78] Id.

[79] Id. at 1-2.

exacerbated by advances in bespoke medicine along with supplementary technological developments on the horizon.[80]

With reverence to research tools, it is more intricate to mend on whether the costs of gene patents offset the payback, or vice versa. On balance, patents on genetic research tools are in all odds more advantageous than they are pricey to society. Although reach-through royalties now and again impede with incentives to develop and commercialize research tools, such royalties have the noteworthy pro of making research tools accessible at a minimal up-front cost for use in noncommercial research.[81] Receptively, studies have revealed that patented genetic research tools are far and wide accessible to scientists engrossed in conducting indispensable delve into.

B. POTENTIAL SOLUTIONS

Gene patents inflict significant costs on society along with the progress of science, other than removing genes from the scope of patentable subject affair might not be the paramount solution to the catch-22. Via the patentable subject matter doctrine of patent law to proscribe gene patents, as the district court did in *Myriad I*, does not necessarily dole out the patent system's goals of incentivizing the development as well as commercialization of new-fangled technologies and encouraging follow-on excogitation. There are several options for continuing to allow gene patents whilst still facilitating technological and scientific encroachment. Alas, there is no "just what the doctor ordered solution" that serves both goals of the patent system with look upon to all three scientific arenas (i.e., therapeutic proteins, diagnostic methods, and research tools).

One feasible solution is to adopt some form of experimental use exemption,[82] conceivably as a "fair use" dogma that exempts scientists from patent infringement if they use patented genes for fundamental research or diagnostic test development. The biggest vigor of this solution is that it would smooth the progress of follow-on innovation by generally mounting the quantity of legal, non commercial, scientific research. One of the biggest weaknesses of an experimental use exemption is that it would be incredibly hard to put into action in this Bayh-Dole epoch, in which approximately all vital research is undertaken with some commercial purpose.[83] Additionally, creating a research exemption doctrine in patent law would drastically abate the market exclusivity associated with gene patents: manufacturers of commercial products such as drugs or diagnostics would be in jeopardy by the leeway that "fair use" research might demonstrate the approach to an enhanced drug or diagnostic for a scrupulous genetic disease. In consequence, an experimental use exemption might corrode the incentives that the patent system currently provides to egg on the development along with commercialization of therapeutic proteins and diagnostic methods.

Another promising solution is for the government to institute a obligatory licensing scheme that would necessitate gene patent holders to proffer levelheaded licenses to public sector scientists

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[80] *See* Louis M. Solomon & Gregory J. Sieczkiewicz, *Impact of the US Patent System on the Promise of Personalized Medicine*, 4 GENDER MED. 187, 188 (2007).

[81] *See generally* Michael S. Mireles, *An Examination of Patents, Licensing, Research Tools, and the Tragedy of the Anticommons in Biotechnology Innovation at 164-165.*

[82] *Madey v. Duke University*, 307 F.3d 1351 (Fed. Cir. 2002).

[83] *See generally* Arti K. Rai & Rebecca S. Eisenberg, *Bayh-Dole Reform and the Progress of Biomedicine*, 66 LAW & CONTEMP. PROBS. 289 (2003).

betrothed in noncommercial research. In the United Kingdom, for case in point, the government is permitted to coerce a company to license a patent if the invention has not been commercialized "to the fullest extent that is reasonably practical" after three years.[84] The U.S. has taken the position that there ought to be no broad spectrum proviso for compulsory patent licensing,[85] but the government could blueprint a compulsory licensing scheme that confines licensees to specifically-defined uses of gene patents. As with the prior elucidation, enforced licensing would indubitably hand out the patent system's goal of facilitating follow on innovation by increasing access to patented genes. regrettably, like a "fair use" discharge, compulsory licensing would in all probability fade gene patent rights so that such rights would no longer proffer a robust enticement for firms to invest in developing and commercializing certain technologies. The trivial advantage this solution has over the experimental use exemption is that gene patent holders would at least be rewarded with licensing fees for discovering and patenting important genes.

A final solution is to use institutional mechanisms to augment communication flanked by patent holders along with scientists fascinated in conducting genetic research. Historically, innovators affianced in reciprocally reliant relationships have created institutions to trim down the transaction costs of licensing patented technology.[86] A fine exemplar of this behavior is the establishment of cooperative cross licensing agreements between members of the computer industry.[87] There are three institutional mechanisms that might assuage some of the problems associated with gene patents: guidelines or preeminent practices issued by industry leaders, patent pools, and clearinghouses.[88] All of these mechanisms endeavor to square the interests of patent holders, researchers, and patients.[89] Pharmaceutical and diagnostic companies, however, may be leery of licensing their patented genes to others who could use them to invent a new and better commercial product.[90] One of the biggest challenges to establishing meaningful best practices, patent pools, or clearinghouses, therefore, is gene patent holders' resistance to participate.[91]

Finding a solution to the gene patent problem requires balancing two important goals of the patent system: encouraging meaningful follow-on research while maintaining patent rights that offer a robust incentive to develop and commercialize new technology. Of the three proposed solutions, implementing institutional mechanisms seems to be the most promising, but there are significant hurdles to establishing patent pools and clearinghouses and encouraging gene patent holders to participate.[92] Whatever solution is ultimately chosen by legislators and judges, it should not be to apply the patentable subject matter doctrine to ban all gene patents or to allow all gene patents, as the courts did in *Myriad I* and *Myriad II*, respectively. The ultimate goal should

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[84] NAT'L RESEARCH COUNCIL, REAPING THE BENEFITS OF GENOMIC AND PROTEOMIC RESEARCH: INTELLECTUAL PROPERTY RIGHTS, INNOVATION, AND PUBLIC HEALTH 131 (Stephen A. Merrill & Anne-Marie Mazza eds., 2006) at 96.

[85] Id. at 96.

[86] James Bradshaw, *Gene Patent Policy: Does Issuing Gene Patents Accord with the Purposes of the U.S. Patent System?*, 37 WILLAMETTE L. REV. 637, 659 (2001).

[87] Id.

[88] Rochelle C. Dreyfuss, *The Patentability of Genetic Diagnostics in U.S. Law and Policy* 14 (N.Y.U. Sch. of Law, Pub. Law Research Paper No. 10-68, 2010) at 22-27.

[89] Id.

[90] *See* Kourtney Baltzer, Note, *A Clearinghouse: The Solution to Clearing Up Confusion in Gene Patent Licensing*, 24 HARV. J.L. & TECH. 519, 537–38 (2011); *see also* Mireles; *supra* note 42, at 177–78.

[91] See Id.

[92] See Id.

be to narrowly tailor the law in order to counteract the disparate effects that gene patents have on different types of scientific research.

Social Security for Workers: The need for a Totalization Agreement between the United States of America and India

Ms. Stuti Subbaiah and Ms. Eva Tanna

ABSTRACT:

In this age of globalisation, there is higher incidence of employees having to shuttle between two or more countries. While doing so, an employee ends up having to pay social security contributions in both countries. A totalization agreement is an agreement between countries to allow a person from one country, working in the agreement country to pay social security taxes of only the country he is working in. Most developed countries have such agreements among themselves to avoid double payment of social security contributions. While India has totalization agreements with certain European countries, it still does not have such an agreement with the United States of America (U.S.A). The U.S has not entered into a totalization agreement with India on the ground that the social security structures between the two countries are not compatible, which is one of the fundamental aspects of a totalization agreement. However, on analysing the current social security structure and the legal provisions dealing with social security in both countries, and with the higher incidence of workers moving between the US and India, it becomes imperative for both countries to enter into a totalization agreement.

Key Words: Social Security, Totalization, workers, Contributions, Taxes

I. Introduction

I.1. With the advent of globalization and liberalization of developing economies, it becomes increasingly possible for highly-skilled individuals to travel and migrate to where they can achieve their potential and pursue opportunities. Likewise, firms and countries recognize the contributions of these individuals to their prosperity and well-being. Further, sending countries see the potential for establishing relationships with their expatriates. These dynamics are fostering a global market for ideas and the talent to pursue them. Yet government policies vary greatly from hands off strategies to complete control over resident movements in and out of their countries. While some countries actively seek immigration of highly-skilled individuals, others are turning them away; and while some countries pay no heed to who is leaving their country, others are investing in their home countries to retain individuals or seek their return. The competition among nations for these people or "war for talent" may impose costs on the countries of emigration. However, the distribution of costs and benefits that result from their mobility is not necessarily zero-sum or fixed. The possibility that policy-makers will fail to capitalize on opportunities for mutual gain among sending and receiving countries is especially large for high-skill migration.[1]

I.2.i. At first glance, the case of India – U.S. relations would appear to contradict this point. As noted, both India and the U.S. have experienced significant benefits from migration and circulation. Yet many Indians still live in poverty and many Americans see India, its immigrants and offshore services, as a threat to their jobs and wages. Cooperation on migration offers an opportunity for countries to address the tensions that arise from immigration while opening avenues for pursuing common objectives and mutual prosperity. Though it may be desirable to consider a common system of migration across countries that transcend bilateral arrangements, such a system may not be able to address the unique dynamics that exist between countries. Nor should these relationships be viewed uniformly. Differences exist between sectors, such as technology services and medical services that call for their own strategies.

[1] Ted Davis, The Global Dynamic of High-Skill Migration: The case of US/India Relations, (February 2010), unpublished manuscript, part of doctoral thesis http://umdcipe.org/conferences/Maastricht/conf_papers/Papers/The_Global_Dynamic_of_High-Skill_Migration.pdf

I.2.ii. Beyond trade in goods and services, the U.S. and India have had a strong relationship with respect to high-skill migration. Since the U.S. liberalized its immigration policy in 1965 and especially since the further liberalization of 1990, the Indian-born population in the U.S. has boomed. According to U.S. Census Bureau (2000), there were more than a million Indians living in the U.S. with 55% of who entered the U.S between 1990 and 2000. The effect of the Indian high-skill migration has been significant on the U.S. as well as on India. In 2008, India had the highest level of H-1B and L-1 admissions for high-skill employment (Monger and Barr 2009). Their H-1B admissions were more than five times that of Canada, the second ranked country. They also had the third highest F-1 admissions for advanced education and the third highest individuals accepted for legal permanent residence. According to the Ministry of External Affairs (2000), the per capita income of Indians in the U.S. was $60,093 compared to the U.S. average of $38,885. About 300,000 work in Silicon Valley technology firms and accounted for 15% of high-tech start-ups; their average salary was over $200,000; and there were about 700 Indian-owned companies.[2] With regard to migration to the U.S, Indians have to take into account two issues: the Cost of the Visas required and social security.

I.2.iii. The growth of trade in IT services has placed pressure on the U.S. H-1B visa program. The H- 1B visa permits U.S. companies and universities to temporarily employ foreign workers who have the equivalent to a U.S. bachelor's degree. While there is an annual quota of 78,200 visas, exemptions have allowed the U.S. Citizenship & Immigration Services to issue over 100,000 H1- B visas in 2004 and 2005. Recipients of an H1-B visa may remain in the United States for up to six years (ten years for Defense Department related work) so long as they remain employed by the same company. H1 B visas are not transferable.[3]

I.2.iv. Both U.S. and Indian companies have complained that the current quota is too restrictive, making it difficult for U.S. companies to hire enough engineers and technicians to remain competitive in the global market. Also, some companies would like to see the creation of a new visa category that would allow foreign

[2] Supra 1

[3] Michael F. Martin, India-U.S Economic Trade Relations, (August 31, 2007) http://www.docstoc.com/docs/6118907/%E2%80%9CIndia-US-Economic-and-Trade-Relations%E2%80%9D

nationals to work and/or train in the United States for a short period of time. However, there is opposition to the expansion of the current H1-B program. Visa costs for Indian IT companies are estimated to be anywhere between 1% and 2.5% of revenue. The next important aspect is that of Social Security.

II. The Importance of Social Security

II.1 Social security is declared as a human right in the major United Nations human rights instruments. However, at the beginning of the twenty-first century, access to any form of social protection remains a dream for 80 per cent of the world's population. In accordance with the aims and purposes set out in the Preamble to the ILO Constitution (1919), the extension of social security worldwide has consistently been one of the main objectives of the Organization. This mandate, restated in 1944 in the Declaration of Philadelphia, part of the ILO Constitution, recognizes the "solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve", among others, "the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care", as well as "provision for child welfare and maternity protection", thereby extending the protection from workers to all those in need. The extension of social security to all calls for the implementation of a "social security floor" which provides a basic benefit package to all those in need. The results of recent ILO research have shown that basic social security can be afforded by virtually all countries.[4]

III. Social Security Structure in USA

III.1. According to the US Social Security Administration there exist approximately 162 million workers in covered jobs. Only 6% of the total work force is uncovered. Social Security provides security benefits to retired and disabled workers. Such benefits are paid when there is a loss of earnings due to retirement, disability or death. The OASDI and Medicare which are contributed

[4] International Labour Office, Setting Social Security Standards in a Global Society, Consultation Paper / International Labour Office, Social Security Department, Geneva: ILO, 2008 viii, 75 at 978-92-2-121157-0.pdf, 9

by the employee and matched by the employer form up to 15.3% of the total Social Security Contribution. A worker will qualify for the retirement benefits only after he can ensure 40 credits or 10 years of coverage. In order to be eligible for retirement benefit under the social security, worker should be:

- Age 62 (with reduced benefits)
- Age 65-67 (with full benefits)
- Up to age 70 (with full enhanced benefits)

The benefits received are related to the earnings of the worker which implies that higher the earning, higher the benefit. The benefit formula is weighed in favor of low wage earners.

III.2. The Social Security (Minimum Standards) Convention, 1952 or Convention No. 102 is an ILO Convention that prescribes member states to adopt national legislations that protect and implement social security to all people in terms of protection against injury during employment, maternity benefits and medical care. Based on this Convention, the American Social Security Administration, or SSA has provided a formal structure to social security schemes in the country. Though the Administration exists as a federal body, the schemes exist at the state level because of the federal-state relationship. Hence the specific rights and benefits are not controlled by federal law, but it is either controlled by the State or by the centre and State. Under the social security scheme in the US, the following benefits are available[5]:

- Medical care: National funded programs do not cover the prescribed percentages of the population.
- Sickness benefits: No federal program for the general population.
- Unemployment benefits: This is a joint federal-state program. Federal law sets forth broad parameters. It is not a national system. The duration, benefit amount and other types of provisions are not uniform across the country. In general, each state is free to establish its own tax structure, qualifying requirements, benefit levels and eligibility provisions.
- Old-age benefits: Some differences appear to exist between the Social Security Act, which provides cash benefits to persons who reach retirement age and the rules in the ILO Convention no. 102 concerning periodic payments to beneficiaries together with the principles of income replacement rates differ

[5] Supra 4, 83

from the Social Security Act. The benefits in accordance with the Social Security Act are not intended to be the only source of income for a person who retires.

- Employment injury: Most programs are administered at the state level because of the federal-state relationship.
- Family benefits: Federal tax reductions exist, but no programs such as those envisaged by the Convention.
- Maternity benefits: No statutory scheme on federal level. The state laws provide coverage only to working women.
- Invalidity pensions: Such benefits under the Social Security Act are calculated in a different way. In addition, the benefits are not intended to be the only source of income for a person who becomes disabled.
- Survivors' benefits: The methodologies of the periodic payments to the beneficiaries together with the income replacement rates of the Convention are substantially different from the Social Security Act. In addition, the benefits are not intended to be the only source of income.

IV. Social Security Structure in India

IV.1 On the other hand, the principal social security laws enacted in India are the following:

(i) The Employees' State Insurance Act, 1948 (ESI Act) which covers all non-seasonal factories run with power and employing 10 or more persons and to those factories which run without power and employing 20 or more persons.The Act provides for comprehensive medical care to the employees and their families as well as cash benefits during sickness and maternity, and monthly payments in case of death or disablement. The cash benefits are administered by the Central Government through the Employees State Insurance Corporation (ESIC), whereas the State Governments and Union Territory Administrations administer medical care. Employees covered under the ESI Act, are required to pay contribution towards the scheme on a monthly basis. A contribution period means a six month time span from 1st April to 30th September and 1st October to 31st March. Cash benefits under the scheme are generally liked

with contributions paid. The benefit period starts three months after the closure of a contribution period.

(ii) The Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (EPF & MP Act) which applies to specific scheduled factories and establishments employing 20 or more employees and ensures terminal benefits to provident fund, superannuation pension, and family pension in case of death during service. By this law, the employer is required to contribute to the Provident Fund in the same way in which the employee is required to make the contribution. The Act however is not applicable to industries owned by the Central or State Governments or a local authority, though there is a provision[6] within the Act which empowers the Central Government to add industries in the Schedule of the Act if the industries fall within the purview of the Act. Different decisions of the courts in India have determined that establishments in the nature of business undertakings, solicitor firms and even member clubs not run on profit motives can be within the purview of this Act.

For the applicability of the Act the unit must be an industry as specified in Schedule I and engaged in a manufacturing process in which at least 20 persons are employed and depends on the continuance of the establishment.[7] Section 5 of the Act clearly stipulates:

"Employees' Provident Funds Scheme- (1) The Central Government may, by notification in the Official Gazette, frame a scheme to be called the Employees' Provident Fund Scheme for the establishment of provident funds under this Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply and there shall be established, as soon as may be after the framing of the Scheme, a Fund in accordance with the provisions of this Act and the Scheme.

[6] Power to add to Schedule I. – (1) The Central Government may, by notification in the Official Gazette, add to Schedule I any other industry in respect of the employees whereof it is of opinion that a Provident Fund Scheme should be framed under this Act, and thereupon the industry so added shall be deemed to be an industry specified in Schedule I for the purpose of this Act. (2) All notifications under sub-section 1 shall be laid before Parliament, as soon as may be, after they are issued.

7 Dr. S.K Puri, An Introduction to Labour and Industrial Laws, 45, (Ed.9, 2005)

(1A) The Fund shall vest in, and be administered by, the Central Board constituted under section 5A.

(1B) Subject to the provisions of this Act, a Scheme framed under sub-section 1 may provide for all or any of the matters specified in Schedule II.

(2) A Scheme framed under sub-section 1 may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in the Scheme."

The Act since its inception has been amended several times and various notifications have been passed to extend its scope for the benefit of the workers in the country. Since October 2008 the Act includes and applies to international workers (both Indians working outside the country and non-Indian citizens working in India) who are now required to contribute 12 per cent of their basic salary (matched by an amount equal to the employee's 12 per cent contribution payable by the employer) to the Employees' Provident Fund Organization that implements the Employees Provident Fund Scheme (the 'EPF Scheme'), irrespective of the contributions they may be making to such schemes in other countries. Apart from this, India has also recently changed its social security scheme to be analogous to foreign social security structures where foreigners working in India can withdraw their provident fund accumulations only on retirement at 58 years of age as opposed at the end of their employment.

The Employees Provident Fund Organisation extends to the entire country covering over 393824 establishments. At present, over 3.9 crore EPF Members and their families get benefits under the social security schemes administered by the EPFO. Under this social security project, there is an allotment of the Unique Identification Number or the Social Security Number to the EPF subscriber. [8]

(iii) The Workmen's Compensation Act, 1923 (WC Act), which requires payment of compensation to the workman or his family in cases of employment related injuries resulting in death or disability.

[8] Ministry of Labour and Employment, Social Security Division, (May 2010), http://labour.nic.in/ss/overview.html

(iv) The Maternity Benefit Act, 1961 (M.B. Act), which provides for 12 weeks wages during maternity as well as paid leave in certain other related contingencies.

(v) The Payment of Gratuity Act, 1972 (P.G. Act), which provides 15 days wages for each year of service to employees who have worked for five years or more in establishments having a minimum of 10 workers.

V. What is a Totalization Agreement

V.1 A Totalization agreement, as a general understanding, is an agreement between countries whereby an employee only has to pay Social Security taxes to the country in which he or she is working. Totalization agreements or International Social Security agreements have two main purposes. First, they eliminate dual Social Security taxation, the situation that occurs when a worker from one country works in another country and is required to pay Social Security taxes to both countries on the same earnings. Second, the agreements help fill gaps in benefit protection for workers who have divided their careers between the United States and another country.

V.2. Agreements to coordinate Social Security protection across national boundaries have been common in Western Europe for decades. Without some means of coordinating Social Security coverage, people who work outside their country of origin may find themselves covered under the systems of two countries simultaneously for the same work. When this happens, both countries generally require the employer and employee or self-employed person to pay Social Security taxes. Dual Social Security tax liability extends to American citizens and U.S. resident aliens employed abroad by American employers without regard to the duration of an employee's foreign assignment, and even if the employee has been hired abroad. This extraterritorial U.S. coverage frequently results in dual tax liability for the employer and employee since most countries, as a rule, impose Social Security contributions on anyone working in their territory. Dual tax liability can also affect U.S. citizens and residents working for foreign affiliates of American companies. [9]

[9] Social Security Administration, "U.S International Social Security Programmes", (March 22, 2011), http://www.ssa.gov/international/agreements_overview.html

VI. Compatibility of U.S Social Security Agreements and Indian Social Security

VI.1 The main purpose of the U.S social security agreements is to prevent dual coverage or contributions, promote totalization and provide benefit portability. Under section 233 of the Social Security Act, any such Social Security agreement entered into must aim at:

1. Eliminating dual coverage and contributions.
2. Permitting combination of periods of coverage for benefits.
3. Permitting unrestricted payment to residents of the other country under certain circumstances.
4. Allow inclusion of other provisions not inconsistent with Title II.
5. Not combining periods of coverage for Medicare benefits.
6. Being exclusive if other U.S programs.

VI.2.i. Section 233(1)(a) and (b) of the Social Security Act reads as:

"(a) The President is authorized (subject to the succeeding provisions of this section) to enter into agreements establishing totalization arrangements between the social security system established by this title and the social security system of any foreign country, for the purposes of establishing entitlement to and the amount of old-age, survivors, disability, or derivative benefits based on a combination of an individual's periods of coverage under the social security system established by this title and the social security system of such foreign country.

(b) For the purposes of this section-

(1) the term "social security system" means, with respect to a foreign country, a social insurance or pension system which is of general application in the country and under which periodic benefits, or the actuarial equivalent thereof, are paid on account of old age, death, or disability;"

Clause (2) of the Section describes the period of coverage as follows:

"The term "period of coverage" means a period of payment of contributions or a period of earnings based on wages for employment or on self-employment income, or any similar period recognized as equivalent thereto under this title or under the social security system of a country which is a party to an agreement entered into under this section."

VI.2.ii The Section comprehensively lays down the conditions for a totalization agreement between the US and any other country stating that:

- In the case of an individual who has at least 6 quarters of coverage and periods of coverage under the social security system of a foreign country that is party to the agreement, the periods of both these countries may be combined to establish the amount of benefits.
- The employment can be self-employment or contractual or any service which is recognized as equivalent to employment in the title to both the country parties and subsequently the period of coverage will commence.
- When an individual's periods of coverage are combined, the benefit amount will be proportionate to the agreement.

VI.2. iii Under sub-clause (e) (1) of the Section, it states further:

"(e)(1) Any agreement to establish a totalization arrangement entered into pursuant to this section shall be transmitted by the President to the Congress together with a report on the estimated number of individuals who will be affected by the agreement and the effect of the agreement on the estimated income and expenditures of the programs established by this Act."

VI.3 Paying dual Social Security contributions is especially costly for companies that offer "tax equalization" arrangements for their expatriate employees. A firm that sends an employee to work in another country often guarantees that the assignment will not result in a reduction of the employee's after-tax income. Employers with tax equalization programs, therefore, typically agree to pay both the employer and employee share of host country Social Security taxes on behalf of their transferred employees. Under the tax laws of many countries, however, an employer's payment of an employee's share of a Social Security contribution is considered to be taxable compensation to the employee, thus increasing the employee's income tax liability, which is prevalent in India as well.

VI.4. The aim of all U.S. Totalization agreements is to eliminate dual Social Security coverage and taxation while maintaining the coverage of as many workers as possible under the system of the country where they are likely to have the greatest attachment, both while working and after retirement. Each agreement seeks to achieve this goal through a set of objective rules.

VI.5. To qualify for benefits under the U.S. Social Security program, a worker must have earned enough work credits, called quarters of coverage, to meet specified "insured status requirements." For example, a worker who attains age 62 in 1991 or later generally needs 40 calendar quarters of coverage to be insured for retirement benefits. Under a Totalization agreement, if a worker has some U.S. coverage but not enough to qualify for benefits, Social Security Administration (SSA) will count periods of coverage that the worker has earned under the Social Security program of an agreement country. In the same way, a country party to an agreement with the United States will take into account a worker's coverage under the U.S. program if it is needed to qualify for that country's Social Security benefits. If the combined credits in the two countries enable the worker to meet the eligibility requirements, a partial benefit can then be paid, which is based on the proportion of the worker's total career completed in the paying country.

VI.6. The agreements allow SSA to totalize U.S. and foreign coverage credits only if the worker has at least six quarters of U.S. coverage. Similarly, a person may need a minimum amount of coverage under the foreign system in order to have U.S. coverage counted toward meeting the foreign benefit eligibility requirements. The US has already entered in Totalization agreement with two dozen countries namely Australia, Austria, Belgium, Canada, Czech Republic, Chile, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Poland, Portugal, South Korea, Spain, Sweden, Switzerland and United Kingdom.

VII. Current position on Totalization Agreements in India

VII.1. In India, the National Association of Software and Service Companies (Nasscom), said that Indian firms and their employees are currently paying an excess of $1 billion annually in Social Security taxes and getting no benefit due to the absence of a totalization agreement with the U.S.[10] The problem at the moment with regard to social security is that the benefits of social security do not kick in for at least ten years from the date when the first pay check is received by such workers in the United States. In a nutshell, returning Indian nationals do not benefit in any manner after making a contribution toward social security and Medicare. Therefore, for India

[10] Patrick Thibodeau, *India seeks tax deal for H1-B workers*, September 22, 2010, at http://www.computerworld.com/s/article/9187281/India_seeks_tax_deal_for_H_1B_workers

an agreement with the US under which professionals on short term work visits to America are exempted from paying social security taxes is imperative to avoid such excess payments that lead to no gains.

VII.2 Under a Totalization agreement, an expatriate in either country need not contribute to social security schemes of the host country. Changes made to the law relating to EPF have enabled India to enter into totalization agreements with European countries. India has similar agreements with several European countries.[11] For example, the agreement signed with Denmark on 17th February, 2010 states that "a person normally employed in India by an Indian employer shall be subject to only Indian Social Security Legislation (i.e. Provident Fund as per the 1952 Act) during a period of secondment to Denmark provided that the period of employment there is not expected to exceed five years." The agreement signed with Belgium on 1st September, 2009 is also on the similar lines and it exempts Indian worker from Belgium's Social Security Taxes payment for a period of five years. Totalization agreement with Germany with effect on 1st October 2009 allows four years exemption to an Indian worker working in Germany from their Social Security taxes payment.

VII.3 In 2011, The Indo- American Chamber of Commerce (IACC) lobbied for a Totalization agreement between India and the U.S with the aim to help the country's small and medium enterprises working in the field of carbon credit, clean energy, organic farming, clean fuel and green buildings to grow their business and expand under such a bilateral chamber[12]. The need to speed up the implementation of a Totalization agreement between India and U.S was propagated in the 2012 Budget as Nasscom reported that Indians on H1 and L1 visas pay almost USD 1 billion in social security taxes annually, without getting any benefits[13]. Currently, India has entered into bilateral social security agreements with countries like Belgium, France,

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[11] PTI, *India for Totalization agreement with US: Sharma*, The Economic Times, September 11, 2011, at http://articles.economictimes.indiatimes.com/2010-09-11/news/27595509_1_totalization-social-security-visa-fees

[12] IFRS1, *Making the right decisions in the transition process*, IACC forum, April 2010, at https://www.iaccindia.com/page.asp?pageid=22

[13] Agencies, *Budget 2012: Speed up Indo-US Totalization Agreement*, The Economic Times, February 27,2012, at http://articles.economictimes.indiatimes.com/2012-02-27/news/31104603_1_bilateral-totalization-agreement-social-security-indo-us-totalization

Germany, Switzerland, Luxembourg and the Netherlands. While, U.S has entered into Totalization agreements with 24 countries- including South Korea and Japan.

VIII. The need for totalization agreement between India and the USA

VIII.1.i A Totalization Agreement between India and the US will mainly serve following two purposes:

a) This agreement is executed between two countries with a view to fill the gap of retirement benefit of those workers who have divided their career between two countries; and

b) To eliminate dual Social Security or Retirement benefit taxation in the situations where constituent of one nation works in the other country and due to taxation structure of the countries, is required to pay social security taxes in both countries on the same earnings.

VIII. 1. ii. The agreements allow Social Security Agreement (SSA) to totalise US and foreign coverage credits only if the worker has at least six quarters of US coverage. Similarly, a person may need a minimum amount of coverage under the home country's system in order to have US coverage counted toward meeting the home country's benefit eligibility requirements.[14]

IX. Conclusion

IX.1. Both sides (US and India) are negotiating the Bilateral Totalization Agreement (BTA), which once signed, would benefit lakhs of Indians who are working in America and paying social security but are unable to get any benefit out of it. According to government sources, there are 300,000 Indians working in the US and they lose their social security contributions if they do not complete 10 years of employment. According to Nasscom Indians on H1 and L1 visas pay almost USD 1 billion in social security taxes in the US annually, without getting the benefits. The Totalization Agreement will exempt Indian professionals working in the US from paying social security and medicare taxes. Currently, residents of the US pay 6.2% social security taxes on wages up to USD 106,800 and 1.45% medicare taxes. Since a lot of these professionals return to India before they retire, they will never see the

[14] Rajesh Kumar Jain and Gagan Gujral, *Global Perspective: Totalization Agreement with US will augment Billions of Dollars Annually in India's Forex*!, Chartered Accountant, December 2011, at http://220.227.161.86/25044cajournal_dec2011_20.pdf,

payouts of these contributions.[15] Over the years the US has denied entering into such an agreement stating that India does not have a social security structure. However, in fact, the Indian Social Security Scheme is not different from the US Scheme particularly in terms of the organized workforce in the country. Signing of Totalization agreements with common European nations can be used as reference benchmark to enter into same kind of agreement with USA. USA is one of the countries which attract skilled Indian workers in large numbers every year. Therefore, to protect the interest of such workers in the long run, certainly the issue of having Totalization agreement with United States has become paramount.

[15] Agencies, *Budget 2012: Speed up Indo-US Totalization Agreement*, The Economic Times, February 27, 2012 at http://articles.economictimes.indiatimes.com/2012-02-27/news/31104603_1_bilateral-totalization-agreement-social-security-indo-us-totalization

'Humanizing Consumer Protection: An Instrument for food safety'

Dr. Mayuri H. Pandya

Abstract:

Key Words: Consumer Protection, Food security, Human health, Consumer education, Law

The problem of consumer protection is a multidimensional and needs to be tackled from various angles. Law has proved to be a major instrument in tackling such socio-legal problems. The amount of success achieved in the field of consumer protection in the last few years, since the enactment and implementation of the Consumer Protection Act, 1986 is remarkable. Non-legal measures are also of great significance in dealing with such problem. These measures can prove effective supplements to the statutory measures. Prominent non-legal measures can be Consumer education, Consumer boycotts, International co-ordination and Business self-regulation.

Consumer education is sine qua non for the success of a consumer movement anywhere. Consumer education as concerned with learning to choose goods and services intelligently, in accordance with one's needs and resources. In this globalization issues of genetically modified crops and food may create sincere issues relating to our food security and especially the human health. The paper examines the role of consumer protection act for the food security issues.

HUMANIZING CONSUMER PROTECTION: AN INSTRUMENT FOR FOOD SAFETY

By Dr. Mayuri H. Pandya*

INTRODUCTION

The consumer movement in India is as old as trade and commerce. In *Kautilya's Arthashastra*, there are references to the concept of consumer protection against exploitation by the trade and retailer with respect to quality, short weight, measurement and adulteration of goods.[1] Yet until the late 1970s, there was no systematic movement in the country for safeguarding the interest of consumers. But now it is widely acknowledged that the level of consumer awareness and protection is a true indicator of development of the country and progressiveness of civil society. The main reason for this is the rapidly increasing variety of goods and services which modern technology has made available. In addition, the growing size and complexity of production and distribution systems, the high level of sophistication in marketing and selling practices and in advertising and other forms of promotion, mass marketing methods and consumers' increased mobility resulting in reduction of personal interaction between buyers and sellers, have contributed to the increased need for consumer protection.

Protection of consumer rights in modern times dates back to 1962.[2] On 15 March 1962, the Consumer Bill of Rights was proclaimed by the United States President in a message to the Congress. The message proclaimed:

(i) the right to choice,
(ii) the right to information,
(iii) the right to safety, and
(iv) the right to be heard.

Subsequently, the right to consumer education, the right to a healthy environment and the right to basic needs (food, clothing, and shelter) were added by Consumer International. In India, 24 December is celebrated as National Consumer Rights Day as the Consumer Protection Act, 1986 was enacted on that day. 15 March is observed as World Consumer Rights Day since 1983, when International Organization of Consumer Unions declared it so. In India, 15 March was also adopted as the National Consumers Day and has been observed since then. Another significant day in the history of world consumer movement is 9 April 1985, when the General Assembly of the United Nations adopted a set of guidelines for consumer protection and the Secretary General of the United Nations was authorized to persuade member countries to adopt these guidelines

*The Author is the Asst. Prof. Sir L.A. Shah Law College,GLS, Ahmedabad.
[1] P. K. Majumdar: Law of Consumer Protection in India , 5th edition 2003.
[2] Ibid.

through policy changes or law. These guidelines constituted a comprehensive policy framework outlining what governments need to do to promote consumer protection in the following areas:

(i) physical safety,
(ii) protection and promotion of consumer economic interests,
(iii) standards for safety and quality of consumer goods and services,
(iv) measures enabling consumers to obtain redressal,
(v) measures relating to specific areas (food, water, and pharmaceuticals); and
(vi) consumer education and information programme.

These guidelines provided an internationally recognized set of basic objectives, particularly for governments of developing countries, enabling them to identify the priorities and structure of their consumer protection policy and legislation. Subsequently, the guidelines were expanded to include 'sustainable consumption' which was an important subject in the changed social, political and economic scenario. Article 21 of the Constitution requires the State, inter alia, to protect life, which must be construed as including the right to a healthy and safe environment. A healthy and safe environment is inalienably linked with sustainability and promotion of sustainable consumption. The concern in the Indian Constitution for protection and promotion of an individual's rights, and for the dignity and welfare of the citizen makes it imperative to provide for the welfare of the individual as a consumer, a client and a customer. The rights under the Consumer Protection Act, 1986 flow from the rights enshrined in Articles 14 to 19 of the Constitution of India. The RTI, 2005 which has opened up governance processes of our country to the common public also has far-reaching implications for consumer protection.

The consumer protection policy creates an environment whereby the clients, customers, and consumers receive satisfaction from the delivery of goods and services needed by them. Good governance requires efficiency, effectiveness, ethics, equality, economy, transparency, accountability, empowerment, rationality, impartiality and participation of citizens. The concern of consumer protection is to ensure fair trade practices; quality of goods and efficient services with information to the consumer with regard to quality, quantity, potency, composition and price for their choice of purchase. Thus, proper and effective implementation of consumer protection law promotes good governance.

Education is the most powerful tool for the progress of the country and is a social and political necessity. Education helps an individual—as a consumer—in making rational choices and protects him from trade and business-related exploitation. But more is needed for the effective functioning of the national market to create an increased level of awareness of consumer rights, and for this consumers have to be educated about rights and responsibilities through concerted publicity and awareness campaigns. In the awareness campaigns, special emphasis needs to be given to vulnerable groups such as women and children, students, farmers and rural families and the working class.

BACKGROUND

In the early years when welfare legislatures like the consumer protection Act did not exist, the maxim Caveat emptor (let the buyer beware) governed the market deals. We find the seeds of consumer protection during the Mughal times[3] and especially during the time of Khiljis. It is said that Sultan *Ala-ud-Din Khilji* (1296 A.D. to 1316 A.D.) had introduced strict price control measures based on production costs[4]. He had also established separate shopping centers in Delhi for (1) grain, (2) cloth, sugar, dried fruits, herbs, butter, and oil, (3) horses, slaves, and cattle, and (4) miscellaneous commodities. The supply of grain was ensured by collecting tax in kind in the production areas and keeping it in the royal storehouses. Hoardings of grain were forbidden. Elsewhere the growers were ordered to sell their grains for cash in their fields at fixed prices and were not allowed to take any grain home for private sale. The market controller, the state intelligence officer, and the Sultan's secret agents, each submitted independent reports on these shopping centers to the Sultan. Even a minor violation of the rules was not tolerated[5].

The shopping center for cloth, known as the *sara-i-adl,* was established near one of the royal palaces on the inner side of the Bada-un-Gate. All goods, including foreign imports, were first taken there and their price fixed. Every merchant was registered with the commerce ministry and had to sign a bond guaranteeing a regular supply to the goods in which they traded. The Hindu Multani merchants were advanced money by the treasury to import rare commodities for the *sara-i-adl,* some price were subsidized. Costly fabrics and luxury goods could be sold only to those who have obtained permits from the Government. The prices of cattle were also fixed and unscrupulous merchants were deprived of their trading rights[6].

The shopping center for general commodities was under the direct control of the commerce ministry. Ala-ud-Din's Minister of commerce was also the Superintendent of weights and Measure and the Controller of the Commercial transactions. He was assisted by Superintendent for each commodity. Prices and weight and measure were chequed by sending the children employed in the royal pigeon-house to buy petty articles[7].The prices fixed for the Delhi market were also applied in the provincial capitals and towns.

During the British regime (1765-1947)[8], also known as the *'Colonial Era'*, Government's economic polices in India were concerned more with protecting and promoting the British interests than with advancing the welfare of the native population. The administration's primary

[3] J.N.Sarkar (1952): Mughal Administration, Calcutta.
[4] S.A.A.Rizvi (1987); The wonder that was India, vol.2, London Sidgwick & Jackson.
[5] Ibid.,
[6] Ibid.,
[7] Ibidd.,
[8] J.N.Pandey (1992): Constitutional Law of India, Allahabad: Central Law Agency, pp.1-16.

per-occupation was with maintaining law and order, tax collection and defence[9]. Accordingly much of the legalisation enacted during the British regime was primarily aimed at serving the colonial rulers intend of the natives. There were, however, some pieces of legislation which protected the overall public interest through not necessarily the consumer interest.[10] Prominent among these were: the Indian Penal code, 1860, the sale of Goods act, 1930, the dangerous drugs act, 1930 and the drugs and cosmetics act, 1940. In a sense, the sale of good act, and the principles of the law of torts were more for the protection of the trader than the consumer[11].

CONSUMER PROTECTION IN INDIA

The Consumer Protection Act was enacted in 1986 based on United Nations guidelines with the objective of providing better protection of consumers' interests. The Act provides for effective safeguards to consumers against various types of exploitations and unfair dealings, relying on mainly compensatory rather than a punitive or preventive approach. The Act applies to all goods and services unless specifically exempted, and covers the private, public, and cooperative sectors and provides for speedy and inexpensive adjudication. The rights provided under the Act are:[12]

- The right to be protected against marketing of goods and services which are hazardous to life and property
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods and services, as the case may be, to protect the consumer against unfair trade practices
- The right to be assured of access to a variety of goods and services at competitive prices
- The right to be heard and assured that consumer interest will receive due consideration at appropriate fora
- The right to seek redressal against unfair or restrictive trade practices or unscrupulous exploitation of consumers
- The right to consumer education

Under the Consumer Protection Act, 1986 a three-tier, simple, quasi-judicial machinery has been established at the national, State, and district levels for hearing cases raised by consumers. The Act had been amended in 1991 and again in 1993. A comprehensive amendment was last made in 2002 for making the Act effective, functional and purposeful. The amended Act, inter alia, provides for the attachment and subsequent sale of the property of a person not complying with an order.

Although implementation of the Consumer Protection Act can be viewed as a success, there are still serious shortfalls in achieving consumer welfare because of the deficiencies in quality infrastructure in the country. First, there is a regulatory deficit in many products and services which impact on the health, safety and environment of the consumers and mandatory standards

[9] Dharam Kumar and Meghnath Desai (eds) (1982): The Cambridge Economic Histroy of India,vol.2, Hyderbad: Orient Longman.
[10] D.N.Saraf (1990): Law of Consumer Protection of India, Bombay: N.M. Tripathi.
[11] Ibid.,
[12] D.N.Saraf (1990): Law of Consumer Protection of India, Bombay: N.M. Tripathi.

have not been prescribed for such products as electrical and electronic goods, IT and telecom equipment, industrial and fire safety equipment and toys. There is a multiplicity of regulatory/standardization/conformity assessment bodies and proliferation of certification and inspection bodies. At present, the Quality Council of India (QCI) is the main accreditation body for conformity assessment bodies taking up product or system certification or for inspection bodies, and the National Accreditation Board for Laboratories performs the same function for laboratories. However, there is no compulsion on the conformity assessment bodies, inspection bodies or laboratories to obtain accreditation, thus creating a lack of certainty about the existence of quality products, systems, inspections and laboratories.

Objective

The provision of the Act in the light of its preamble reads as: *"An Act to provide better protection of the interest of consumers… for the settlement of consumer dispute and for matters connected therewith".*[13] The word '*protection*' furnishes the key to the mind of the makers of the act[14]. Its provision has to be interpreted in favour of the consumer, in such a manner as to provide maximum relief to him. This right of Consumer education has been given prominent place among the various rights which the Consumer Protection Act, 1986 seeks to promote and protect.

Food safety is a public health priority; millions of people fall ill every year and many die as a result of eating unsafe food. Serious outbreaks of food borne diseases have been documented on every continent in the past decade, and in many countries rates of illnesses are increasing significantly.

CONSUMER EDUCATION AND FOOD SAFETY VIA INTERNATIONAL TREATIES

The right to food is recognized in several legally binding international instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), where it is recognized as part of an adequate standard of living, which also includes right to safe and hygienic food. Under the Covenant, State parties are obliged to take all appropriate steps, to the maximum of available resources, to progressively achieve the right to food for all.

The United Nations Guidelines for Consumer Protection passed in 1985 have also placed considerable emphasis on the need for consumer education. They urge governments to "develop or encourage the development of general consumer education and information programmes, bearing in mind the cultural traditions of the people concerned.[5] The guidelines further recommend that consumer education should, where appropriate, become "an integral part of the basic curriculum of the educational system, preferably a component of existing subjects"

The U.S. Department of Education considers consumer education as a process by which consumers:

[13] The Premable to the *The Consumer Protection Act, 1986*.
[14] Lucknow Development Authority v. M.K. Gupta, (1994) 1 SCJ 103 at 110

- develop skills to make informed decisions in the purchase of goods and services in the light of personal values, maximum utilization of resources, available alternatives, ecological considerations and changing economic conditions
- become knowledgeable about the law, their rights and methods of resources, in order to participate effectively and self-confidently in the market place and take appropriate action to seek consumer redress and
- develop an understanding of the citizens' role in the economic, social and government systems and how to influence those systems to make them responsive to consumer needs.[15]

FAO's role

FAO's Constitution sets out the purpose of FAO, in its preamble, as "raising levels of nutrition and standards of living ... and thus ... ensuring humanity's freedom from hunger." Its Strategic Framework for 2000-2015 also mentions rights-based approaches to food security and stresses FAO's role as a forum for debate and negotiations, and in strengthening regulatory frameworks.[16] General Comment 12 of the Committee on Economic, Social and Cultural Rights is the most up-to-date and authoritative interpretation of the right to adequate food, as enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The following elaboration of the normative content of the right to food is based on the General Comment.[17]

Definition of the right to food:

The right to adequate food is **realized** when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement.

The **core content** of the right to adequate food implies:

- The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;
- The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

[15] Committee on Economic, Social and Cultural Rights, *General Comment 12, the Right to Adequate Food (Article 11 of the Covenant),* UN Document No E/C/12/1999/5, 12 May 1999.

[16] UN, *The right to food*, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10, UN Document No E/CN.4/2001/53, 7 February 2001; *The right to food*, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2001/25 and General Assembly resolution of ****, and *Addendum*, *Mission to Niger*, UN Document No E/CN.4/2002/58/Add.1, 23 January 2002*; The right to food*, Note by the Secretary-General**, UN Document No A/56/210, 23 July 2001; *The right to food*, Note by the Secretary-General, UN Document No A/57/356, 27 July 2002. Reports of the missions to Bangladesh and Brazil are forthcoming.

[17] Committee on Economic, Social and Cultural Rights, *General Comment 12, the Right to Adequate Food (Article 11 of the Covenant),* UN Document No E/C/12/1999/5, 12 May 1999.

Framework law

Article 2 of the ICESCR commits State Parties to take legislative measures for the implementation of the rights recognized in the Covenant. In the case of the right to adequate food, relevant legislation ranges from food safety through production and marketing to social security. Food security and the right to food are thus multidimensional and cross sectoral in nature, requiring legislative measures in many different areas.[18]

General Comment 12 of the CESCR recommends the adoption of framework legislation on the right to food:

> *In implementing the country-specific strategies referred to above, States should set verifiable benchmarks for subsequent national and international monitoring. In this connection, States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organizations.*[19]

Such a regulatory framework, while not an obligatory measure for State Parties, would be useful for several reasons.

- It could assign responsibility to the different government agencies involved, and define overall responsibility for one particular organ, thus overcoming the problem arising from too many actors bearing responsibility, which tends to lead to lack of responsibility.
- Greater accountability would be achieved through legislation laying down the responsibility. Legislation in itself is a transparent measure, and it can also provide for public access to government information that otherwise would not necessarily be released.
- Participation in decision-making is a key element of rights; this could also be provided for in the legislation, by formalising the role of communities, NGOs and civil society at large.

While framework legislation would probably not dictate policy in any detail, it would establish the principles to which such policy should conform, as well as perhaps defining actions which

[18] FAO Legislative Study 68, *Extracts from international and regional instruments and declarations, and other authoritative texts addressing the right to food*, Rome, 1999 (In English, French and Spanish).
[19] Committee on Economic, Social and Cultural Rights, *General Comment 12, the Right to Adequate Food (Article 11 of the Covenant),* UN Document No E/C/12/1999/5, 12 May 1999.

were forbidden to ensure respect for the right to food. It would also set in action review of other, sectoral legislation and set targets for the progressive achievement of the right to food, which will be monitored by specified actors.

CONSUMER PROTECTION/EDUCATION AND FOOD SAFETY VIA NATIONAL TREATIES

In India at present there are seventeen different Acts and Rules under Centre and State Governments which are dealing wholly or partially with "Food" as a subject and are responsible for Standards and Regulations settings and enforcement. Multiplicity of these food laws and standard setting and enforcement agencies pervades different sectors of food have created confusion in the minds of traders, investors and manufacturers. Provisions regarding admissibility and levels of food additives and contaminants, food colours, preservatives etc. and the requirements of labeling have varied standards under these laws.

Under 'The Food Safety and Standards Act-2006', the apex authority under this is the Food Safety and Standards Authority of India which under section16 (2) of the Act have the power to specify Rules and Regulations for setting up of Standards for ensuring safe and wholesome food for the consumers.

The main objectives of the FSS Act are[20]:

1. Single reference point for all matters relating to Food Safety & Standards, and regulations;
2. Lay food standards based on science, transparency and consultation;
3. Effectively regulate manufacture storage, distribution and sale of food to ensure consumer safety and promote global trade.
4. Rationalize and strengthen existing enforcement mechanism.
5. Shift from mere regulatory regime to self-compliances through Food Safety Management Systems.
6. The Act has the features to achieve appropriate levels of protection of human life and health and protection of consumers' interests including fair practices in all kinds of food;
7. Carry out risk management based on risk assessment; also to adopt risk management measures necessary to ensure appropriate levels of health protection;
8. Risk assessment is to be based on the available toxicological evaluation and extensive open and transparent discussion with all stakeholders, and the underlying principle is to ensure protection of consumers by preventing fraudulent, deceptive or unfair trade practice
9. In case of suspected risks of the public consuming contaminated food, the FSSA will take appropriate steps to inform the general public of the risk to health;

Key Features of the Act

[20] Views of the Author.

- The Act establishes the Food Safety and Standards Authority (FSSA) to regulate the food sector.
- FSSA will be aided by several scientific panels and a central advisory committee to lay down standards for food safety. These standards will include specifications for ingredients, contaminants, pesticide residue, biological hazards and labels.
- State Commissioners of Food Safety and other local level officials will enforce the law.
- Every food business operator is required to have a license in order to operate his food business from State Food commissioners or from Designated Food Officers.
- Petty manufacturers who make their own food, hawkers, vendors or temporary stall holders do not require a license. Instead, they need to get their businesses registered with the local municipality or Panchayat.

Issues of Consumers' Concerns

There are a number of Consumer concerns relating to the implementation of the law. The Act provides for a food recall procedure under Sec 28, which mandates a food business operator to recall a food item if it is manufactured in contravention of any provision of the Act. However there is no requirement that the food business operator inform consumers about a product recall, especially if some of the products have already been sold. Nor is there any cognizance of junk or fatty food, ignoring the fact that obesity has emerged as a major problem in India in recent years. This Act differentiates between contaminants, which renders food unsafe and 'extraneous matter'. Extraneous matter, it defines, will not render food unsafe. The Act also excludes plants prior to harvesting feed from its purview. Any harmful input such as pesticides in vegetables that could affect the safety standards of food products is not effectively covered. While the government has drafted an integrated food law, no assessment has been made about the technical and upgraded manpower required to meet and monitor the intended objectives. Therefore the Act could turn out to be stillborn at the initial stage itself. While the new integrated food law promises availability of safe food, its effective implementation will remain the key.

CONCLUSION

The primary objective of the Consumer Protection Act is to ensure availability of safe and wholesome food for human consumption. Unlike existing laws, which are punitive or preventive in nature, the provisions of this Act are compensatory in nature. The act is intended to provide simple, speedy and inexpensive redressal to the consumers' grievances, award relief and appropriately compensate the consumer. Further, the Act intends to shift from mere regulatory regime to self-reliance through Food Safety Management Systems. But this laudable step of the Government to have a consolidated Food Law may not be successful as there are numerous ambiguities that still exist in the Act. Now making the Act as a Consumer Friendly Law is the responsibility of the various educational institutions, organizations, advocates, NGO's as they can play a significant role in the area of consumer education. It depends on the Authorities that how efficiently they can utilize the existing system including public private partnership in the

implementation of the Act so that it will give least burden to the public exchequer and simultaneously providing safe and wholesome food to the consumers.

APPLICABILITY OF THE WRIT OF *SCIRE FACIAS* TO THE COMPANIES ACT, 1956

Mr. Satish Padhi

Abstract

The Companies Act, 1956 states that the certificate of incorporation given by the registrar shall be conclusive evidence that all the requirements of the Act has been complied with as regards registration. So once a company is born, the Companies Act provides winding up as the only method for its extinguishment. This is where the writ of *scire facias* can be used to rescind the certificate issued by registrar of companies and provides an alternative relief of disincorporation in cases of fraud or misrepresentation being committed by the company. This paper attempts to study the writ of *scire facias* and its applicability to the Indian Companies Act, 1956. This paper explores and examines whether the writ of *scire facias* could be called in order to get rid of a company incorporated under The Companies Act, 1956? In order to do so, the paper examines the manner in which courts have construed the writ of *scire facias*.

APPLICABILITY OF THE WRIT OF *SCIRE FACIAS* TO THE COMPANIES ACT, 1956

INTRODUCTION

Writ of *scire facias* is a Latin phrase meaning 'that you cause to know'.[1] Osborn in his "Concise Law Dictionary"[2] says that it is a Writ founded upon some record, such as a judgment or letters patent etc. directing the sheriff to make known to the person against whom it is brought to show cause why the person bringing it should not have advantage of the record etc. or where it is used to repeal Letters Patent etc.

This writ is of two kinds and one is issued for satisfaction of a decree in execution.[3] The other is issued for the purpose of rescinding Crown grants, charters of or franchises and in England, the Crown used to issue charters authorizing companies to do business, the most famous example of such charters being the one issued to the East India Company to make grants or franchises, such as the right to levy tolls at a Particular place or to ply a ferry or the sole right to the benefits of fisheries etc.[4] When such charters or franchises were granted, there was an implied condition under the doctrine of common law that they could be repealed or rescinded if it appeared that they were obtained by misrepresentation or by fraud.[5] In other words, this was the means adopted for getting rid of the incorporation of a company or franchise or grant given on a misrepresentation.[6]

It is useful to refer to a passage in Halsbury's Laws of England. It is stated, "*Scire facias* on the Crown side of the Queen's Bench Division is a proceeding for the purpose of

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[1] BRYAN A GARNER, BLACK'S LAW DICTIONARY, 668 (9th ed., 2009).

[2] LESLIE RUTHERFORD, OSBORN'S CONCISE LAW DICTIONARY (8TH ED., 1993).

[3] .T.V.Krishnan v. Andhraprabha (P) Ltd., AIR 1960 AP 123.

[4] *Id* at para 11

[5] *Ibid.*

[6] *Ibid.*

rescinding or repealing Crown grants, charters and franchises. It must be distinguished from the obsolete writ of *scire facias* used in aid of executions and from *scire facias* on the Revenue side of the Queen's Bench Division which was abolished by the Crown Proceedings Act, 1947, *Scire facias* on the Crown side is still available."[7]

The Simonds edition of Halsbury's Laws of England is also apposite in this context. It states:

"A corporation may be dissolved on proceedings on a *scire facias* instituted on the Crown side of the Queen's Bench Division and to every Crown grant there is annexed by the common law an implied condition that it may be repealed by *scire facias* by the Crown.[8] Proceedings on a *scire facias* may be taken if the charter has been obtained by fraud or misrepresentation; or if the Crown has granted a charter under a mistake as to facts, or under a misapprehension as to the construction of effect of the charter; or if the Crown has exceeded its powers; or if the corporation has done something which is prohibited or is not authorised by its charter, a subject whose rights are affected by a franchise or charter granted to a corporation may, as of right, procure the cancellation or forfeiture of the charter by *scire facias* for the prerogative of the Crown is the privilege of, and may be used by, the subject on the fiat of the Attorney General."[9]

This passage indicates that the writ of *scire facias* is open for the purpose of cancelling or revoking the incorporation of a company formed under a charter.

This paper attempts to study the Writ of *scire facias* and its applicability to the Indian Companies Act, 1956. The researcher recognizes that writ of *scire facias* has been used for many other purposes but the present paper restricts itself to the writ's applicability with respect to a company. This paper explores and examines whether the writ of *scire facias* could be called in order to get rid of a company incorporated under The Companies Act, 1956? In order to do so, the paper examines the manner in which courts have construed the Writ of *scire facias*.

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[7] 11 HALSBURY'S LAWS OF ENGLAND 153 (3rd ed.,)

[8] 9 HALSBURY'S LAWS OF ENGLAND 99 (Simonds ed.)

[9] *Ibid.*

SOME INSTANCES WHERE THE EXISTING INDIAN COMPANIES ACT, 1956 PROVISIONS ARE INADEQUATE AND HENCE THE NEED OF THE WRIT OF *SCIRE FACIAS*.

Section 35 of the Companies Act, 1956, states that a certificate of incorporation given by the registrar shall be conclusive evidence that all requirements of this act have been complied with in respect of registration. Therefore the certificate of incorporation is conclusive evidence that the requirement of the act as regards registration has been complied with and prevents the reopening of matters prior and contemporaneous thereto, and it places the existence of the company as a legal person beyond doubt. This is so even if all the subscribers are forged or all the signatories are minors.[10] Such is the effect of the certificate of incorporation.

In *Peel's* case,[11] the memorandum of association had, after signature and before registration, been altered, without the privity of the signatories, materially. Lord Cairns stated that,[12] "the certificate of incorporation is not merely a prima facie answer, but a conclusive answer to any such objection……when the certificate of incorporation is given, nothing is to be enquired as to the regularity of the prior proceedings".

In *Oakes v. Turquand*,[13] it was stated by Lord Chelmsford, "that the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case that all previous requisitions have been complied with."

In *Bowman v. Secular Society*[14], it was held that the extent to which the registrar is required to satisfy himself is to whether the requirements of this act has been complied

[10] A RAMAIYA, GUIDE TO THE COMPANIES ACT (17th ed., 2010).

[11] (1867) LR 2 Ch 674.

[12] *Ibid.*

[13] (1867) LR 2 HL 325.

[14] 1917 AC 406.

with, his decision is within his powers and cannot be interfered with by the court unless it is perverse or clearly wrong.

In *T.V Krishna v. Andhra Prabha Private Limited*,[15] it was held that the only duty cast upon the registrar before he could register is to see that the requirements prescribed by Sub-sections 1 and 2 of Section 33 of the Companies Act, 1956 are complied with. It is not within his province to make enquiries into matters, which are unconnected with the conditions enumerated in Sub-Sections 1 and 2 or into collateral matters to probe into the motives of the promoters.[16] Moreover, the companies act does not give the powers to the registrar to de-register the companies act under specific circumstances.

Thus it can be concluded that once a company is born, the companies act provides winding up of companies as the only method for its extinguishment. The companies act, 1956 provides provisions in this regard through Sections 234, 235, 237 and 243. This is where the writ of *scire facias* can be used to rescind the certificate of incorporation issued by the registrar of companies.

WRIT OF *SCIRE FACIAS* AND ITS APPLICABILITY TO THE COMPANIES ACT, 1956 AND WHO ALL MAY PETITION

In *Princess of Reuss v. Bos*,[17] the House of Lords were not prepared to extend this Writ to Companies created under a Statute. There a company was incorporated under the Companies Act, 1863. Some persons, who were foreigners, formed a company with the aim of raising money in England and for investing it in Germany. For this purpose, they issued two kinds of shares (i) nominative shares and (ii) shares which could be passed from hand to hand, the latter of which was opposed to the principle underlying the Companies Act. On the issue of a certificate by the Registrar, the company was incorporated. After some time, it fell into difficulties with the result that winding up

[15] (1960) 30 Com Cases 437 at 446-447.

[16] *Ibid.*

[17] (1871) LR 5 HL 176.

proceedings were started, The objection of one of the shareholders was that the incorporation itself being invalid, the winding up proceedings were not permissible.

This contention was overruled and the incorporation was held to be valid notwithstanding that the memorandum of Association was extraordinary and unusual, that the creation of shares that were to pass from hand to hand was contrary to the spirit of the Act of 1862. According to the Learned Law Lords, when once a company was born, the only method by which it could be got rid of was by getting it extinguished through the effect of the Act of Parliament which provides for the winding up and not by disincorporation. The speech of the Lord Chancellor (Lord Hatherley)[18] brings out the scope of this writ:

"The question is, therefore, simply whether it has been created. It created, there is no power, given in this Act of Parliament, nor in any other Act of Parliament that I am aware of by which through any result of a formal application, like an application, by *scire facias* to repeal a charter, the company can be got rid of unless it can be got rid of by being extinguished through the effect of the Act of Parliament which provides for the winding up of companies when they ought, from any circumstances whatsoever, to be wound up."

This doctrine was to some extent modified by the House of Lords *in Bowman v. Secular Society Ltd.*[19] Lord Parker observed that the section did not preclude all His Majesty's lieges from going behind the certificate or from alleging that the society was not a corporate body with the status and capacity conferred by the Acts, that such a certificate of registration could not bind the Crown and that the Attorney General on behalf of the Crown could institute proceedings by way of certiorari to cancel registration, which the Registrar had improperly or erroneously allowed. The effect of the pronouncement is that either the Attorney-General can initiate proceedings for the cancellation of the certificate or a subject, who is adversely affected by the franchise, could invoke such a writ with the fiat of the Attorney-General.[20]

[18] *Ibid.*

[19] 1917 AC 406.

[20] See T.V Krishna V. Andhra Prabha Private Limited and Another, AIR 1960 AP 123.

Dealing with Lord Parker on this subject, Holdsworth[21] offers this comment:

"It is true that dicta of great weight assert that the Crown might institute proceedings to attack the validity of its creation, because the crown is not bound, as the subject is bound by Section 17 of the Companies (Consolidation) Act 1908, which makes the certificate of the Registrar absolutely conclusive as to the fact of incorporation. But as yet there has been no direct decision on the question whether the Crown possess even this modified power."

In *Queen v. Prosser*[22], the Master of the Rolls (Lord Langdale) remarked:

"The action of *scire facias* to repeal letters patent is a proceeding of the Crown for the benefit of the public adopted and authorised upon information that the letters patent are void and of no force or effect in law for some such reason as that the conditions upon which the grant was made were not performed or that the grant was improperly made; or in effect, that a monopoly supposed to have been granted legally, has in fact been granted illegally, and to the prejudice of the public or of her Majesty's subjects."

In *Saloman v. Saloman and Company*[23], the Learned Lord Chancellor remarked that it would be possible to go behind the certificate of incorporation by proceedings in the nature of *scire facias* by showing that fraud had been committed upon the officer entrusted with the duty of giving the certificate.

In *Jenkin v. Pharmaceutical Society of Great Britain*[24], it was contended that a corporation created by charter can at common law do with its property all such acts as an ordinary person can do, and bind himself to, and even if the charter expressly prohibits a particular act the corporation can at common law do the act. But if the corporation did that which was prohibited or was not authorised by the charter, the charter might be

[21] IX SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW (1953).

[22] (1848) 50 EH 834.

[23] 1897 A C 22.

[24] (1921) 1 Ch D 392.

recalled by the Crown by proceedings on a *scire facias*.[25] It was held that though there was a difference between a statutory company and an association incorporated by charter it did not follow that a member of a chartered society could not take legal proceedings for the purpose of preventing the society or its governing body from doing acts outside the purposes authorized by the charter which might lead to the destruction of the corporation by the forfeiture of its charter.[26]

In *Bonanza Creek Gold Mining Co. Ltd. v. R.*[27], Viscount Haldane said, "In the case of a company created by the charter the doctrine of ultra vires has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire rights and duties. If by the terms of the chapter it is prohibited from doing so, a violation of this prohibition is not an act beyond its capacity, and is therefore not ultra vires, although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of ultra vires applies."

In *Natendra N. Chowdhury and Another v. Institute of Engineers India and Others*[28], it was upheld that the remedy against a chartered corporation in respect of acts which are in excess of the objects or in violation of prohibition contained in the charter is for the attorney general to issue a writ of *scire facias*.

In *T.V Krishna v. Andhra Prabha Private limited and another*[29], the court left open this question and did not answer whether the writ of *scire facias* could be called in order to get rid of an incorporation effected under the provisions of an enactment.

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[25] *Ibid.*

[26] *Ibid.*

[27] (1916) 1 AC 566, AIR 1916 PC 193.

[28] AIR 1964 Cal 73.

[29] AIR 1960 AP 123.

Section 35 of the companies act, 1956 cannot be read as completely ousting away the power of judicial review from the court.

In England, judicial review is not derived from the constitution. Therefore, courts in England can control statutory power only on two grounds- ultra vires and error on the face of the record. Courts in England cannot interfere with an intra vires decision i.e. a decision within jurisdiction and displaying no error on its face. The courts, therefore, have to stretch the doctrine of ultra vires i.e. lack of jurisdiction to cover all the forms of error which they need to control.

In India, Judicial Review is not only an integral part of the constitution but is also a basic structure of the constitution which cannot be abolished or whittled down even by an amendment of the constitution.[30] In any democratic society judicial review is the soul of the system because without it democracy and the rule of law cannot be maintained.[31] In *L. Chandra Kumar v. Union of India*[32], the Apex Court has held that the power of judicial review under articles 226/227 is a basic feature of the constitution which cannot be abridged or ousted.

Therefore, it is clear that judicial scrutiny in the form of appeal may be ousted but judicial review cannot certainly be abridged or ousted in any manner whatsoever.

In *India General Navigation and Railway Company Limited v. Their Workmen*[33], Section 17(2) of the Industrial Disputes Act, 1947, provided that the award given shall be "final and shall not be called into question in any court of law whatsoever." The apex court stated that your right to appeal is ousted certainly. But even then the provisions of this act are subject to paramount law laid down in the constitution. Article 136 of the constitution[34] under which the court grants special leave cannot be read as subject to the

[30] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225; AIR 1973 SC 1461.

[31] Minerva Mills v. Union of India, (1980) 3 SCC 625.

[32] (1997) 3 SCC 261.

[33] AIR 1960 SC 219.

[34] CONSTITUTION OF INDIA, 1950 Art. 136.

provisions of this act. With this ruling by the Apex Court, it is clear that even the special leave to appeal is not ousted.

In *Ubbink Isolatie BV v. Dak- en Wandtechniek BV*[35], it was held that under the doctrine of judicial review a registration can be declared to be a nullity where the company ought not to have been registered.

The writ jurisdiction of the Supreme Court is limited only to the extent of enforcement of fundamental rights, while the High Courts can issue writs not only for the purposes of enforcement of fundamental rights but for other purposes also. The approach of the court in the area of fundamental rights must not be whether the authority is 'State' within the meaning of article 12 but the correct approach should be that every authority or person who poses a threat to a fundamental right should be amenable to the jurisdiction, and, there by not the 'type of agency' but the 'threat to the fundamental rights' must be the determining factor for the issue of writs under Article 32.[36] The threat to fundamental rights may certainly arise from the agencies registered under statutes i.e. the Companies Act, 1945. In *Raj Soni v. Air Officer Incharge Administration*[37], the Apex Court further held that a private body even if it is not a State under Article 12 but if governed by a statute is bound to provide the benefit under the statute and hence the benefit of writ would be applicable. In *Unni Krishnan v. State of A.P.*[38], the Supreme Court observed that the term 'authority' used in Article 226 must receive a liberal meaning unlike the term in Article 12 because Article 12 is relevant not only for the enforcement of Fundamental Rights but for non-fundamental rights also. It may cover any person or body performing public duty.[39] Therefore, it can be safely concluded that where "public interest element" is present the writ is maintainable. Following this, the Apex Court has allowed a writ in *K. Krishnamacharyulu v. Sri Venkateshwara Hindu College of*

[35] (1990) BCLC 182 CJEC.

[36] I.P MASSEY, ADMINISTRATIVE LAW (7th ed., 2008).

[37] (1990) 3 SCC 261.

[38] (1993) 1 SCC 645.

[39] *Ibid.*

Engineering[40], against a non-aided private educational institution where its employees were seeking parity in scale with employees of government institutions.

Who all may petition?

In *T.V Krishna v. Andhraprabha Private Limited and Another*[41], writ petitions were filed for the issue of a writ of *scire facias* to rescind the certificate issued by the Registrar of Companies to Andhra Prabha Private limited. All the petitioners were either working journalists or workers employed in the express newspaper private limited. So therefore it can be stated that any person whose rights are affected by a company may file this petition and in turn have the right to bring an action. In *Maganbhai v. Union of India*[42], it was stated that a mere interest would not entitle a person to writ but he should be able to show that he has a clear interest or direct interest. In *Fertilizer Corporation Kamgar Union v. Union of India*[43], Justice Krishna Iyer, stated that, "locus *standi* must be liberalized to meet the challenges of the times. *Ubi jus ibi remedum* must be enlarged to embrace all interests of public-minded citizens or organizations with serious concern for conservation of public resources and the direction and correction of public power so as to promote justice in all facets.[44]

The various stakeholders of a company include shareholders, residual owners, other creditor's i.e. suppliers/financial institutions, government and the society. Therefore, in turn all of them may file this petition.

CONCLUSION

We find that the writ of *scire facias* provides an alternative relief of disincorporation in cases of fraud or misrepresentation being committed by the company. It has been stated that Section 35 of the Companies Act, 1956 does not immune itself from judicial review.

[40] (1997) 3 SCC 571.

[41] AIR 1960 AP 123.

[42] (1970) 3 SCC 400.

[43] (1981) 1 SCC 568.

[44] *Ibid.*

So the court can very well review on particular grounds and the writ is also maintainable against a company. The petition can be filed by the various stakeholders of a company.

Walking a Tight Rope: Balancing Sovereign Regulatory Discretion & the Inviolability of International Investment Treaty Obligations

Ms. Shaivlini Khemka and Ms. Aishwarya Padmanabhan
Vth Year Law Students, B.A. LLB (Hons.)
WB National University of Juridical Sciences (NUJS)
12 LB Block, Sector – III, Salt Lake City,
Calcutta- 700098,
West Bengal, India
Phone: ++91 98307 76177 & 97487 72751
E-mail: shaivlini@hotmail.com & aishwarya_p@hotmail.com

International Investment Agreements (IIAs) are signed between two countries under which a country binds itself to offer treaty-based protection to investments and investors of another country.

Bilateral Investment Treaties, or BITs, are treaties entered into between two States with the aim of protecting and encouraging investment flows between their economies. There are now over 2,500 BITs signed (of which over 2,000 are in force) and this number is still growing. BITs create legal obligations owed by the Host State to the foreign investor. Most BITs also allow foreign investors to enforce these obligations directly against the Host State. Multilateral Investment Treaties, or MITs, are treaties between three or more States, often within a geographic region, and create rights similar to those under BITs. Important MITs include[1]:

a) The Energy Charter Treaty, or ECT: 51 States are signatories to the ECT, plus the European Union, of which 46 States are Parties, spanning Europe, the CIS, Central Asia and Japan, with the Russian Federation and Belarus applying the ECT provisionally, subject to ratification.

b) The North American Free Trade Agreement, or NAFTA: Member States are Mexico, the USA and Canada.

c) The Southern Common Market or MERCOSUR Treaty: Member States are Argentina, Brazil, Venezuela, Paraguay and Uruguay.

[1] Dolzer, R and C. Schreuer (2008): *Principles of International Investment Law*(Oxford: Oxford University Press) at p. 238

d) The Association of Southeast Asian Nations or ASEAN Treaty: Member States are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

The basic provisions of an IIA typically guarantee certain relative standards of treatments for the foreign investor such as National Treatment and Most Favoured- Nation (MFN) Treatment.[2] They also agree to guarantee certain absolute standards of treatment such as fair and equitable treatment for foreign investors in accordance with international standards. IIAs also assure compensation for expropriated property or funds, and free transfer and repatriation of capital and profits. Further, the IIA parties agree to submit to a dispute settlement body should a dispute arise between the host State and the investor.

IIAs, while protecting and propelling investment, also restrict the regulatory discretion of the host States. States have witnessed a considerable increase in the number of investor-state investment disputes as a result of the sizeable growth in the number of international investment agreements being signed. This has given rise to concerns over the compromise of regulatory discretion due to the obligations imposed.

India is pursuing a vigorous IIA programme aimed at attracting foreign investment. The country should be mindful, nonetheless, should be mindful of the necessity to protect and safeguard legitimate State interests through regulation in times of exigencies. However, such regulatory discretion threatens to jeopardize the climate of certainty sought to be bred by the IIAs.[3] To strike a balance between these opposing interests, it is imperative to undertake a critical review of the extent to which and the circumstances under which the States can move away from its obligations under the IIAs without deterring further investments perpetually. Focus is placed specially with respect to Most Favoured Nation Treatment (MFN) and Expropriation under International Investment Law.

Most Favoured Nation Treatment (MFN)

The objective of MFN clauses in general is the grant by the Host state to the beneficiary state a treatment equal to that which the host state grants any third state with respect to the terms under

[2] *Ibid.*
[3] Kumar, N (2005): "Liberalisation, Foreign Direct Investment Flows and Development: The Indian Experience in the 1990s", Economic and Political Weekly, 40 (14): 1459 69.

the treaty, in the event that the treatment accorded to such third state is more beneficial than that being accorded to the beneficiary state under the treaty. [4]

It has been argued that MFN protection serves to multilaterlize investment treaties and prevents them from being used as a bilateral quid pro quo mechanism.[5] In *Rights of Nationals of the United States of America in Morocco*[6] the ICJ stated that the purpose of MFN clauses was to "maintain at all times fundamental equality without discrimination among all of the countries concerned." Therefore, by reducing the "leeway of specificities"[7] in bilateral investment treaty, they help to reorder the entire investment protection regime in states.

This helps place investors of and investments from different states on an equal footing, and the playing field is leveled both with respect of dispute resolution under investment treaties as well as any other rights and obligations. Scholars have contended that "substantive investment protection is inseparable from its procedural implementation, which is essential to the conferral of a right"[8]

The central question that emerges in context of MFN treatment vis-à-vis regulatory discretion under IIAs is whether MFN is "an unqualified and equalizing principle"[9] which prevents the host state from discriminating between foreign investments, even if different treatment is explicitly mentioned in the IIA.

When countries engage in the conclusion of BITs, the bargaining process is of essence. The differences in the bargaining process lead to different final outcomes in terms of the content of the IIA in consonance with the respective interests of the two states. This final outcome "presents a delicate balance between the rights of investors and state's regulatory discretion."[10] An instance of such differing outcomes has been given in the following terms: "…in an IIA, a host country may impose performance requirements linked to the benefits extended to the other

[4] Van Harten, G (2007): *Investment Treaty Arbitration and Public Law* (New York:Oxford University Press).
[5] *See* Stephen W. Schill, "Multilateralizing Investment Treaties through Most Favoured Nation Clauses," (2009) 27:2 Berkeley Journal of Internation Law, 496 at 555
[6] *Rights of Nationals of the United States of America in Morocco (France . v. U.S.)*, 1952 I.C.J. 190
[7] *Supra* note 2, at 568
[8] *Ibid*, at 555
[9] *See* Prabhash Ranjan, "International Investment Agreements and Regulatory Discretion: Case study of India," (2008) 9 No. 2, *Journal of World Investment and Trade*, 209 at 220
[10] *Ibid.*

country. In another IIA signed by the same host country, these benefits may not exist and hence it may also not contain performance requirements."[11] However, if the MFN principle is called into play, then once the host state agrees to certain terms in an IIA, those terms become the benchmark for all future IIAs, denying the host state the flexibility or adaptability to structure different IIAs according to an understanding of mutual interests with the beneficiary state arrived at during the bargaining process. In fact, it may well be that the bargaining process itself becomes a redundant exercise. This in essence is nothing but a severe infringement of the regulatory discretion of the host state even in cases where its economic interest demands. In addition, such practice could potentially lead to "treaty shopping"[12] whereby the investor state tries to invoke the MFN clause to derive benefits granted to another state of its choosing.

It has been observes that "a broad construction of MFN treatment, therefore, forces the host State to internalize the costs of violating its treaty obligations. This will limit government breaches of investment treaties to those cases in which the advantage a State derives from the breach outweighs the full costs to affected foreign investors."[13] However, the crucial point that emerges through this observation is that extending such a broadly construed MFN treatment to any and every beneficiary state without regard to the terms of the treaty results in the host state becoming liable for nothing short of a "breach" of the primary treaty, due to non-extension of terms in the secondary treaty. The question arises then, is such construction desirable, and if so, to what extent or with what preconditions?

This question came up in the famous ***Maffezini v. Spain***[14] case. The Tribunal held that a beneficiary state in an IIA containing the MFN clause can use the beneficial provision (dispute settlement provision in this case) in a 'secondary treaty' signed by the host state. For this, the tribunal first looked into whether the primary treaty covers the subject matter related to dispute settlement. Finding in the affirmative, it opined that if this subject matter is more favourably treated by the host state in a secondary treaty, then by virtue of the MFN clause in the primary, the beneficiary state becomes entitled to the same benefit. However, the *Maffezini* tribunal cautioned against a broad interpretation of MFN in laying down four exceptions to its

[11] *Ibid* at 224
[12] See *supra* note 2.
[13] *Ibid*, at 556
[14] *Maffezini v. Spain*, 16 ICSID Rev-FILJ 212 (2001).

application. First, for the applicability of the MFN clause; the primary treaty and the secondary treaty should contain the same subject matter. Second, certain 'public policy considerations' may limit the MFN clause. Third, changing the dispute resolution forum already agreed upon was not allowed. Finally, by invoking the MFN clause, a state which has agreed for a more institutionalised system of arbitration; cannot move to a less institutionalised system

In the subsequent case of *Plama Consortium v. Bulgaria*[15], the tribunal distinguished between "situations where claimants want to add beneficial provisions present in 'secondary treaty' to the 'primary treaty'…from situations where the claimant wishes to replace the dispute settlement procedure in the primary treaty for provisions in the secondary treaty" by invoking the MFN clause. The tribunal concluded that unless the MFN provision in the primary treaty leaves 'no doubt' that contracting parties intended to incorporate them, the MFN provision in the 'primary treaty' will not go so far as to incorporate dispute settlement provisions provided in another treaty. This came to be known as the "No Doubt Test".

Through the course of these decisions and our discussion above we notice that while MFN clause has its benefit of securing a level playing field for investors in a host country, at the same time, such a clause should not be applied in such a broad based manner that it negates legitimate interest of the state which are reflected in its individual BITs arrived at through a mutual bargaining process. To find this balance, there must be certain preconditions as indicated above to the extension of the MFN clause. A noted scholar in the field suggests that MFN provisions in an IIA be limited by "qualifying its applicability to 'like situations' or to 'like circumstances'. This allows domestic regulators to differentiate between investments in different circumstances such as in different sectors or in different regions of a country and hence allows them to treat equals equally."[16]

EXPROPRIATION

In the *SD Myers*[17] case, it has been held that the term "expropriation carries with it the connotation of taking by a governmental-type authority of a person's property with a view to

[15] *Plama Consortium Limited v. Bulgaria*, 44 ILM 721 (2005).
[16] *Supra* note 6, at 231
[17] *SD Myers v. Canada*, 40 ILM 1408 (2001)

transferring the ownership of that property to another person." In *Metalclad*,[18] it was furthered the definition of expropriation and held that it also includes covert or incidental interference with the use of property which deprives the owner from enjoying the reasonable economic benefits expected from the property.

Several IIAs, including ones signed by India include protection given to the beneficiary states against not just expropriation, but also measures having the effect of expropriation, subject to only a few exceptions such as fair compensation and public purpose.[19] In this context, it becomes important to examine the fine line that demarcates regulatory discretion that may be exercised by the host state and a measure which may be or have the effect of expropriating the economic interests of the beneficiary state.

To determine this balance, scholars have argued that what needs to be taken into account is not merely the effect of the action of the host state, but also the intent behind the action.[20] It has been contended that choosing the former over the latter creates essentially two problems – first, the balance sought to be achieved by domestic regulation between interests of the foreign investor and public welfare may be disturbed. In this case, an arbitral tribunal may have to determine what constitutes public welfare, that which is clearly the prerogative of the state to determine. Second, sole reliance placed on effect of the actions tends to create a hierarchy between the public interest provisions and those relating to investment. [21] Thus, it was held it *TECMED*[22] that what needs to be determined is whether the action of the state is proportional to the object it seeks to achieve.[23]

It should be noted that whether a treaty used a broad definition of expropriation or a narrow one is of consequence in determining the ramifications of the host state's actions. It is also open to the states, in order to remove doubts, to provide whether or not certain specified actions will

[18] *Metalclad Corporation v. Mexico* (2000) ICSID ARB(AB)/97/1
[19] *See* India-UK BIT, Article 5(1), online: United Nations Conference on Trade and Development http://www.unctadxi.org/templates/docsearch 779.aspx
[20] *Supra note 6*, at 236
[21] *Ibid, at 236-237*
[22] *TECMED v. Mexico*, 23 ILM 133 (2004)
[23] *See also US–Standards for Reformulated and Conventional Gasoline,* WT/DS32/AB/R (1996).

amount to expropriation or not through the use of an interpretative clause in the treaties.[24] This will accord the treaties more certainty and predictability which is quintessential for fostering investment and attracting international investors.

Thus, an analysis needs to be done of the Indian Investment Treaty Regime and understand critically the fine demarcation between exercising sovereignty and regulatory discretion and on the other side, honouring International Investment Treaty obligations.

Indian Investment Treaty Programme

India, in its overall strategy of liberalisation has been signing BITs to attract foreign investments as clearly enunciated by the Ministry of Finance, which is the nodal department that negotiates and signs BITs with other countries.[25] India signed its first BIT in 1994 with the United Kingdom. Since 1994, India has signed BITs with 75 countries; out of which 66 are already in force and 9 are yet to be enforced.[26] Negotiations with another 25 countries are underway. Out of the 66 BITs that India has entered and enforced, close to 40 are with developing and less developed countries.[27] Thus, India has entered into quite a few BITs with non developed countries as well. The Indian BIT programme has picked up speed in last four years or so. Of the 66 BITs entered and enforced, close to 20 of them have been enforced in last five years or so.[28]

Further, in last few years, India has concluded Comprehensive Economic Cooperation Agreements (CECAs), containing a chapter on investment with Korea and Singapore[29]; has concluded negotiations on a BIT with Canada[30] and there are reports suggesting India and the United States (US) taking steps towards entering into a BIT.[31]

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[24] *See* United Nations Conference on Trade and Development, '*Taking of Property*', IIA Issue Paper Series (United Nations: New York and Geneva), 1999, at p. 49-51

[25] *See* Investment Division, Ministry of Finance, India, Viewed on 17 December 2011 (http://www.finmin.nic.in/the_ministry/dept_eco_affairs/dea.html).

[26] *Ibid.*

[27] *Ibid.*

[28] *Ibid.*

[29] India Korea CECA was signed in 2009 and India Singapore CECA was signed in 2005.

[30] *See* Background on Canada- India Foreign Investment Promotion and Protection Agreement, Viewed on 18 November 2009 (http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipaapie/india-inde.aspx?lang=en)

[31] *See* US Keen to push for a Bilateral Investment Treaty, 26 October 2009, Viewed on 17 December 2011 (http://www.blonnet.com/2009/10/26/stories/2009102651830100.htm).

These numbers make the Indian BIT programme one of the biggest amongst developing countries. By entering into so many BITs, India is creating for herself numerous bilateral regulatory frameworks, at the international level, to regulate investment inflows. This bilateral regulatory framework is significant in terms of its effect on the domestic regulatory behaviour of India as regards investment inflows from its treaty partners is concerned. Notwithstanding this gigantic and profound BIT programme, apart from few articles[32], not much work has been done to analyse and understand the Indian BITs.

More and more countries including India are entering into BITs on the pretext that BITs result in more investment inflows. Until 1991, Indian policy was restrictive to foreign investment. However, the beginning of economic reforms in the early 1990s brought a change in India's perception towards foreign investment with changes in policy to boost liberalisation[33].

As part of the larger economic reforms programme, India launched the BITs programme in mid 1990s - based on the assumption that offering treaty based protection to foreign investments will boost investor confidence and will translate in investment inflows[34]. This assumption has been the common thread of the entire Indian BIT programme from the mid 1990s to date. This is evident from the latest recital by the Finance Ministry, which states that although it is difficult to quantify the benefits of BITs, BITs invariably result in increased FDI inflows, encourage transfer of technology and modern management skills[35].

However, all these years, no effort has been made to assess the actual impact of BITs on investment inflows to India. For example, there is no evidence to show that increased foreign investment inflows to India, over the last two decades or so, globally or from a specific country or source, has been due to BITs signed by India or to what degree BITs have contributed to these

[32] *See* Krishan D (2008): "India and International Investment Law" in B N Patel (ed) India and International Law, Volume 2 (Leiden/Boston: Martinus Nijhoff), 277 92.
[33] *See* Kumar, N (2005): "Liberalisation, Foreign Direct Investment Flows and Development: The Indian Experience in the 1990s", Economic and Political Weekly, 40 (14): 1459 69.
[34] *See* Ministry of Finance (1996): *Compendium of India's Bilateral Investment Promotionand Protection Agreements*, Volume I (New Delhi: Department of Economic Affairs).
[35] *See* Ministry of Finance (2009): *Compendium of India's Bilateral Investment Promotion and Protection Agreements*, Volume VI (New Delhi: Department of Economic Affairs).

inflows. If one looks at the data of FDI flow on the basis of country of origin, US (with whom India is now thinking of signing a BIT) has been the second largest investor in India after Mauritius (10% of total FDI flows in India in last decade originated from the US)[36] despite the absence of a BIT between the two countries. Another example is of Brazil that has no BITs, but is still one of the leading recipients of FDI in Latin America.[37]

Globally speaking - empirical evidence on increase in foreign investment inflows, in a country, directly caused by signing new BITs is inadequate and thus inconclusive[38]. There are studies that argue for a positive relationship between BITs and investment inflows. For instance, Neumayer and Spees have looked at the data of 119 countries from 1970 to 2001 to argue for a positive relationship between BITs and FDI[39]. There are also studies arguing that positive effect of BITs on investment flows will depend on whether BITs have been signed with developed or developing countries.

On the other hand, it has also been argued that although there is some positive effect of BITs on foreign investment flows, these treaties are at best complements and not substitutes for good institutional quality and local property rights in the host state – factors which have a more direct influence on foreign investment. Investment is more related to macro economic factors such as host country's overall economic stability, advantages as a location, level of infrastructure and other related factors.[40]

If these economic factors are missing, a mere legal framework in the form of BITs alone may not succeed in attracting investments in a particular country. Moreover, the effect of BITs on

[36] *See* Gopalan, S and Ramkishen Rajan (2009), ISAS Insights, No 79, viewed on 15 December 2011 (http://www.isasnus.org/events/insights/80.pdf).
[37] *See* Whitsitt, E and Damon Vis-Dunbor (2008), Investment Arbitration in Brazil: Yes or No?, viewed on 17 December 2011, (http://www.investmenttreatynews.org/cms/news/archive/2008/11/30/investmentarbitration-in-brazil-yes-or-no.aspx)
[38] *See* Dolzer, R and C. Schreuer (2008): *Principles of International Investment Law* (Oxford: Oxford University Press).
[39] *See* Neumayer, E and L Spees (2005): 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?', *World Development,* 33: 1567 85 and Tobin, J and S Rose-Ackerman (2005): Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties, Yale Law & Economics Research Paper No. 293.
[40] *See* Vandevelde, K (1998): "Investment Liberalisation and Economic Development: The Role of Bilateral Investment Treaties", Columbia Journal of Transnational Law, 36: 501 27.

investment flows may vary from country to country and may also be different for different periods of time and thus there cannot be a general proposition that signing BITs invariably result in more investment inflows.[41]

In this light, the need is to do research in India to understand and assess the relationship between BITs, investment inflows and other objectives that India thinks BITs help in achieving and thus to test the assumption that BITs result in greater investment inflows. The conclusions of such research can then feed in the negotiation process. For instance, if the research shows that there is going to be a weak effect or a negative effect of a particular BIT with a specific country on investment inflows into India, then India should reconsider entering into a BIT with that country. On the other hand, if the research shows major economic gains are expected from a BIT, then India should engage with that country for a potential BIT. In the absence of research evidence; one cannot make an overarching assumption, as India has been doing for its BIT programme, that BITs will invariably result in investment inflows and on that basis undertake onerous treaty obligations.[42]

Furthermore, such research is important in light of the fact that BITs may unduly constrain regulatory discretion of host nations (discussed below). Thus, an important policy question is how much of a trade-off between regulatory discretion and investment inflows a country is willing to undertake. A bargain where a country limits its regulatory discretion in return for large investment inflows may still be acceptable as compared to a bargain where a country limits its regulatory discretion without much investment inflows in return[43].

BITs and Regulatory Discretion

Another important issue that India needs to take cognizance of especially as it wishes to further expand its BIT programme is that BITs have the potential to unduly restrict the regulatory discretion of the host country. By regulatory discretion one means the ability of a country to adopt policies and laws to serve its national policy objectives, which may keep changing or

[41] *See* P. Ranjan, *International Investment Agreements and Regulatory Discretion: A Case Study of India*, 9 Journal of World Investment and Trade, 209 (No.2, 2008); D. Krishan, *A Notion of ICSID Investment, in* INVESTMENT TREATY
[42] *Ibid.*
[43] *Ibid.*

evolving – without any restriction being imposed on this ability. To give a very simple example of such restriction – the host nation's decision to give tax incentives to investments that go in economically backward regions of the country (assuming that the host country wishes to adopt such a regulatory policy for her national objectives) – may violate the national treatment or MFN provisions of the BITs that the host country has entered into unless the BITs recognise such exceptions.[44] This issue has become important in light of increasing number of investor-state treaty disputes (as mentioned in the introduction) where often the public regulatory discretion of the host nation has come under scrutiny.

Before going further on this issue, it is pertinent to mention a basic conceptual point. By entering into a BIT, a country voluntarily accepts some restriction on her overall regulatory discretion in exchange for benefits that the treaty might bring. This, in itself, is a sovereign function of the state.[45] However, the moot issue is what happens if BITs restrict the regulatory discretion of a host country in a manner that the latter did not envisage at the time of entering into the BIT or more specifically, is there something in the provisions and the structure of BITs because of which a host country's regulatory discretion, at the national level, is circumscribed in ways different than what the host nation thought at the time of signing the treaty.

The interface between foreign investments and regulatory discretion of the host state is not a novel issue. Common sense tells us that once an investor has entered into a country to do business; her conduct has to be in accordance with the regulations of the host state. To protect the investor from arbitrary and discriminatory exercise of regulatory discretion is indeed an important objective of the BIT.[46] However, problem arises not when the regulation is arbitrary or discriminatory, but when it is genuine. For instance, an important question that the entire body of international investment law is grappling today, is, that if in the course of exercising genuine public regulatory discretion the host state's action result in an adverse impact on the business of the foreign investor, then should host nation pay damages to the investor. The answer to this

[44] *See* Prabhash Ranjan, *Medical Patents and Expropriation in International Investment Law – With Special Reference to India*, 5 (3) Manchester Journal of Intl Eco Law (2008)
[45] *Supra note* 38.
[46] *Ibid.* (*Also See* Salacuse, J W (1990): "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries", *International Lawyer*24: 655 76.)

question will depend on innumerable number of factors, relevant to a case, such as the provisions given in the BIT.

Recalling the features of BITs mentioned in the Introduction above, it is pertinent to note that most of the BITs and this includes BITs signed by India, have provisions that suit the interest of the investors more than the regulatory interests of host countries, notwithstanding the close interface between investment inflows and host country's regulatory discretion. The structural design of BITs is such that they are largely perceived as instruments to protect foreign investors and investments; and not as instruments aimed at balancing the rights of investors with the regulatory discretion of host nations. For example, the preamble of majority of Indian BITs emphasize on the desire to create conditions favourable for fostering greater investment inflows and that such investment should receive protection under the BIT so as to stimulate individual business initiative and increase prosperity.[47] Notwithstanding the close interface between foreign investments and regulatory discretion, there is no mention, in the preamble, of the right of the host nation to regulate investments as per its national interest, which, at times, may require suspending protection to a foreign investment. In other words, a plain reading of the preamble, which is useful in understanding the overall aims and purposes of the treaty, tells us that the protection of foreign investments is the overriding concern; and that the treaty interpreter should bear this in mind while interpreting the BIT, even if this is at the expense of genuine regulatory discretion of the state.[48] Similarly, another compelling example in the Indian BITs is the provision on capital transfers that allows foreign investors to freely repatriate investments and returns to their home country without any exceptions.

Thus, if in the case of a balance of payments problem, India were to enact a measure restricting repatriation of profits, it will potentially amount to a breach of the bilateral regulatory framework contained in the BIT because the BIT does not recognise any exception to free repatriation. And thus make India liable to pay damages to the foreign investor. Another example is of the National Treatment provision in the Indian BITs. The national treatment provision in a BIT puts

[47] *See* Model Indian BIT, viewed on 17 December 2011, (http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_div/invest_index.htm#Background_and_salient_features).
[48] *Supra note* 38

the host state under an obligation to not to discriminate between foreign and domestic investments as mentioned above. However, this obligation is qualified by the term 'like circumstances' and thus the obligation is not to discriminate between foreign and domestic investments in 'like circumstances'. However, majority of Indian BITs do not have this qualifier in the national treatment provision and thus open the window for an expansive interpretation where a foreign investor may ask for comparisons to be made between different sectors or between businesses in unlike circumstances to establish violation of national treatment.

In this regard, it has been argued by many scholars that investment treaty arbitration – a feature of all BITs - under which states agree to compulsory arbitration of disputes with foreign investors on wide range of sovereign activities that affects foreign investment, constrain the regulatory discretion of sovereign states. [49]There are numerous cases where a host country's regulatory measure has been held illegal under BIT investor-state arbitration. For example, a number of cases were filed against Argentina by private investors, at international arbitral forums, when Argentina took certain regulatory monetary policy related measures to save its economy following the severe financial crisis that started to unfold from 1990s[50]. These measures included, *inter alia*, freezing of bank accounts and allowing the Argentinean currency Peso to decline in value against US Dollar.

These regulatory measures disrupted the promises that Argentina had given to foreign investors – which included the promise that one Argentinean Peso will be considered equivalent to one US Dollar for the purposes of tariffs; and profits will be allowed to be repatriated freely. The decline in the value of Peso and freezing of bank accounts resulted in many foreign investors suffering losses. These foreign investors brought cases against Argentina at international arbitral tribunals for alleged violations of the BITs that Argentina had entered[51]. In one of the cases – *CMS v Argentina*[52], involving US-Argentina BIT, Argentina was ordered to pay US $133.2 million in

[49] *See* Aaken, A (2008): "Perils of Success? Case of International Investment Protection", European Business Organisation Law Review, 9: 1 27 (See generally, Howse, R (2008): "Sovereignty, Lost and Found" in W Shan et al (ed) *Redefining Sovereignty in International Economic Law* (Oxford: Hart Publishing), 61 76; Schneiderman, D (2008): Constituionalizing Economic Globalisation (Cambridge: Cambridge University Press)).
[50] *See* Van Harten, G (2007): *Investment Treaty Arbitration and Public Law* (New York: Oxford University Press).
[51] *See* Schill, S (2007): "International Investment Law and the Host State's Power to Handle Economic Crises – Comment on the", *Journal of International Arbitration,* 24: 265 86.
[52] *CMS Gas Transmission Company v Argentina*, 44 International Legal Material 1205.

compensation to a US investor by an international tribunal because the Argentinean measure adversely affected the interests of the US investor notwithstanding the fact that Argentina took the measure to safeguard its economy [53].

It is important to note that while deciding the case in favour of the investor, the arbitral tribunal, apart from many other factors, also noted that the treaty preamble emphasized on creating a stable legal and business environment for the investor and the actions of Argentina disrupted the stability of the legal and business environment to the detriment of the foreign investor.[54] The treaty preamble, like the preamble of Indian BITs, only talked about creating conditions favorable for investments and had no reference to the host nation's right to regulate. This played an important role in arbitral tribunal looking at the BIT only from the perspective of the investor.

Similarly, in another case – *Metalclad v Mexico*[55] , Mexico was ordered to pay US$ 16 million as damages to a foreign investor on account of Mexico adopting an environmental standard in order to address certain environmental concerns that adversely affected the business of the foreign investor. [56]

In yet another case – *Occidental Exploration Corporation v Ecuador*[57], Ecuador was ordered to pay US$ 75 million to an US oil company on account of Ecuador's tax policy violating the US-Ecuador BIT. The tribunal held that by distinguishing between foreign oil exporter and domestic flower and seafood exporters, Ecuador had discriminated between exporters (exporters taken as one homogenous group irrespective of the sector involved) and hence violated the national treatment provision of the US-Ecuador BIT. The tribunal rejected Ecuador's argument that since the tax regime was same for domestic and foreign oil companies there was no discrimination[58]. There are many more cases, a discussion of which is not possible here to due to constraints of

[53] *See* Van Harten, G and M Loughlin (2006): "Investment Treaty Arbitration as a Species of Global Administrative Law", *European Journal of International Law*, 17: 121 50.
[54] *See Id*, paras 274 and 275.
[55] *Metalclad Corporation v Mexico*, ICSID Case No. ARB (AF)/97/1.
[56] *See* Dodge, W S (2001): "International Decisions", American Journal of International Law, 95: 910 18
[57] *Occidental Exploration and Production Co v. Ecuador*, London Court of International Arbitration
[58] *See* Kurtz, J (2007): "National Treatment, Foreign Investment and Regulatory Autonomy:The Search for Protectionism or Something More" in P Kahn and T W Walde (ed) New Aspects of International Investment Law (Hague: Martinus Nijhoff), 311 51.

space. From the above examples, one can say that the private foreign investors, relying on the broad provisions of a BIT, have used the investor state arbitration mechanism to challenge the actions of the state – that emerge from the exercise of their public authority and not their private actions, to claim damages[59].

The purpose behind the preliminary discussion is to highlight the concerns that have surfaced globally on the issue of BITs and regulatory discretion. India should be mindful of these concerns as she wishes to negotiate more BITs with other countries like the US.

Domestic Regulation and BITs

The discussion above is not meant to suggest that India does not regulate foreign investments. In fact, it is difficult to find out how the BIT obligations have influenced India's domestic regulations on foreign investment. India's national regulatory framework for foreign investment is mainly contained in the Press Notes (these documents lay down the regulations related to foreign investments in different sectors), issued by the Ministry of Commerce, and in other domestic laws.[60] However, what is interesting to note is that none of the domestic regulations on foreign investment refer to the BIT obligations as the basis for developing, adopting or amending any of these regulations.

This is in complete contrast to how India has approached its WTO obligations in matters related to changing its domestic laws and regulations. In the case of WTO obligations, India has been quick to point out WTO obligations as one of the chief reasons for changes in certain laws and policies. For instance, the government, while introducing amendments to the Indian Patent Act of 1970, clearly stated that these changes have to be made due to India's obligations in the WTO. However, none of the regulations or laws on foreign investments mention about the BIT obligations and the role of these obligations in developing these regulations. One reason for this

[59] *See* Van Harten and Loughlin 2006 – who have argued that because of this investment treaty arbitration is an example of global administrative law (Van Harten, G and M Loughlin (2006): "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 17: 121 50.)

[60] *See* Ranjan, P (2008): "International Investment Agreements and Regulatory Discretion: Case Study of India", *Journal of World Investment and Trade*, 9: 209 43.

could be that BIT obligations are undertaken for a specific country and are not multilateral like the WTO obligations.[61]

Thus the BIT obligation of national treatment is only for the investors from the BIT partner country and has no consequence for investors from non-BIT partner countries. Notwithstanding this difference, policy coherence requires that domestic regulations on foreign investment should highlight these points, which is not the case. For instance, the Press Note (PN) 2010, issued by the Commerce Ministry in December 2009 compiling all the existing PNs, does not even mention about the standards contained in Indian BITs - the most important regulatory framework on foreign investment for India[62]. Careful reading of PN 2010 shows that this domestic regulatory framework on foreign investment has been adopted independently from India's international regulatory framework on foreign investments (BIT framework). As a result, quite a few domestic regulations are contrary to India's international obligations contained in BITs.[63] It thus appears that India's international regulatory framework and domestic regulatory framework on foreign investment are evolving independent of each other and thus the conflict between the two. Given this 'independent of each other' development of the two regulatory frameworks one is unsure as to which of the domestic regulations have been developed to accommodate the BIT obligations unlike the WTO obligations where we all know, for example, that India amended its product patent regime in order to accommodate its WTO obligations.[64]

Let us look at one example each of a provision given in a PN and a domestic legal provision that may be difficult to be reconciled with the bilateral regulatory framework (BIT). According to Press Note No 2/2005, on FDI in developing townships, the original investment cannot be repatriated back before a completion of three years from minimum capitalization. This policy is inconsistent[65] with India's commitment to allow for free repatriation of investments, without any

[61] *See* Krishan D (2008): "India and International Investment Law" in B N Patel (ed) *India and International Law*, Volume 2 (Leiden/Boston: Martinus Nijhoff), 277 92.
[62] *Ibid.*
[63] *Ibid.*
[64] *See* P Ranjan (2008): "Medical Patents and Expropriation in International Investment Law –With Special Reference to India" Manchester Journal of International Economic Law, 5: 72 104.
[65] Although according to some media reports, the Government is reconsidering this policy of having a three year lock in period. *See* The Hindu Business Line, 23 November 2009, viewed on 17 December 2011, (http://www.thehindubusinessline.com/2009/11/24/stories/2009112452020100.htm).

exceptions, in BITs. Example of an Indian legislation - Section 66 of the Indian Patent Act allows for revoking a patent (which is recognised as an investment in all Indian BITs) on ground of public interest without any compensation. However, this action can be challenged by the foreign investor under a BIT as expropriation of foreign investment because majority of Indian BITs do not have provisions allowing for expropriation relying on public interest unless or until compensation is paid as per the provisions of the BIT. In the case of a treaty dispute, the national regulatory framework will be looked through the lens of the bilateral regulatory framework (BITs) rather than the other way round.[66] For investments from those countries with whom India has not bound itself internationally by signing a BIT, treaty disputes will not arise on applying the national regulatory framework.

However, with close to 70 countries with whom India has a BIT, it is important to bear in mind that in case a treaty dispute arises between a foreign investor and India, the national regulatory framework cannot be invoked as defence to escape liability from treaty obligations – a fundamental principle of public international law. Once standards have been laid down in a BIT, then in case a dispute arises between India and a foreign investor, the arbitral panel will look at domestic regulations through the lens of standards given in the BIT. Thus, it is important for India to synchronize its BITs obligations and overall BITs policy with domestic regulations on foreign investments.[67]

Conclusion

The note has argued that in light of the two global issues, there is a need to critically examine the Indian BIT programme. It is necessary for India to go beyond the mere assumption that BITs translate in investment inflows and carefully assess the economic benefits that a BIT will bring before entering into such BIT.[68] Also, India should carefully negotiate its BITs so as to preserve her regulatory discretion to regulate investments. The analysis suggests that governments should exercise greater care when considering entry into the system or, more likely, the renewal or

[66] *Supra n*ote 60
[67] *Supra note* 57
[68] *See* Tobin, J and S Rose-Ackerman (2005): Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties, Yale Law & Economics Research Paper No. 293.

expansion of existing treaty networks, and calls for thorough examination of the options for reform.

Further, the dynamics of the situation change during arbitration proceedings. Because they lack institutional safeguards of independence, investment arbitrators are vulnerable to inappropriate influence by private actors that have clout in the arbitration industry and by the states or business entities that dominate voting and appoint officials in key appointing authorities.[69] The appointing authorities are central to the system because they have the power to decide the make-up of the tribunals, the content of the arbitration rules, and the conduct of the process by which awards are reviewed.

In the history of investment treaties, developing and transition states were presented with take-it-or-leave-it offers from major capital-exporters to conclude investment treaties that, it was said, would attract foreign investment in exchange for commitments by capital-importing countries not to expropriate or discriminate against foreign investors. There is now much evidence that the promised benefit did not materialize, whereas the obligations of host states have emerged as wide-ranging constraints on general regulations adopted in good faith and on a non-discriminatory basis.[70] Many states have faced the challenge of unexpected waves of claims against them on matters of economic development, financial security, environmental and health regulation, and so on. If reform is to come, it is likely to originate in these countries.

One avenue for reform lies in the renegotiation or abrogation of investment treaties. Another lies in reform of the institutional mechanisms and, specifically, in the creation of alternative forums and processes for the resolution of investment disputes.[71] It would be beneficial to their perceived neutrality if such alternatives were based outside of the conventional arbitration centers of Western Europe and North America and if they surpassed the

[69] *See* Van Harten, G (2007): *Investment Treaty Arbitration and Public Law* (New York: Oxford University Press).
[70] *See* Van Harten, G and M Loughlin (2006): "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 17: 121 50.
[71] *See* Vandevelde, K (1998): "Investment Liberalisation and Economic Development: The Role of Bilateral Investment Treaties", Columbia Journal of Transnational Law, 36: 501 27.

current system in terms of their incorporation of institutional safeguards of judicial independence.[72] However, while all states should strive for a system that is consistent with values of fairness independence in adjudication, it is just as critical for developing and transition countries such as India, to formulate appropriate strategies on the investment treaty system after careful assessment of its costs and benefits.

[72] *See* Schill, S (2007): "International Investment Law and the Host State's Power to Handle Economic Crises – Comment on the", Journal of International Arbitration, 24: 265 86.

Lack of Access to Development as a Denial of Human Right: An Analysis of the Right to Development Discourse.

Mr. Deva Prasad M.

Abstract:

This paper analyzes the concept and evolution of access to development as a human right and concerns regarding access to development and how the lack of access lead to violation of human rights. For this purpose the Right to Development discourse is being discussed to trace consensus the international community has reached and also the definition of development and the generation of rights concept is also dealt with. Further the linkage between human rights and development, the concerns regarding non-justiciability and implication of globalization and international financial institutions also forms part of this paper.

1.INTRODUCTION

Lack of access to development as denial of human rights calls for an enquiry into the very aspect of evolution and concept of right to development and the interface of development and human rights. A paradigm shift in the human rights approach so as to include and acknowledge individuals to be 'subject' of the right, rather than 'object' of the right were initiated with the introduction of the concept of treating development as a right which all the human beings are entitled for the mere fact of being human.[1]

Right To Development (henceforth referred to as "RTD") perspective helps in bringing about the broader and inter-disciplinary aspect to human rights.[2] The recognition of RTD by United Nations (henceforth referred to as "UN") in 1986[3], is considered to be birth of new generation of human right, which also emphasis upon the collective interest. Today, we are at a stage of having seen the generation of human rights, trying to compartmentalize and divide the civil and political rights and socio-economic rights into different categories and then overlooking these to reach at the holistic approach to rights.[4] This also has the under-pinning of impact of

[1] UPENDRA BAXI, HUMAN RIGHTS IN A POSTHUMAN WORLD: CRITICAL ESSAYS, 132 (2007).
[2] Philip Alston, *Making Space For New Human Rights: The Case Of Right To Development,* 1 Harvard Human Rights Year Book 4, 14 (1988).
[3] The Declaration on the Right to Development, December, 4, 1986, A/RES/41/128.
[4] Alessandro Sitta, The Role of Development In The Human Rights Framework To Development (January 2,2011), http://www.capabilityapproach.com/pubs/5_1_Sitta.pdf .

the advancement in the field of developmental economics, with the importance of development as freedom and capability approach being emphasised.[5]

Though RTD have been criticised on the ground of not being able to concretely establish a legal entitlement that could be claimed by the people and for not being able to translate the entire conceptual build up into practice, there is more over a consensus due to the RTD movement over the last two decades that apart from the civil and political right and social and economic right, that there is need of opportunity be provided to the individuals that would help in realising and pursuing their freedom.

Accessibility to the process of development and lack of development could be considered to be two important problems faced by the RTD movement today. Further it is importance to see that globalisation and financial institution such as the World Trade Organisation (and its agreements also causes major impact upon the developmental agenda has created new hindrance to the access to development for the poor and marginalised community.[6] The lack of access to the process of development could only be tackled by the assertion of the fact that there is RTD as a basic human right, which every individual is entitled to.

2. CONCEPTUAL EVOLUTION OF RIGHT TO DEVELOPMENT

2.1 Importance of RTD

RTD could be understood as a right which entitles access to the process of development. The process of development should be such that civil and political, socio-economic and cultural rights are holistically approached and tried to be realised.[7] RTD agenda tries to make a reconciliation between the right of the individual and need for economic growth of the country.[8] Hence it is quite important to have RTD approach which aims at building capabilities and expanding the freedom of the individuals, so that he/she can exercise and enjoy certain rights which are so inalienable for the subsistence of human life. RTD also have another important angle of the certain rights that are not being traditionally conceived to be a inalienable right are now being increasingly in a need to be accepted as an inalienable human right.

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[5] *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM, 230 (1999).
[6] BAXI, *supra* note 1, at 152-155.
[7] SEN, *supra* note 5, at 36-53.
[8] Arjun Sengupta, *Right to Development as a Human Right*, 36 Economic and Political Weekly 2527,2527 (2001).

Importance of RTD could be very well understood from Eleanor Roosevelt's statement while being part of drafting the Universal Declaration of Human Rights that: *"We will have to bear in mind that we are writing a bill of rights for the world and that one of the most important right is the opportunity for development. As people grasp that opportunity they can also demand new rights if they are broadly defined."*[9]

2.2 Defining Development

Development is usually looked at only from the economic perspective and cannot be understood in one blanket definition, as development could mean different things to different people and countries. Development has been defined in the economic sense as *"seen as simultaneously the vision of a better life, a life materially richer, institutionally more modern and technologically more efficient and an array of means to achieve that vision."*[10] Development looks for achieving the spiritual and material needs of an individual by way of helping individual in maximising and effectively using all the resources.[11] When an individual cannot access or achieve these tangible and intangible benefits, he/she is being denied the access to development. Hence RTD could be understood be *"the right to a process of development in which all human rights and fundamental freedoms can be fully realized"*.[12] Without the enjoyment of human rights and fundamental freedom one cannot be said to have achieved development.

When defining development we cannot ignore the role played by the World Bank and United Nations Development Program (henceforth referred to as "UNDP") toward the understanding of development as perceived by the international community today. UNDP has emphasised upon the aspect of human development and the ability of people to choose their livelihood and strategy.[13] UNDP tried to achieve this while maintaining all their cultural and historical varieties. According to the World Bank also development mainly emphasised upon the ability to choose and to strike a balance between economic growth and poverty while improving the individual's ability to choose.[14]

[9]Alston, *supra* note 2, at 5.
[10]N. J. Udombana, *The Third World and the Right to Development: Agenda for the Next Millennium*, 22 Human Rights Quarterly 753,756 (2000).
[11] *Id.* at 757.
[12] Sitta, *supra* note 4.
[13] Hans Otto Sano, *Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development*, 22 Human Rights Quarterly734, 742 (2000).
[14] *Id.*

2.3 Generation of Rights

Generation of Rights concept brings in the aspect of compartmentalising the rights and giving priority to certain rights in the attempt to achieve and providing the rights. Civil and Political rights are generally understood to be first generation rights and the Social, Economical and Cultural Rights to be second generation rights. Further there is a third generation of rights, which includes the collective and solidarity rights such as right to environment, right to development. The third generation rights perform the function of reinforcing the existing human rights and enhance the effectiveness and help the government and individuals to access the other rights in an effective manner.[15]

The generation of rights concept started with new correlation between the individual and the global political order being tried to achieve, initiated with the Universal Declaration of Human Rights, 1948.[16] Generation of Rights concept also gets leverage from the concept that the states cannot pursue the realisation of all the rights at the same time due to the lack of economical resources. Further Generation of Rights concept is also argued on the basis of human rights being in a constant process of development and hence requires a progressive and prioritisation based approach and that though the conventions have proclaimed that the human rights shall be universal, there are important issues such as cultural relativism that need to be dealt with.[17]

But there is severe criticism to Generation of Rights concept that prioritising and pursing only certain rights causes a total neglect of other rights and lead to a situation of asymmetrical development and progress. Amartya Sen has identified development to be expansion of the real freedom that people enjoy and emphasised upon the inter-linkages between instrumentals of freedom, which translates as human rights in the legal language.[18] Amartya Sen clearly shows us that unless these instrumentalities of freedom are pursued holistically capabilities of the people cannot be fully empowered due to the inter-connection and complementarily of the instrumentalities of freedom.[19]

[15] Udombana, *supra* note 10, at 762.
[16] Sano, *supra* note13, at 737.
[17] Partial and Jack Donnelly, *Cultural Relativism and Universal Human Rights*,6 Human Rights Quarterly 400 (1984).
[18] SEN, *supra* note 5, at 36-53.
[19] *Id.*

2.4 Tracing the International Recognition of RTD

The RTD discourse in international scenario could be traced back to the Philadelphia Declaration, 1944 which states that: "All human beings, irrespective of race, creed or sex, have the right to pursue both their material well being and their spiritual freedom in conditions of freedom and dignity, of economic security and equal opportunity".[20] UN Charter, 1945 and UDHR, 1948 have also contributed in pushing forward the RTD, with the Article 55 of UN Charter and Article 22 of Universal Declaration of Human Rights mentioning the importance of development. Proclamation of Tehran, 1968 mentioned about the interconnection between the realization of human rights and economic development[21] and further in the 1979, the Commission on Human Rights also highlighted the importance of right to development.[22]

The RTD has got recognition at the international level in specific and express way by the Declaration of the Right to Development, 1986[23] (henceforth referred to as "DRD"). The DRD asserts RTD to be an "inalienable human rights, which entitled every human being to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".[24] Further Vienna Declaration on Human Rights, 1993 reiterated the RTD as an inalienable human right.[25] We could see from the above that the RTD has now been an accepted human right, and is being tried to be implemented through the Millennium Development Goals. But we should also not forget about the objection United States has displayed against the RTD, as they feared about unwanted obligation upon them for contributing towards the under-developed and developing nations.[26]

2.5 Overview of Declaration on RTD

As mentioned above the DRD which was adopted by the General Assembly of UN in 1986, declared that the right to development is an inalienable human right that every individual is

[20]ILO CONST. Declaration Concerning the Aims and Purposes of the International Labor Organization, art.II.
[21] Proclamation of Tehran, Final Act of the International Conference of Human Rights, April, 22- May,13, 1968, U.N. Doc. A/CONF. 32/41.
[22] Resolution 4 (XXXV) of the Commission on Human Rights, February, 21, 1977.
[23] The Declaration on the Right to Development, *supra* note 3[hereinafter Declaration on the Right to Development].
[24] Art. 1, Declaration on the Right to Development.
[25] Art.10, Vienna Declaration on Human Rights, June, 14- 25, 1993, U.N. Doc. A/CONF.157/24.
[26] BAXI, *supra* note ,1 at 127-130.

entitled by the very fact of being a human being, which makes them entitled to participate in, contribute to, and enjoy economic, socio- cultural, and political development, in which all human rights and fundamental freedoms could be fully realised. [27] Sovereign right over the entire natural wealth and resources and right to self- determination, which are important component for the freedom, are also provided in the DRD.[28] Further the responsibility of development is jointly upon the individual as well as collectively as a community to therefore promote and protect an appropriate political, social and economic order for development.[29]

All the states are under the obligation to formulate appropriate national development policies which aims at the well-being of the entire population and of all individuals.[30] DRD also emphasis upon the effective participation of individuals in the development and on the fair distribution of benefits. Further DRD categorically mentions that there should not be any discrimination and equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income need to be ensured.[31]

3. CONCERN RELATING TO ACCESS TO DEVELOPMENT

In the first part we saw the conceptual evolution and acceptance of RTD to be an inalienable fundamental right by the international community. To understand and perceive how RTD when translated into reality is faced with the main hindrance of access to development, leading to violation of human rights, the researcher attempts to search the linkage between concept of human rights and access to development and related issues such as legal entitlement to development and conflicts, non-justiciability of RTD and the way forward and new challenges.

3.1 Link between Human rights and Access to Development

Human rights are those rights and freedom to which everyone is entitled to merely by the reason of being human. Human right is a product as well as answer the modern welfare state has evolved and the human rights approach calls for a proactive fulfilling of duties of the

[27] Art. 1(1), Declaration on the Right to Development.
[28] Art. 1(2), Declaration on the Right to Development.
[29] Art. 2(2) , Declaration on the Right to Development.
[30] Art. 4, Declaration on the Right to Development.
[31] Art. 8, Declaration on the Right to Development.

state, which would help the individuals with a decent standard of living.[32] The greatest and prime most aspect of human right could be identified to be acknowledgement of dignity of human beings. The Universal Declaration of Human Rights, 1948 have emphasised this aspect. Dignity signifies the innate rights of human beings for treatment with respect and ethical conduct.[33] It is an extension of the thought and recognition that the individuals have inherent inviolable rights, which human beings are eligible by mere fact of being human.[34] Freedom is also an aspect which has underpinnings in the dignity concept.

Development activities are necessary for the decent standard of living of the individuals to be fulfilled and for an environment in which enjoyment of other human rights and dignity of human beings will be respected. In order for effective freedom and capabilities of the individuals are enjoyed, there need to be entitlement to the developmental activities. Entitlement to the developmental activity in the form of a human right would help in holding the states accountable for the resource utilization.[35]

The human rights perspective to development helps in providing the status of human rights to the basic goals of development such as access to education, food, shelter and other core rights which are inalienable for the mere subsistence as human.[36] Human rights approach also provides an entitlement to the people for these rights, which are based on means-goal approach which provides effectiveness in having the right. It is of no use to have a right mentioned in the black letter of law, unless one is in a position to actually enjoy those rights. The human rights approach to development, which entitles the people with broad RTD, provides a process by which the rights could be effectively accessed.

Essentially the linkage between the development and human rights is that, it makes an attempt to synchronize the main elements of human development theory with the normative framework of internationally recognized human rights.[37] There is certain principle which could be identified as the primary area of concern for both the developmental agenda as well as the human rights movement. They are as follows: (a) attention to the process of

[32]Sano, *supra* note 13, at 741.
[33] *See* Oscar Schachter, *Human Dignity as a Normative Concept,* 77 The American Journal of International Law 848 (1983).
[34] *Id.*
[35] Sano, *supra* note 13, at 745.
[36] Sitta, *supra* note 4.
[37] *Id.*

development; (b) direct linkage to rights; (c) participation and empowerment; (d) non discrimination; (e) attention to the most vulnerable groups and (f) accountability.[38]

The above mentioned areas are so integral that non attention to any of these aspects would result in denial of human right to development, i.e. the RTD. Attention to the process of development calls for the states to take pro-active steps for equality of development in the entire country. Further direct linkage to the rights try to bring about the entitlement angle of allowing the individuals to claim for the entitlement and duty imposed by the right upon the state. Participation and empowerment is an important angle, as this would ensure the bottom up approach which gives priority to the actual needs of people.[39] Non-discrimination and attention to vulnerable group, calls for the equal treatment of all for purpose of development and special and differential treatment of non-equal so that they could be brought Accountability aspect calls for the transparency in governance and involves the angle of freedom to access to information as to the allocation and utilization of resources of development.

3.2 Lack of Access to the Process of Development and Lack of Development

It is well established that from the above discussion that there is a universal consensus as to RTD and the linkage between human rights and developmental agenda. The major concern for the development in the present scenario could be identified as the lack of access to the process of development. This is caused in a situation where the state is developing but the benefits are in the hands of only few and it is not being distributed amongst the people in an equal manner and also the marginalized and vulnerable population are totally pushed out of the process of development. Further there is the situation of lack of development, where in which the state do not effectively allocated adequate resources for the development and also a situation in which state is not having the resources for allocation due to the pressures and requirement existing in the post-globalised international financial system.

Further as already discussed the human rights approach brings in the concept of obligation upon the state to promote, secure and protect the RTD of people in a country. It is not just about making policies and leaving at that, but to ensure that components of right to development are reaching every individual.

[38] *Id.*
[39] BAXI, *supra* note 1, at133.

Arjun Sengupta, has correctly put regarding the human rights approach to development that: "The problem of realising the right to development, viewed from this perspective, would not appear to be just designing a set of national and international policies to implement the elements of economic, social and cultural rights, as enunciated in the covenant together with civil and political rights, but also in exercising the human rights approach of respecting the fundamental freedom of individuals to choose the lives they want to live, and exercising the rights they want to claim, transparently and accountably, through participation, with equal access, and with fair share of the benefits. The process of free exercise of the right to development is as important as the increase in the supply of means or resources that facilitate the enjoyment of those rights".[40]

Now the main concern is that there is a serious gap between the theoretical RTD discourse and the pragmatic application of RTD on the field level. Even though the international level consensus as to RTD being a part of human right and also that denial of access to development could be considered to be a denial of human rights, there are challenges in the effective implementation of the RTD. The effective implementation of RTD is restricted due to the aspects such as non-justiciability, influence of international financial institution.

3.3 Non-justiciability and Legal Entitlement

An important concern is that of non-justiciability of the RTD even after it is being acknowledged to be a human right.[41] If the RTD claim could be provided with a legal backing by the way of legislation at the national level and by a covenant or a treaty at the international level, so that the claim to development could be provided with a binding value.[42] Formulating a legislative basis for the obligations that is morally and internationally accepted and consensus formed need to be made legally obligatory.[43] This need to be seriously considered as a viable solution to the problem of non-justiciability of RTD.

Otherwise, RTD shall remain as a moral standard which may not have a legal sanction, but could be used only as an obligation of persuasive value. The legal entitlement to the RTD would also help in circumventing the criticism of being a collective right and hence do not

[40] Sengupta, s*upra* note 8, at 2530.
[41] Alston, *supra* note 2, at 33.
[42] Sengupta, s*upra* note 8, at 2531
[43] *Id.*

fall under the strict category of being a human right. Amartya Sen has also advocated for the legislating of human rights, so that they could be provided with much more relevance for both the individuals as well as the state.[44]

Amartya Sen further observes that "Human beings in nature no more are born with human rights than they are born fully clothed; rights would have to be acquired through legislation, just as clothes are acquired through tailoring".[45] Hence every attempt need to be made to devise and implement appropriate legislative instruments to ensure the realisation of the RTD as it would then be backed by justiciable claims in courts and by authorities of enforcement. Any human rights approach to development need to be understood on the basis of equity and justice because it follows from a notion of human dignity.[46] This further calls for the legislating the RTD as this would help in achieving the equity and justice in a more effective manner.

3.4 Impact of Globalisation and International Financial Institutions

An area of grave concern is the impact of the international financial institutions leading to the phenomenon of globalization and liberalisation based on the free market philosophy. This issue raises concern due to the fact that there is an adverse impact on the access to development of marginalised and vulnerable community with the new world order emerging, especially in the developing countries. There is a clear and paradigm shift from the concept of universal human rights to that of trade-related, market-friendly human rights.[47] Denationalization, Disinvestment and Deregulation are the new agenda of developmental concern[48] and the various international financial institutions support the same. This is in direct conflict with the RTD discourse as there is no entitlement to the people and the international consensus of RTD is not at all of followed. Many supra-national international legal regimes created by World Trade Organisation, such as Trade Related Intellectual Property Rights are said to denying the access to medicine in developing countries due to the stringent patent protection.[49]

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[44] *See* Amartya Sen, *Elements of a Theory of Human Rights*, 32 Philosophy and Public Affairs 315 (2004).
[45] SEN, *supra* note 5, at 230.
[46] Sengupta, s*upra* note 8, at 2534
[47] BAXI, *supra* note 1, at 154.
[48] *Id.*
[49] J Watal, Access to Essential Medicines in Developing Countries: Does the WTO TRIPS Agreement Hinder It, (January, 02,2011), http://www.cid.harvard.edu/archive/biotech/papers/discussion8.pdf .

Further there is no clear policy or legal mechanism which provides for financial aid and help from the developed countries to the under-developed countries and still the financial aid are considered to be acts of charity rather than collective responsibility of developed countries towards the developmental of all the countries. Even the millennium developmental goals are just pointers in identifying immediate areas of concern and there is no legal entitlement that would make the developed countries to help the developing countries of the south. This above mentioned discussion points towards the need of what Upendra Baxi suggests as the crimes against the RTD, which involves criminal penalty for any intentional act or omission which leads to the denial of access to the development and/or state of 'mal-development'.[50]

4. CONCLUSION

The discussion in this paper helped to identify that there is adequate consensus and conceptual clarity as to the fact that the right to development is an inalienable human right. But lack of access to development and/or lack of process of development still persist though it is agreed to be at the theoretical discourse level to be a violation of the human rights. The entire discussion points towards the gap between the theoretical discourse and that of the actual ground level implementation scenario. The following are some pointers for the way forward in the implementation of the RTD:

1. RTD need to be legislated and a legal entitlement need to be provided for the effective achievement of the purpose of RTD. At the national level RTD to be provided by the way of legislation, while at the international level there is need for a covenant or convention that need to be entered into.

2. Further the impact of the globalisation and international financial institutions should not allow taking away the consensus of the human rights approach to RTD. There is need to devise adequate mechanism for tackling this problem by ways such as defining crimes against RTD.

[50] BAXI, *supra* note 1, at 152.

Google Adwords and Keywords in Contemporary TradeMark law

Mr. Saurav Dan

ABSTRACT

Keyword ads are paid links provided to given search terms including trademarks. These ads are then presented together above or alongside "natural" search results concerning those keyword terms. The brand owners had contended that allowing competitors to sponsor ads keyed to and presented with "natural" results is to allow the competitors a free ride on the goodwill in their trademarks. Ninety-nine percent of Google's revenue comes from its advertising programs. When a user types a query into Google, the search engine produces two types of results. First solely on Google's algorithm and second the *sponsored links*. These sponsored links are directly targeted at the user's query. The key legal issue is to distinguish innocuous choices that may be of some initial interest from confusion affecting the eventual purchase of products or services. Further when or if search engines, whose technological platforms support keyword advertising, should share liability with the advertisers themselves. *"Search Term Suggestion Tool,"* which facilitated selection of words and marks for advertisers to select as keywords, unnecessarily or improperly encouraged purchases of trademarks as keywords. The Article analyses the various approaches taken by the Courts of different jurisdictions mainly that of US, India, EU and Austria.

Google is the world's most valuable online advertising agency disguised as a web-search engine ....."
- The Economist

BACKGROUND

People with an insatiable appetite for information can appreciate how Internet search engines make a vast amount of information readily accessible.[1] Search engines make it easy and reliable to obtain valuable information.[2] Because of the internet's potent impact on the economies of countries worldwide, the issue of

[1] Press Release, Nielsen/Netratings, Nielsen/Netratings Announces August U.S. Search Share Rankings (Sept. 19, 2007), available at http://www.nielsen- netratings.com/pr/pr 070919.pdf (stating that the top five search providers are Google Search, Yahoo! Search, MSN/Windows Live Search, AOL Search, and Ask.com Search, which was based on the total number of searches for August 2007, and distinguishing Google Search as representing 54% (an estimated 4.2 billion search queries) of all search queries during August 2007).

using trademarks as keywords in internet advertising has become an important topic and a much-litigated issue in both Europe and the United States. Despite considerable consternation concerning the question when or if keyword ads might infringe the trademarks to which they are keyed, there has been virtually no meaningful examination by the courts of the actual risks, if any, such ads present to consumers or brand owners, or why or under what circumstances keyword ads might actually lead to mistaken purchasing decisions.[3] But even avid Internet users want to search for their preferred product and avoid confusion about which website is authorized by the manufacturer. It is here at the intersection of information and commerce that two worlds collide. While Google and other search engines are utilizing the Internet to lead consumers ever more efficiently to the products and services that they seek, the law already supports a longstanding mechanism for doing so: trademarks. Trademark law and Internet search engines approach the task of connecting buyers and sellers very differently, and there are numerous points of distinction.[4] Keyword advertising programs result in revenues to search engines that sell trademarks to increase their profits.[5] Search engine advertisers pay for the value of popular trademarked keywords to put themselves visually in front of potential customers.[6] These advertisers use another's trademark to have their banners, advertisements, or sponsored links[7] appear predominately on the search result's foremost Web pages.[8] These advertising programs have raised the legal issue of whether Internet search service sales of keyword-based advertisements and search listings that use trademarks are violating trademark law.

WHAT IS KEYWORD BASED ADVERTISING

[2] G. Peter Albert, Jr. & Rita A. Abbati, *Metatags, Keywords, and Links: Recent Developments Addressing Trademark Threats in Cyberspace*, 40 SAN DIEGO L. REV. 341, 342 (2003).

[3] Jonathan Moskin, *Virtual Trademark Use —The Parallel World Of Keyword Ads,* Vol. 98 TRADE MARK REPORTER 873, 874.

[4] *Internet Advertising: The Ultimate Marketing Machine,* THE ECONOMIST (July 6, 2006), http://www.economist.com/business/displaystory.cfm?story id=7138905.

[5] Thomas C. Folsom, *Missing the Mark in Cyberspace: Misapplying Trademark Law to Invisible and Attenuated Uses*, 33 RUTGERS COMPUTER & TECH. L.J. 137, 141-42 (2007)

[6] Deborah F. Buckman, Annotation, Lanham Act Trademark Infringement Actions in Internet and Website Context, 197 A.L.R. Fed. 17, § 2 (2004).

[7] Moskin, *supra* note 3, at 876.

[8] *See* Restatement (Third) of Unfair Competition § 9 cmt. c (1995).

Google Adwords and Keywords in Contemporary TradeMark law

Mr. Saurav Dan

When search services began selling and displaying advertisements on search results pages, display advertisements of various kinds became commonplace on search service results pages. Google is the world's most popular search engine and generates the vast majority of its revenue through AdWords, its online advertising system.[9] Approximately ninety-nine percent of Google's revenue comes from its advertising programs.[10] When a user types a query into Google, the search engine produces two types of results. First, it produces a list of results based solely on Google's algorithm for which advertisers are not able pay for a higher ranking. Second, it produces a list of "sponsored links" at the top of the page and to the right of the organic results. The results that are shown at the top of the page are also sometimes banner ads. These sponsored links are directly targeted at the user's query.[11] Banner ads are those which are boxed pastel-shaded textual advertisements that it also displays along the right-hand side of the results page. Advertisers are willing to pay a premium for this space on the search results page because the ads are purported to be directly relevant to the specific user.[12] Since 2004, Google has allowed advertisers in the United States, the United Kingdom, and Ireland to purchase competitors' trademarks as keywords. However, the search engines Yahoo! and Bing do not allow advertisers in any country to competitors' trademarks.[13] Google claims that its keyword advertising policy gives advertisers more options by letting them use comparative advertising.[14] On June 4, 2009 (two months after the Second Circuit's decision in Rescuecom) Google announced that it would expand the keyword policy to 190 other countries.[15] European Union countries such as France, Germany, and Austria were not included in the expanded list of countries.[16] It is unclear

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[9] Google's 2008 revenue was over $ 21 billion. See United States Securities and Exchange Commission Annual Report on Google Inc. , (Dec. 9, 2010), http://www.sec.gov/Archives/edgar/data/1288776/000119312509029448/d10k.htm#toc21192_ 11.

[10] Stephanie Yu Lim, *Can Google be Liable for Trademark Infringement? A Look at the "Trademark Use" Requirement as Applied to Google AdWords*, 14 UCLA ENT. L. REV. 265, 269 (2007).

[11] Moskin, *supra* note 3, at 876.

[12] Jonathan J. Darrow and Gerald R. Ferrera, *The Search Engine Advertising Market: Lucrative Space or Trademark Liability* ?, 17 TEX. INTELL. PROP. L.J. 223, 239.

[13] Kristin Kemnitzer, Trademark Law: A. NOTES, *Beyond Rescuecom v. Google: The Future of Keyword Advertising*, 25 BERKELEY TECH. L.J. 401, 406.

[14] Comparative advertising means that defines comparative advertising as "advertising that compares alternative brands on objectively measurable attributes or prices, and identifies the alternative brands by name, illustration or other distinctive information" (statement of policy regarding comparative advertising, FTC, Washington DC, August 13 1979).

[15] Google Inc.'s Updated Keyword Policy, Updates to Adwords Trademark Policy, https://adwords.google.com/support/aw/bin/answer.py?answer=143903&cbid=1kw2tkcpty4t2&src=cb&lev=answer.

[16] Noam Shemtov, *Mission Impossible? Search Engines' Ongoing Search for a Viable Global Keyword Policy*, 13 J. INTERNET L. 3, 7 (2009).

whether Google planned on announcing its new global trademark policy before the Rescuecom[17] decision, or whether the policy was a response to it. Regardless, the decision demonstrates that Google believes its practices do not result in trademark infringement. The problem with Internet trademark cases are that they do not fit squarely within the traditional likelihood of confusion test because of the different circumstances facing online searching.

WHY THE *RESCUECOM*® WAS NOT RESCUED

Trademark law enjoys a unique position in Internet marketing as online companies strategize the use of brand names that will identify the source of their goods and distinguish them from others. Congress passed the Lanham Act in 1946, establishing the current framework of federal trademark law. The Act defines a trademark as a "*word, name, symbol, or device, or any combination thereof used to identify and distinguish his or her goods ... from those ... sold by others and to indicate the source of the goods."* [18]Online protection of trademarks is of vital importance because products and services sold by e-businesses are displayed to a global audience. Trademark owners want to be assured that online consumers are not mistakenly led to believe that another company with a confusingly similar name is in any way associated with the trademark owner's goods or services. A trademark infringement claim brought by a trademark owner whose trademark has been purchased by a third party via Google's AdWords program would be subject to traditional analysis under the Lanham Act.[19] The plaintiff must prove that (1) the searched trademark is valid and legally protectable, (2) the plaintiff has ownership of the trademark, (3) the plaintiff has used the mark in commerce, (4) the defendant used the mark in commerce, and (5) the defendant's use of the mark will create confusion concerning the origin of the goods or services.[20]

In *Rescuecom Corp v. Google Inc*.[21], the Second Circuit(Appeal court of New York) addressed the meaning of the phrase *"use in commerce"* in the Lanham Act.[22] It held that Google's sale of the term to

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[17] 562 F.3d 123 (2d Cir. 2009).

[18] The Lanham Trademark Act, 15 U.S.C. § 1127 (2006).

[19] *See* eBuying for the Home, LLC *v.* Humble Abode, LLC, 459 F. Supp. 2d 310 (D.N.J. 2006); Rescuecom Corp. *v.* Google, Inc., 456 F. Supp. 2d 393 (N.D.N.Y. 2006).

[20] The contentions that the plaintiff must prove is not been decided in a single case, the points have been put forward by culmination of decisions in various cases.

[21] 562 F.3d 123 (2nd Cir. 2009).

Rescuecom's competitors is *a "use in commerce"* as defined by the Act, and thus the plaintiffs stated a claim upon which relief could be granted.[23] In doing so the court revisited its decision in *1-800 Contacts, Inc. v. WhenU.com*, Inc. Plaintiff, Rescuecom, is a computer service franchise that operates nationally.[24] It sells and services computers and receives a significant amount of its business over the Internet.[25] Its website, www.rescuecom.com, receives between 17,000 and 30,000 visitors per month.[26] The company advertises over the Internet, and uses Google's services to do so.[27] Rescuecom brought an action against Google in the United States District Court for the Northern District of New York for violations of the Lanham Act. It alleged that Google is liable under 15 U.S.C. §§1114 and 1125 for infringement, false designation of origin, and dilution of the Rescuecom trademark. Rescuecom made four assertions. First, it argued that Google attempted to "free ride" on the association with Rescuecom's trademark, and that Google's actions cause brand confusion. Second, Google's sponsored links lure consumers away from their original searches and thus prevent consumers from reaching Rescuecom's site. [28]Third, Google's search interface with sponsored links at the top and right side of the screen modify the user's original search Rescuecom's trademark internally to trigger competitors' advertisements for sponsored links.[29]

The company alleged that *"by the manner of Google's display of sponsored links of competing brands in response to a search for Rescuecom's brand name. Google creates a likelihood of confusion as to trademarks."* The District Court granted Google's 12(b)(6) motion and dismissed Rescuecom's complaint. The lower court held that this case was analogous to 1-800 Contacts.[30] In the same way that WhenU.com

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[22] Rescuecom Corp. *v*. Google Inc., 562 F.3d 123 (2nd Cir. 2009).

[23] *id* .at 127.

[24] Rescuecom Corp. *v*. Google Inc., 562 F.3d 123,125 (2nd Cir. 2009).

[25] *Id.*

[26] Rescuecom Corp. *v*. Google Inc., 562 F.3d 123,128 (2nd Cir. 2009).

[27] *Supra* n 20 at 124. "Rescuecom" has been valid registered federal trademark since 1998.

28Rescuecom Corp. v. Google Inc., 456 F. Supp 2d. 393, 400 (N.D.N.Y. 2006),

29 *Id.*

30 Rescuecom Corp. v. Google Inc., 456 F.Supp. 2d. 393 (N.D.N.Y. 2006). In 1-800 Contacts, the plaintiff argued that the defendant's internal software infringed on the plaintiff's trademark by providing pop-up ads to relevant searches. The Second Circuit found that the defendant's pop-up advertisements were not a "use in commerce" of the plaintiff's trademark. Therefore, without finding a "use in commerce," there was no way to find trademark infringement, and thus the plaintiffs did not state a claim. *See c.f.* 1-800 Contacts, Inc. *v.* WhenU.com, Inc., 414 F.3d 400, 403 (2d Cir. 2005).

did not use 1-800 Contacts' trademark as a *"use in commerce,"* the lower court found that Google did not use Rescuecom's trademark as a *"use in commerce"* and dismissed the complaint. The Second Circuit reversed the district court's ruling and found that Google's use of the trademarked term Rescuecom was a *"use in commerce"* and therefore the plaintiffs did state a claim upon which relief can be granted.[31] Google argued that 1-800 Contacts held that the use of trademarked terms in *"an internal computer directory cannot constitute trademark use."*[32] Yet, the Second Circuit disposed of this argument. It stated that Google uses other companies' trademarked terms outside of its internal algorithm by selling and suggesting trademarks such as Rescuecom to competitors.[33] This sale constitutes a *"use in commerce."* The court noted that in 1-800 Contacts, the pop-ups were triggered by the plaintiff's website address, which was not trademarked.[34] For the above stated reasons, the Second Circuit found that Google's sale of Rescuecom's trademark was a *"use in commerce"* under the Lanham Act. The court vacated the lower court's dismissal of the case for failure to state a claim, and remanded for further proceedings.[35] Yet, the court carefully noted that its decision did not address whether Rescuecom will be able to prove that Google violated the Lanham Act and caused likelihood of confusion.[36]

THE ISSUE OF FREE RIDING IN KEYWORD ADVERTISING

While free competition demands that consumers have the greatest possible access to information and the ability to choose freely among alternatives, it is easy to understand why trademark owners bristle at the thought of competitors using their trademarks to garner attention and profits. After all, the trademark adopted has been created after much expense, deliberation, and even professional assistance.[37] The mere fact that a trademark is known to and used by the public by no means suggests that a given use does not constitute trademark infringement. To the contrary, famous marks receive even greater protection than non-

31 Rescuecom, 562 F.3d 123, 127 (2d Cir. 2009).

32 *id*. at 129.

33 Rescuecom, 562 F.3d 123, 131 (2d Cir. 2009).

34 Kemnitzer, *supra* note 13 at 422.

35 Darrow, *supra* note 12 at 241.

36 Shemtov, *supra* note 16 at 8.

37 Ferrera, *supra* note 12 at 231.

famous marks,[38] and the level of protection accorded non-famous marks varies in proportion to the degree of recognition by the relevant public.[39] Moreover, trademark holders can point to authority acknowledging that the *"stimulant effect"*. Trademark owners claim that competitors who buy trademarked keywords from a search engine are attempting to divert customers who might otherwise have patronized the trademark owner.[40] This is undoubtedly true. Businesses, of course, routinely attempt to attract competitors' customers.[41] The purported difference is that, in the case of keyword advertising, the businesses are using the competitor's trademark to do so. Such a practice, it is argued, is unfair.[42] To the contrary, the practice of businesses trading on the goodwill of competitor's trademarks to divert customers is a legal, age-old practice.[43]

The use of trademarks as part of a process for recommending competing products and services can, of course, be completely automated. For example, Amazon shoppers, for example, will find that upon making a product selection, they will be advised that "Customers Who Bought the product selected Also Bought the following items."[44] If the recommended items include products by competitors, this means that one entity is benefiting from the goodwill of another via a referral from an online information aggregator. Amazon, of course, may be hoping that the customer will purchase additional products rather than substitute one product for another. Even so, given that the suggested products are presented prior to purchase, diversion from one product to another in at least some cases is nearly certain to occur. As one judge noted, Amazon's practice is unlikely to violate the law.[45] In the words of the Supreme Court, so long as a mark "is used in a way that does not deceive the public there is no such sanctity in the word as to prevent its being used to tell the

[38] *See* Lanham Trademark Act, 15 U.S.C. § 1125(c)(1) (2006).

[39] Boston Athletic Association *v.* Sullivan, 867 F.2d 22, 32 (1st Cir. 1989).

[40] Am. Airlines, Inc. *v.* Google, Inc., No. 4-07CV-487-A (N.D. Tex. Aug. 16, 2007) ("Many of Google's Sponsored Links are expressly designed to draw customers away from the trademark owner's websites.").

[41] *See* Ty Inc. *v.* Perryman, 306 F.3d 509, 512 (7th Cir. 2002).

[42] Site Pro-1, Inc. *v.* Better Metal, LLC, 506 F. Supp. 2d 123, 124 (E.D.N.Y. 2007) (alleging unfair competition claim where defendant caused plaintiff's SITE PRO 1(R) mark to be used in a Yahoo! search algorithm in order to divert Internet traffic to defendant's website).

[43] 1-800 Contacts, Inc. *v.* WhenU.com, Inc., 414 F.3d 400, 411 (2d Cir. 2005) ("It is routine for vendors to seek specific "product placement' in retail stores precisely to capitalize on their competitors' name recognition.").

[44] *See c.f.*Amazon.com, http://www.amazon.com/.

[45] Zachary J. Zweihorn, *Searching for Confusion: The Initial Interest Confusion Doctrine and Its Misapplication to Search Engine Sponsored Links*, 91 CORNELL L. REV. 1343, 1375 (2006).

truth."[46] Despite Congress's disapproval of Moseley as expressed in the Trademark Dilution Revision Act, free speech concerns will no doubt continue to play an important role in balancing the rights of trademark owners with the rights of others.[47] The Court of Justice of European Union(previously the ECJ) with its decision on *Interflora v. Marks & Spencer* (Case C-323/09) said that *"In relation to taking unfair advantage, the Court found that although the selection of a trademark with a reputation as a keyword for triggering advertisements did "take advantage" of its reputation, such use is fair competition, not an infringement, where the resulting advertisement is offering a mere alternative. However, where the advertisement offers imitation goods or services, or otherwise causes dilution (or tarnishment) or adversely affects one of the functions of a trademark, such use may "take unfair advantage" and infringe."*[48]

CAN THE FAIR USE DOCTRINE BE INVOKED

Trademark law has never conferred absolute control over a mark to the mark owner.[49] For example, a competitor may sell imitations of unpatented expensive perfumes and inform customers that they have intentionally copied the trademarked product.[50] Alternately, a competitor may make no effort to copy a trademarked product, but simply invite consumers to compare its product to the trademarked product.[51] More generally, the Lanham Act includes a fair use defense that allows the use of registered *marks "otherwise than as a mark" where the mark is "used fairly and in good faith only to describe goods or services."*[52] Traditionally, to prevail in an infringement action, a trademark owner must prove that the defendant's use of the trademark is likely to mislead or confuse consumers as to the source of the products

[46] Playboy Enters. *v.* Netscape Communications Corp., 354 F.3d 1020, 1035 (9th Cir. 2004)

[47] Darrow, *supra* note 12 at 244.

[48] Michaela Huth-Dierig ,*EUROPEAN UNION: AG's Opinion on Use of Third-Party Marks as Google Keywords*, INTA Bulletin, Vol. 66 No. 13 (July 15, 2011).

[49] Diversified Mktg., Inc. *v.* Estee Lauder, Inc., 705 F. Supp. 128, 130, 134 (1988).

[50] Smith *v.* Chanel, Inc., 402 F.2d 562, 563 (9th Cir. 1968) ("Use of another's trademark to identify the trademark owner's product in comparative advertising is not prohibited ... absent confusion.").

[51] WCVB-TV *v.* Boston Athletic Association, 926 F.2d 42, 45-46 (1st Cir. 1991).

[52] 15 U.S.C. § 1115(b)(4) (2006). The Trademark Dilution Revision Act of 2006 also contains a fair use defense. § 1125(c)(3) ("The following shall not be actionable as dilution ... : (A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with (i) advertising or promotion that permits consumers to compare goods or services.").

or services.[53] For example, a plaintiff might be able to show that an appreciable number of consumers purchasing defendant's products which bear marks confusingly similar to plaintiff's mark mistakenly believe that the product they purchased came from the plaintiff, rather than from the defendant. The challenge to this theory in search advertising cases is that the trademark is being used not to consummate the sale or deceive the consumer into mistaking the origin of the product being sold, but is instead being used to bring the consumer to a competitor's website. Despite the fact that consumers are not likely to be confused at the point of sale, the Ninth Circuit has reasoned that the use of another's mark to divert consumers to a competitor's website is itself a wrong in need of a remedy, and adopted the initial interest confusion doctrine from the offline world to provide a means of redress.

In the case of Brookfield Communications v. West Coast Entertainment, the court addressed the scenario where a competitor used marks confusingly similar to plaintiff's trademarks as metatags to draw traffic to its site.[54] Metatags are pieces of code not visible to users that are associated with a site and that, at the time, were "used by search engines in determining which sites correspond to the keywords entered by a Web user."[55] The Brookfield court held that the use of a trademark in a metatag diverts customers and allows the defendant to *"improperly benefit from the goodwill"* of the plaintiff. [56] The court held that this practice constituted initial interest confusion[57] and instructed the lower court to enter a preliminary injunction against the invisible use of the marks as metatags.[58] Numerous cases were cited by the Brookfield court to support its application of the initial interest confusion doctrine in the metatag context.[59] However, the court acknowledged that in the case at bar *"it would be difficult to say that a consumer is likely to be confused."*[60] In contrast, tracing the cited cases to their origins reveals that either actual confusion or likely confusion was

[53] Remedies; infringement; innocent infringement by printers and publishers15 U.S.C. § 1114 (2006).

[54] Brookfield Communications, Inc. *v.* W. Coast Entertainment Corp., 174 F.3d 1036, 1062 (9th Cir. 1999) ("Since defendant's initial web page prominently displays its own name, it is difficult to say that a consumer is likely to be confused).

[55] *id.* at 1048.

[56] Brookfield Communications, Inc. *v.* W. Coast Entertainment Corp. at 1061.

[57] *id*. at 1065.

[58] Brookfield Communications, Inc. *v.* W. Coast Entertainment Corp. at 1066-67.

[59] *Ibid.*

[60] North American Med. Corp. *v.* Axiom Worldwide, Inc., 522 F.3d 1211, 1223 (11th Cir. 2008) (noting that in Brookfield there was "never any confusion as to source or affiliation");

present. This is not to suggest that search engine advertising is wholly beyond the reach of trademark law, as some courts have held in finding no "use in commerce." As mentioned above, little research has shed light on the extent of consumer confusion with respect to search-based advertisements. If consumers are indeed confused by them - for example, if they are unable to distinguish between organic results and paid advertisements, or if they mistakenly assume an affiliation where none exists - the law must afford the trademark owner some mechanism for remedying the situation.[61]

It may well be that Google should more clearly delineate between paid and organic results by, for example, using different fonts, more discernable shading, or simply a label that is more understandable than "Sponsored Links." Brookfield has been described as the "leading case" on the issue of metatag trademark infringement[62] and is frequently cited in search advertising decisions, but there is a critical factual distinction between the use of trademarks as metatags and their use in search engine advertising: the metatags in Brookfield had been designed to affect the organic results,[63] whereas in search advertising cases the trademarks are used to display advertisements alongside the organic search results.[64] This distinction has important practical and legal implications. Where organic results are affected, consumers may be more likely to assume an affiliation between the trademark owner and the competitor's site. Moreover, to the extent that an unlimited number of sites might incorporate trademark metatags to optimize their websites for search engine rank, the trademark owner's site might have to expend effort to even appear on the first screen of results.[65] This could lead to actual confusion and, more importantly, increase consumer search costs.[66] In contrast, search engine advertising does not affect the organic results, but

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[61] Tyson Smith, *Googling a Trademark: A Comparative Look at Keyword Use in Internet Advertising,* 46 TEX. INT'L L.J. 231 at 247.

[62] At the federal level, the Lanham Act is the only basis for an unfair competition claim. Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1348 (Fed. Cir. 1999). Moreover, relying on state law to regulate trademark violations would be problematic as it would result in a "piecemeal approach" where "a person's right to a trademark "in one State may differ widely from the rights which [that person] enjoys in another.'" Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 782 (1992)

[63] N. Am. Med. Corp. *v.* Axiom Worldwide, Inc., 522 F.3d 1211, 1221 (11th Cir. 2008).

[64] Organic results, also known as "pure" or "natural" results, are composed of the links which the search engine displays as a result of a user's search query and are distinct from the advertisements (e.g., Google's "Sponsored Links"), which can at least partially be purchased. See Rhino Sports, Inc. v. Sport Court, Inc., No. CV-02-1815-PHX-JAT, 2007 WL 1302745, at 2 (D. Ariz. May 2, 2007) (describing Google's list of relevant results as "organic results").

[65] See Site Pro-1, Inc. *v.* Better Metal, LLC, 506 F. Supp. 2d 123, 124 (E.D.N.Y. 2007)

[66] ("When an internet user performs a search for plaintiff's mark the Yahoo! Search engine allegedly retrieves a listing for the defendant's site and posts that listing before plaintiff's website.").

merely places advertisements next to those results. Presenting two or more options on a single page could lower consumer search costs.[67] Moreover, search engine advertising contains a built-in mechanism for filtering out irrelevant links, in that advertisers must pay for each user click. There is thus an incentive to ensure that the landing page is relevant to the user.[68] Only those firms that offer something valuable to consumers will find it worthwhile to continue to pay for the terms.[69] If consumers don't find the landing page relevant enough, the advertiser will incur costs without generating revenue. In contrast, there is no per-click cost to incorporating a competitor's metatag into a website, and therefore no market force exists to dissuade abuse.

THE LURKING DANGER IN BRANDING Keyword Ads AS UNLAWFUL

The risk of making keyword ads unlawful per se is perhaps best demonstrated by the recent decision in *Storus Corp. v. Aroa Marketing, Inc*.[70] This case involved the less-than-imaginative trademark SMART MONEY CLIP for, not surprisingly, money clips, and Internet ads keyed to the term purchased by a competing money clip marketer. However "smart" (in a literal sense) the competitor's money clips may have been, and notwithstanding that its keyword ad identified its own brand name (Steinhausen), the ad (headed "Smart Money Clip") was summarily deemed to be an infringement. In granting judgment as a matter of law, *Storus* relied on a narrowed version of the familiar multipart test of likelihood of confusion, decreeing instead that, "in the context of the Web," the focus need be confined (perhaps entirely) to a so-called "Internet trinity" or "controlling troika" of three factors: similarity of the marks, relatedness of the goods or services, and the simultaneity of the parties' use of the Internet for marketing.[71] Because the supposed "trinity" rule is said to apply "in the context of the Web," the third element essentially becomes redundant, reducing the remaining trinity to only two questions, and leaving Aroa Marketing in this instance to give up the ghost as well.[72]

THE EQUILIBRIUM OF EUROPEAN UNION

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[67] Smith, *supra* note 60 at 251.

[68] *Id.*

[69]. Smith, *supra* note 60 at 254

[70]No. C-06-2454 (MMC), 2008 WL 449835 (N.D. Cal. Feb. 15, 2008).

[71]*Id*. at 3.

[72] Moskin, *supra* note 3 at 879.

On the European front, a dearth of relevant case law from the European Court of Justice (ECJ) construing the relevant provisions in both Directive 89/104[73] which attempts to bring harmony among the national trademark laws, and Regulation 40/94,[74] which governs European Community trademarks in the European Union, has left national courts without much guidance on how to apply the laws when ruling on the issue of using trademarks as keywords.[75] Recently, several national courts have referred questions to the ECJ, each asking for guidance on how to interpret the Directive and the Regulation for purposes of deciding keyword cases.[76] The ECJ handed down two decisions in March 2010 in response to several of those questions.[77] While these preliminary rulings do not answer all of the questions related to applying the Directive and the Regulation to the issue of using trademarks as keywords, they are an important start both in harmonizing the law among the various member states and providing more certainty to search engines, trademark proprietors, and advertisers in the European Union.[78] The European Union has two sets of laws that affect trademark ownership in the EU. The first is Directive 89/104 (the Directive), which was passed "to approximate the laws of the Member States relating to trade marks"[79] and functions as a framework for national trademark laws in each member state of the EU.[80] The second is Regulation 40/94 (the Regulation), which governs Community trademarks.[81]

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[73] Council Directive 89/104, 1988 O.J. (L 40) (EC).

[74]Council Regulation 40/94, 1993 O.J. (L 11) (EC).

[75] *See* Martin Viefhues & Jan Schumacher, Country Correspondent: Germany, WORLD TRADEMARK REV., Feb.-Mar., 62, 63 (2009).

[76] Google Fr. SARL *v.* Louis Vuitton Malletier SA (Google France & Google), Mar. 23, 2010, paras. 32, 37, 41, available at http://eurlex.europa.eu/Lex UriServ/LexUri Serv.do?uri=CELEX:62008J0236:EN:HTML

[77] Google France & Google paras. 1-2.

[78] See id. Art. 1 (describing concern over disparities in trademark law and outlining model protections for member nations to adopt into law).

[79] See Council Regulation 40/94, 1993 O.J. (L 11) (EC), art. 1.

[80] Joined Case C-236, 237 & 238/08, Google Fr. SARL *v.* Louis Vuitton Malletier SA (Opinion of Mr. Advocate General Poiares Maduro), Sept. 22, 2009, para. 1, available at http://curia.europa.eu/jurisp/cgi bin/gettext.pl?lang=en&num=79909077C19080236&doc=T& ouvert=T&seance=CONCL[hereinafter Opinion of Advocate General]. Paras 30 -33.

[81] Noam Shemtov, *Searching for the Right Balance: Google, Keywords Advertising and Trade Mark Use*, 30 EUR. INTELL. PROP. REV. 470, 471 (2008).

While several provisions of each are implicated in the keyword cases, the infringement provisions found in Article 5 of the Directive and Article 9 of the Regulation are principally at issue.[82] They provide that a trademark "proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade: (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered."[83] Significantly, in order for a trademark proprietor to prevail in an action under the double identity provisions, likelihood of confusion need not be found.[84] However, the ECJ has held that in order for a trademark proprietor to prevent the use of a mark by a third party under either of these provisions, the use by the third party must affect the functions of the trademark.[85] Similarly, Article 5(1)(b) of the Directive and the parallel likelihood of confusion provision in Article 9(1)(b) of the Regulation provide that a trademark proprietor may prohibit the unapproved use by any third party in the course of trade of "any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark."[86] Also implicated in the keyword cases in the European Union is E-Commerce Directive 2000/31 (the E-Commerce Directive).[87]

While not a trademark provision, the E-Commerce Directive sets out a liability exemption for certain hosting activities of information service providers.[88] Thus, the E-Commerce Directive is relevant to search engines providing keywords to advertisers in the EU.[89] This legislative framework provides a backdrop for how keyword issues are handled with respect to both Community trademarks and trademarks registered under national laws of the EU member states. The first of these opinions, Google France & Google,

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[82] Council Directive 89/104, 1988 O.J. (L 40) (EC), art. 5(1)(a) (enumerating when the proprietor of a trademark may limit third-party use of the mark), with Council Regulation 40/94, 1993 O.J. (L 11) (EC), art. 9(1)(a) (stating a virtually identical provision to Council Directive 89/104, art. 5(1)(a)).

[83] Joined Cases C-236, 237 & 238/08, Google Fr. SARL v. Louis Vuitton Malletier SA (Google France & Google), para. 78.

[84] *id*. paras. 76-77.

[85] Council Directive 89/104, 1988 O.J. (L 40) (EC), art. 5(1)(b); see also Council Regulation 40/94, 1993 O.J. (L 11) (EC), art. 9(1)(b) (showing that it is virtually identical to Council Directive, art. 5(1)(b)).

[86] *id.*

[87] Google France & Google, para. 13.

[88] Opinion of Advocate General, supra note 84, para. 34.

[89] *Supra* n 60 at 256.

answered questions referred to the ECJ by the French Court of Cassation, the highest court in France. The French court stayed the proceedings in each of three cases to refer questions to the ECJ for a preliminary ruling.[90] The questions arising out of these cases dealt with the application of Article 5 of the Directive, Article 9 of the Regulation, and Article 14 of the E-Commerce Directive to the question of keyword advertising.[91] The first of the stayed French cases pitted Louis Vuitton, one of the world's largest luxury-goods groups, against Google.[92] The two parties had been locked in a battle since 2003 over whether Google infringed upon Louis Vuitton's trademarks by providing the marks as keywords in its AdWords program.[93] At least part of Louis Vuitton's concern was that "Google offered advertisers the possibility of selecting not only keywords which correspond to Louis Vuitton's trade marks, but also those keywords in combination with expressions indicating imitation, such as "imitation' and "copy.'"[94]

Moreover, if a consumer entered Louis Vuitton's trademarks into a Google search, advertisements for sites offering counterfeit goods were displayed as sponsored links. In 2005, in a decision affirmed on appeal and eventually brought before the Court of Cassation, the French trial court found Google guilty of infringing upon Louis Vuitton's marks. The French high court, in turn, referred three questions to the ECJ.[95] In the second French case, Viaticum, a proprietor of French marks, along with Luteciel, the company that maintained Viaticum's website, also brought suit against Google for selling their marks as keywords. Similarly, in the third case, an individual trademark proprietor and his licensee brought suit against Google and two advertisers who had purchased the proprietor's marks as keywords from Google. After being found liable of trademark infringement, Google and the two advertisers successfully appealed to the French Court of Cassation. In each of these cases, the Court of Cassation stayed the proceedings and referred questions to the ECJ for a preliminary ruling on the interpretation of the Directive and Regulation. The Google & Google France decision answered the questions of these three French cases and was passed by the ECJ on March 23, 2010. However, On September 22, 2011, the Court of Justice of the European Union (CJEU) gave

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[90] Google France & Google, paras. 32, 37, 41.

[91] *Id.*

[92] *Id.*

[93] Google France & Google, paras. 32, 37, 42.

[94] Google France & Google para *29.*

[95] Michele Sinner & Georgina Prodhan, UPDATE 4-European Court Rules Google's Ad Model is Legal, Reuters, Mar. 23, 2010, at http://www.reuters.com/article/idUSLDE62L0P720100323.

judgment on a reference from the English High Court in *Interflora v. Marks & Spencer* (Case C-323/09)[96], which concerned the sponsorship by Marks & Spencer (M&S), advertising flower deliveries, through the Google AdWords service of words **(including INTERFLORA)** corresponding to trademarks of Interflora, a flower delivery network service, without Interflora's consent.[97] According to the CJEU, in relation to dilution, a trademark proprietor may prevent use of the trademark that reduces the distinctiveness of the mark without having to wait for the "end of the process" of dilution: that is, the total loss of distinctive character. The Court held that dilution occurs where the use is such as to contribute to turning the trademark into a generic term. However, if the resulting advertisement is clearly for an alternative product, there will be no dilution, as the use serves only to draw the Internet user's attention to the existence of the alternative. Thus, as the INTERFLORA trademark was not displayed in the Marks & Spencer advertisement and there were no additional circumstances for finding illegitimate behavior by M&S, the AG concluded that the mere marketing message by M&S, offering an alternative to Interflora, did not amount to a trademark infringement through free-riding under Article 5(2) of the Directive.[98]

THE AUSTRIAN SITUATION

Two days after *INTERFLORA* a related decision, BergSpechte, ruled on questions referred to it by the Austrian Supreme Court. The facts of BergSpechte were similar to the French cases that led to the Google France & Google decision, except the words sold and purchased as keywords were not all identical to the plaintiff's mark, Google was not a party, and the action was brought only against the advertisers who had purchased the keywords from Google. The Austrian lower courts enjoined the advertisers from such purchasing based on alleged trademark infringement under Article 5(1)(a) of the Directive, and the advertisers appealed to the Austrian Supreme Court. The Austrian high court in turn referred a question to the ECJ for a preliminary ruling on the interpretation of Article 5(1) in the keyword context. Finally, the court held in Google France & Google that a referencing service provider like Google may or may not qualify for an exemption from liability based on Article 14 of the E-Commerce Directive. In other words,

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[96] [2009] EWHC 1095,

[97] This case focuses on questions regarding infringement under Article 5(2) of the EU Trademarks Directive (Council Directive 89/104/EEC, replaced by Directive 2008/95/EC) and Article 9(1)(c) of the CTM Regulation (Council Regulation (EC) No. 40/94, replaced by Council Regulation (EC) No. 207/2009) concerning a mark used without due cause that takes unfair advantage of the repute or distinctive character of a trademark with a reputation (free-riding) or causes detriment to such distinctive character (dilution).

[98] John Colbourn, *EUROPEAN UNION: Guidance on Infringement by Dilution and Free-Riding Through Keyword Sponsorship*. INTA Bulletin, Vol. 67 No. 4 (February 15, 2012).

national courts must decide as a question of fact whether or not Google takes an active role in (i.e., has knowledge or control of) the data which it stores related to keywords. This holding, while not directly related to the keyword issue, does temper the comfort that companies like Google can take from the first holding of the court, since national courts may still find them liable based on other laws.

With regard to service providers, the keyword issue as a whole was resolved by the court's holding that a search engine does not use a mark in the course of trade by either offering the mark for sale as a keyword or by arranging for and displaying ads based on those keywords.[99] The court arrived at a different conclusion for advertisers. First, the court held that an advertiser is using a mark in the course of trade when it selects a trademark as a keyword because the keyword is the "means used to trigger that ad display." The court in BergSpechte also made it clear that this is the case even when the trademark selected as a keyword does not appear in the ad itself.[100] If the mark and goods are not necessarily identical to those of the trademark proprietor, the question posed by Article 5(1)(b) - and inferred from Article 9(1)(b) - is whether there is a likelihood of confusion created by an advertiser's use of the keyword.[101] The ECJ decided that the use of keywords by service providers like Google was not use as contemplated by the provisions, and thus, Google and others cannot be held liable under EU trademark laws for selling keywords or displaying ads based on those keywords.[102] However, the court held that use by advertisers of trademarks as keywords is in the course of trade and in relation to goods and services. Article 14 of the E-Commerce Directive, EU member states may still hold search engines liable under other national laws.[103]

THE INDIAN REASONING

In conjunction with the global trend, the Madras High Court gave a noteworthy decision. On 30th September, 2010, the said Court passes an interim ruling in Google's favour in a trademark infringement

[99] ("An internet referencing service provider which stores, as a keyword, a sign identical with a trade mark and organizes the display of advertisements on the basis of that keyword does not use that sign within the meaning of Article 5(1) and (2) of Directive 89/104 or of Article 9(1) of Regulation 40/94."). The court made the distinction that, although a search engine like Google is using the marks in commercial activity, it is not using the marks in its own commercial communication. instead of using the marks themselves, search engines allow their clients to use the marks in the course of trade.

[100] BergSpechte, para 19 (citing Google France & Google, paras. 65-73).

[101] BergSpechte, para. 22; Google France & Google, para. 78.

[102] BergSpechte, paras. 24-26 (holding that while the sign in question was not identical to BergSpechte's mark, it was for the national courts to determine whether the same sign was similar to BergSpechte's mark).

[103] *See* Google *v.* Google France . (discussing when an internet service provider might liable under Article 14 of the E-Commerce Directive); (noting that national courts will have to decide whether companies such as Google will be exempt from liability in their current administration of automated services).

suit filed by BharatMatrimony.com against Google and other matrimonial websites such as Shaadi.com and jeevansathi.com.[104] Now, proprietors of BharatMatrimony.com had registered in their name a series of trademarks such as 'Telegu Matrimony', Urdu Matrimony, Tamil Matrimony' etc. Google India Pvt. Ltd was being sued for trademark infringement because of its 'Keyword Suggestion Tool', which suggested the use of the plaintiff's trademark in regard of the Google AdWords Program. The defendants were using the trademark as their keywords thereby displaying their advertisements as sponsored links. Thus, the main issues before the Court was (i) whether the plaintiff's trademark was descriptive or generic ?; (2) whether the defendants were using the mark under S. 2 and 29 of the Trademarks Ac, 1999 ; (3) Whether Google was liable for contributory trademark infringement for including the plaintiff's trademark ? The Court was of the view that the plaintiff's trademarks were descriptive. On the second issue the Court was of the view that the use of the mark by the defendants was actually advertisement of the mark and falls exceptions to S. 29(8) which excludes those advertisements that were rendered according to honest practices in industrial and commercial matters. On the third issue the Court sided with Google.[105] The Court held that to prove contributory infringement 'intention' is required and in the present case as the marks were descriptive it could not be proved that Google had any intention. But the Court warned that if the marks suggested by the keyword Suggestion Tool were arbitrary, fanciful then in the case it would be liable for contributory infringement.

JUDICIAL APPROACH IN THE UNITED KINGDOM

Until 2008, the most authoritative opinion in the U.K. on trademark liability for keyword advertising was the *Reed v. Reed* decision, which dealt with pop-up advertisements.[106] The defendant in Reed was an advertiser who had purchased keywords from the Yahoo! search engine, including REED, a trademark registered in the U.K. by the plaintiff.[107] As a result, the term "reed" would trigger a pop-up advertisement for the defendant's website when typed into a Yahoo! search.[108] Analyzing the case under Article 5(1)(b) of

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[104]Consim Info Pvt. Ltd *v.* Google India Pvt. Ltd. and others. MANU/TN/1816/2010,

[105]Rahul Dev & Prity Khastigir, *Google AdWords and Trademark Litigation : A multijurisdictional perspective,* International bar Association, (17th February, 2012) , http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1E50C65A-AF8B-440C-9A58-36E59081D597.

[106] Darren Meale, *The Online Advertising Free-riding Free-for-all*, 3 J. INTELL. PROP. L. & PRAC. 779, 779 (2008).

[107] Reed Executive PLC *v.* Reed Bus. Info. Ltd., [2004] EWCA (Civ) 159, [5], [138] (Eng.).

[108] *id* at para. 138.

the Directive,[109] the court had no trouble answering the question of whether the use by the advertiser constituted infringement and found that "no likelihood of confusion was established" since the pop-up banner advertisement did not refer to the trademark; therefore, internet users would not be confused. The court also indicated in dicta that it might have reached a similar conclusion had the question been analyzed under the double identity provision, Article 5(1)(a) of the Directive, since the use of keywords was "invisible."[110] Wilson v. Yahoo! pitted a trademark proprietor who owned a Community trademark in the name MR. SPICY against the Yahoo! search engine. When the trademark owner found that a third party had selected a number of keywords containing the word "spicy," he sued Yahoo! for infringing upon his rights under Article 9(1)(a) of the Regulation.[111] The court granted Yahoo!'s application for summary judgment and gave three reasons for dismissing the claim. First, the court reasoned that the trademark had been used only by the internet user who had entered the term "spicy" into the search engine; no one else had used the mark, including the defendant search engine who had merely responded "to the use of the trade mark by the browser" by displaying an advertisement.[112] Second, even if the defendant had used the term, it had not used the claimant's mark, but merely the English word "spicy."[113] Third, even if the defendant had used the claimant's mark, it was not use as a trademark since the proprietor "is not able to prohibit the use of the mark if that use cannot affect his own interest as proprietor of the mark having regard to its functions." The Impact of the ECJ Opinions on Keyword Cases in the United Kingdom, The ECJ's Google France & Google and BergSpechte decisions are likely to affect the future of keyword cases in the U.K. and may alter how English courts will apply the precedents of Wilson v. Yahoo! and Reed v. Reed. The ECJ rulings do leave intact and even reinforce the dicta in Wilson that to constitute infringement, the use of the mark must affect the functions of the mark.[114] This leaves courts in the U.K. free, with respect to advertisers, to apply the reasoning in the Reed dicta and find no infringement if the ad displayed does not contain the mark.[115]

CONCLUSION

[109] The corresponding provision in the U.K.'s trademark legislation is § 10(1) of the Trade Marks Act 1994.

[110] Reed, *supra* note 101at para. 142.

[111] [2008] EWHC (Ch) 361, paras. 8, 31.

[112] Id. para. 64.

[113] *Id.*

[114] Wilson, [2008] EWHC (Ch) 361, para. 65.

[115] Reed, *supra* note 101 at para. 140.

Google Adwords and Keywords in Contemporary TradeMark law

Mr. Saurav Dan

An analysis of the keyword issue in both the European Union and in the United States it can be said that due to different legislative approaches. While both the EU and the United States have likelihood of confusion provisions that must be applied in keyword cases, the United States does not have a corollary to the double identity provisions found in the Directive and the Regulation of the EU. This could potentially have important consequences, since a plaintiff in the EU does not have to prove likelihood of confusion if the case must be decided based on the double identity provisions. That being said, a plaintiff in the EU trying to prove trademark infringement under the double identity provisions must still show that an *"ad does not enable an average internet user, or enables the user only with difficulty, to ascertain whether the goods or services referred to"* in the ad originate from the trademark proprietor, an undertaking economically connected to it, or a third party. Another difference arises regarding whether using a trademark as a keyword constitutes use. Google France & Google clearly articulated that the threshold question, before considering the likelihood of confusion, is whether using a trademark as a keyword constitutes use as contemplated by the Directive and Regulation. The ECJ definitively decided in Google France & Google and BergSpechte that an advertiser does use the mark in the course of trade and in relation to goods and services, while a search engine does not use the mark in the course of trade. Courts in the United States have determined that both search engines and advertisers are subject to a likelihood of confusion analysis. Thus, search engines are not exempt from trademark liability in the United States for their keyword advertising programs as they are in the European Union. Still, the Google France & Google decision does make clear that search engines providing internet referencing services are not necessarily exempt from liability under Article 14 of the E-Commerce Directive. Studying both the scenarios a single test cannot be laid down so as to when a search engine is supposed to be liable for keyword advertising. It depends on many circumstances, but mostly it has been held that when a search engine use trademarks as keywords for commercial purposed then it can be said to have infringed the trademark.

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NATCO PHARMA LTD. V. BAYER CORP. – AN AWAITED BREAKTHROUGH

MR. ANISH JAIPURIAR

INTRODUCTION

"Pharmaceutical companies would rather treat a bald American than a dying African."
- Richard Holbrooke
U.S. Ambassador to the United Nations[1]

*"We recognize that **AIDS** is a major problem, but weakening Intellectual Property rights is not the solution."*
- Alan F. Holmer
President
Pharmaceutical Research and Manufacturers of America[2]

Compulsory Licensing (CL *Hereinafter*) allows a government to force the licensing of a patent to the non-patent-holders and, thus (by itself or through third parties), distribute the production of the patent to its citizens.[3] The present state of CL in India is promising after the rare and welcome decision of granting CL to *NATCO Pharma* for a life-extending drug for liver and kidney cancer.

The system of CL has been reported to be popular in Britain as early as 1850s. Later this system was recognized by the international community through the Paris Convention of 1883. It is also one of the flexibilities on patent protection included in TRIPS agreement. The Indian Government appointed two committees (*Tek Chand Committee* in 1948 and the *Ayyangar Committee* in 1957) to review the Indian patent system with a view toward ensuring that the system comported with national interests. The committees then found that between 80-90% of the Indian patents were held by foreigners out of which 90% had

[1] Steve Sternberg, *AIDS Activists Discount Big Drugmakers' Gifts: Generic Producers Not Allowed to Fight Epidemic for Less*, USA TODAY, July 11, 2000 at 9D (convening the first National Security Council session to address a health issue, AIDS).

[2] Clinton, *Drug Makers Move to Improve Access to Medicines*, AIDS POLICY AND LAW 8 (May 26, 2000) (LRP Publications).

[3] Kevin Kennedy, *The Protection and Enforcement of Intellectual Property Rights*, in WORLD TRADE LAW 1081, 1113 (Raj Bhala & Kevin Kennedy eds., 1998)

not worked in India.[4] The committees asserted that the system was being exploited by foreigners to achieve monopolistic control over the market. In regard to vital industries like food, chemicals, and pharmaceuticals, the data for patents was similar for the period 1947 through 1957. Medicines were unaffordable to the general populace, and the drug-price index was rising.[5]

Indira Gandhi at the World Health Assembly at Geneva in 1982 very rightly pointed out India's state of Pharmaceutical Industry which prevails even now:

"The idea of a better-ordered world is one in which medical discoveries will be free of patents and there will be no profiteering from life and death."

The order by the Indian Patent Office (IPO *Hereinafter*) against the German giant *Bayer Corp*. is therefore not only welcomed but a much awaited end to the suffering masses of India.

DETAILED DISCUSSION OF FACTS AND HOLDING

In the case of *Natco Pharma ltd. v. Bayer Corporation*[6] *G*ermany's Bayer lost a landmark drug ruling in India, forcing it to grant a compulsory license for its cancer treatment Nexavar to *Natco Pharma* in a move that could bring down the cost of other pricey medicines. The IPO issued its *first ever compulsory license* to NATCO, a local generic drug manufacturer, effectively ending the German drug-maker's monopoly in India on the drug for treating kidney and liver cancer.[7]

The question concerned a life-extending drug in cases of Kidney and Liver Cancer in former the drug was useful in extending the life by 4-5yrs while in the latter it extended

[4] B. K. Keayla, *Patent Protection and the Pharmaceutical Industry*, in INTELLECTUAL PROPERTY RIGHTS 151 (K.R.G. Nair & Ashok Kumar eds., 1994)

[5] Martin J. Adelman & Sonia Baldia, *Prospects and Limits of the Patent Provision in the TRIPS Agreement: The Case of India*, 29 VAND. J. TRANSNAT'L L. 507 518 (1996)

[6] Compulsory License App. No. 1 of 2011.

[7] *Natco Gets First Compulsory Licence* (13 Mar 2012), Available at: http://www.businessworld.in/businessworld/businessworld/content/Natco-Gets-First-Compulsory-Licence.html (Accessed on 29-Mar-2012)

for 6-8 months. The drug was to be taken by the patient for his lifetime with `2,80,428 p.m. and `33,65,136 per year.

Contrary to this unviable monopoly NATCO claimed that it can produce the drug at `8,800 p.m. and also 3 yrs was over since the grant of patent to Bayer and therefore application is valid and fulfills the requirement of Patent law in India. Sec 84(1) read with Rule 96 of the Patent Rules provides the base of the application the request under the application was the public interest involved in such class of drugs. The need was to bring the prices down so as to make the drug publicly accessible which *NATCO* was claiming to provide. The application was also able to establish a *prima facie* case triggering the Sec 87(1) of Indian Patents Act. The *Bayer Corp* immediately filed a writ petition in Delhi High Court challenging this application and the IPO order that it established a prima facie case, which was rejected by the court.

The basic questions for consideration were:

1. The reasonable requirements of the public with respect to the patented invention have not been satisfied.
2. The patented invention is not available to the public at a reasonably affordable price.
3. The patented invention is not worked in the territory of India.

First Issue

The applicant (*NATCO Pharma*) contended with the help of GLOBOCAN survey that the demands of the liver and kidney cancer patients were not being met which was contested by the patentee (*Bayer Corp*) on the ground that the figures were misleading and the applicant did not present alternative medication treatment as possibility in their argument. Further, the applicant submitted that mandate of law is not just to supply the drug in the market but to make it available in a manner such that substantial portion of the public is able to read the benefits of the invention.[8] In the support of the same the sale record since the patent was granted was present and only 16 crores was the over sales in the last 5 yrs

[8] *Supra n.6,* 15

till 2010, further the price i.e. `2,80,428 p.m. was provided to prove the inaccessibility. The patentee contested that the applicant had erroneously and impermissibly linked the issue of price of the drug to reasonable requirement of public as Sec 84(7) does not relate to price of the drug which is the ground under Sec 84 (1)(b), they also argued that access to a drug is not identical to affordability.[9]

The IPO after hearing the arguments found merit in the Applicant's argument and considered the fact that even after three years of the patent grant the patentee was making available only an insignificant amount of drug than it was needed thus invoking and triggering Sec 87(7)(a)(ii).[10]

Second Issue

The applicant submitted two ways of determining the affordability[11] and proved how the prices of the drug of the patentee were exorbitant and completely unreachable for the common. They also submitted reports from experts such as James Love[12] to show that the pricing adopted by the Patentee for its life-saving product is an abuse of its monopolistic rights and such practice is unfair and anti-competitive.[13] In contrary the patentee submitted the justification of the high pricing and presented the R&D expenses and other technical qualifications involved. It further contended that it is the innovators who having invested resources in developing/marketing the product who would decide as to what constitute a reasonable affordable price. Therefore if the high price of the patented drug with huge investment is R&D by the originator is good enough argument for the applicant to request a grant of compulsory license, it will always be circumvent the objective of Patents Act, which cannot be intention of the Legislature.[14] It further argued

[9] *Id.*, 18

[10] *Id*., 23

[11] *See*, *id*, 24-25

[12] Economist and IP Expert

[13] *Supra n*.3, 27

[14] *Id.*, 30

that Public in the Sec 84 means different sections i.e. Rich Class, Middle Class, and Poor Class, so a method should be devised to suit different pricing for different sections as treating unequal as equals is discriminatory.

The IPO accepting the patentee's view that different pricing should be done for different sections of the Public, but pointed the irony that the patentee themselves never did that. Therefore after rejecting all other claims of patentee found the pricing of patentee unreasonably high and therefore Sec 84(1)(b) is invoked.[15]

Third Issue

The applicant submitted that the patent product was being imported and not manufactured in India and hence the product is not worked in India to the fullest extent that is reasonably practicable. The patentee in contrary submitted that economies of scale is to be appreciated which provides valid reason for not locally manufacturing the drug. Also, the law does not mandate a local manufacture of the product and mere importation suffices that working requirements mandated under the Patents Act.

The IPO decided after referring to Paris Convention, TRIPS Agreement and Patents Act and after relying on a conjoint reading of all, that working means being manufactured to a reasonable extent in India.

Another appeal i.e. adjournment for a year under Sec 86 which was raised but was rejected on the ground of absence of prompt action to reach the public requirements. So considering all this the IPO finally granted the CL on the various conditions few of which are that the tablets will be made available by NATCO at `8,800 p.m.

ANALYSIS

Economist and IP expert James Love said,[16]

[15] *Id.*, 36

[16] Rupali Mukherjee, *Govt uses special powers to slash cancer drug price by 97%* (Mar 13, 2012), Available at: http://m.timesofindia.com/PDATOI/articleshow/12240143.cms (Accessed on 29-Mar-12)

"The Bayer price of Rs 34,11,898 per year ($69,000) is more than 41 times the projected average per capita income for India in 2012, shattering any measure of affordability. Bayer tried to justify its high price by making claims of high R&D costs, but refused to provide any details of its actual outlays on the research for Sorafenib, a cancer drug that was partly subsidized by the US Orphan Drug tax credit, and jointly developed with Onyx Pharmaceuticals. Bayer has made billions from Sorafenib, and made little effort to sell the product in India where its price is far beyond the means of all but a few persons."

The above statement establishes support for the grant but it has raised huge debate and has been criticized by the US arguing that it would discourage new investments and dilute the international patent regime, but India said it has not broken any rules.[17]

In a developing country like India the concerns of health care and related infrastructure are very important which was given due consideration while granting the license to *NATCO*. This case certainly opens gate for various future applications as it now sets a standard but the question of subjectivity still prevails. The affordability, the nature of drug, degree of public interest involved, and public accessibility etc. were few considerations which were taken in account for deciding the case. While Ranjit Shahani,[18] said:

"OPPI is disappointed with the decision to issue a compulsory license. We believe compulsory licenses should be used only in ***exceptional circumstances****, such as in times of a national health crisis. If used arbitrarily, compulsory licenses will serve to undermine the innovative pharmaceutical industry and will be to the long term detriment of the patient."*[19]

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[17] Amiti Sen, *US protests patent issuance to Natco to sell copied versions of Nexaver*, (Mar 27 2012), Available at: http://articles.economictimes.indiatimes.com/2012-03-27/news/31245102_1_compulsory-licence-patent-owner-indian-patent-office (Accessed on 2-Apr-2012)

[18] President OPPI (Organisation of Pharmaceutical Producers of India)

[19] E Kumar Sharma, *Natco Pharma's grant of compulsory licence hits controversy*, (March 13, 2012), Available at: http://businesstoday.intoday.in/story/natco-pharma-compulsory-licence-controversy-pharma-industry/1/23138.html (Accessed on 2-Apr-2012)

The case of talked about the importance to look at two sides of the coin[20] and therefore the impact of the grant of CL is two sided on one hand it is a welfare decision which supports a the common masses which is large in number while on the other hand the decision de-motivates the pharmaceutical industry to invest in R&D, as mentioned by Ranjit Shahani the test for allowin CL can be the presence of exceptional circumstances. Another possible solution can be royalty which will be given by NATCO to Bayer at 6%, but the question remains whether this suffices the R&D expenses incurred by Bayer.

The question of politics is also about to come in as pointed by M.R.Santhosh:[21]

"India is likely to face exceptional pressure from developed countries and multinational pharmaceutical companies in the coming weeks."[22]

The interpretation of the word '*working*' has been very strict and which may against the intent of Art.27 of TRIPS, the broad and reasonable sense do provide for an expansive interpretation which has been done in Ireland and UK.[23] Further, the distinction between affordability and accessibility which in this case has been removed still stands valid or for the purposes of CL the conclusion so achieved is good in law.

This decision is likely to have an impact not only on Indian as well as international innovator pharma companies but also other industries as well. The issuance of a compulsory license may be good for a short-term, but a long term implication may be detrimental for innovators and health care sector at large.[24]

CONCLUSION

[20] *Supra* n.3, 40

[21] Centre for Trade and Development (Centad)

[22] Ramesh Shankar, *Health Groups hail issuance of India's first Compulsory License by Patent Office to Natco*, (15-Mar-2012), Available at: http://pharmabiz.com/PrintArticle.aspx?aid=68018&sid=1 (Accessed on 2-Apr-12)

[23] Rahul Dhote & Mita Sheikh, *Natco win: Deterrent for FDI?*, (2-Mar-2012), Available at: http://thefirm.moneycontrol.com/story_page.php?more_category=by_invitation&autono=682903 (Accessed on 2-Apr-12)

[24] *Id.*

Shamnad Basheer,[25] observed that:

"This decision heralds the start of a new era in the history of pharmaceutical patents and public health, It will effectively spur other generic manufacturers to apply for compulsory licenses and we'll soon see the start of a phase where prices of patented pharma drugs drop significantly, at least in developed countries, where the threat of a compulsory license looms large."[26]

Adding to the above commentary was that of Dr Tido von Schoen-Angerer, Director of Independent Healthcare Organization, MSF, who said,

"We have been following this case closely because newer drugs to treat HIV are patented in India, and as a result are priced out of reach. But this decision marks a precedent that offers hope. It shows that new drugs under patent can also be produced by generic makers at a fraction of the price, while royalties are paid to the patent holder. This compensates patent holders while at the same time ensuring that competition can bring down prices."[27]

Bayer can appeal to the IP Appellate Board (IPAB) against the order. In any case, whichever party loses before the IPAB is likely to appeal to the courts and the issue is expected to be a long-drawn battle fought in the milieu of a rapidly progressing IP environment in India where ultimately the final judgment could swing either way. The pharmaceutical-industry and the IP stakeholders in India will surely be monitoring this development closely.[28] Human Resources are of great importance so far as a developing nation is concerned and therefore the grant of license in this case brings lot of hope as far as healthcare and related infrastructure is concerned. It sets a precedent and guides

[25] Prof Intellectual Property Law, NUJS, Kolkata

[26] C.H. Unnikrishnan, *Natco gets India's first compulsory licence* Available at: http://www.livemint.com/2012/03/13001601/Natco-gets-India8217s-first.html (Accessed on 2-Apr-2012)

[27] *Id.*

[28] Jose Madan *et al.*, *A Rare Win for Natco!*, (19-Mar-2012), Available at: http://thefirm.moneycontrol.com/story_page.php?more_category=by_invitation&autono=682506 (Accessed on 9-Apr-2012)

various future applications and opens a lot of expensive medicines thereby to the common masses of India.

On the other hand it gives a reason to various pharmaceuticals majors to stay away in terms of FDI and investment into the medicine industry. India may lose out on a great amount of inflow of money and the question is whether it is justifiable or not.

Case comment on "*P.B Sawant v. Times Now Global Broadcasting Co. Ltd*"

Mr. Kush Kalra and Ms. Krishna Thej

The stand of the Indian Judiciary in the *P.B Sawant* v. *Times Now Global Broadcasting Co. Ltd*.[1] (Hereinafter 'Times Now') flabbergasted many, sparking debates in the legal and the media circles. While many highly came down on the verdict delivered by the order of the Pune District Court (Hereinafter 'district court'), a handful backed up the judiciary. Editor's guild to the new Press Council's Chief has expressed anxiety at the possible ramifications of the case.[2] The Press Council of India voiced its concern over the implications of this case. Justice Markendaya Katju, who now helms the Press Council of India, urged P.B Sawant to make light of the issue and the courts to re-consider their decision.[3] The International Press Institute called the award of 100 crore rupees as highly disproportionate and uncalled for.[4] BJP's Arun Jaitley lampooned the quantification of the damages as unusual.[5]

With such heavyweights turning highly critical of the demeanor of the Indian Judiciary, the whole media and the press were awash with news on this issue, making it remain spotlight for a very long period for its corrosive effect on the freedom of the Media.

First part contains the factual matrix and the decision of the case of *Sub Judice*. In the fitness of things, the second *part* is devoted to the laws governing the Indian Media. The *third* part provides an insight into the fallacies in the decision, arguing the courts erred in quantifying the damages judiciously. The *fourth* part shall proffer the adverse and the knock-on impact of this case. The *last* part makes the concluding marks and suggests the way forward.

THE FACTUAL MATRIX AND THE DECISION

On September 10, 2008, *'Times Now*'(hereinafter 'channel') aired a picture of the retired Supreme Court Judge P.B Sawant as that of a retired High Court Judge P.K Samantha for an eternity of fifteen seconds while telecasting a story on a multi-million infamous provident scam. Immediately enough, Justice Sawant chose to set things right through his secretary Mr.

[1] *Mr. P.B Sawant* v. *Times Now Global Broadcasting Co. Ltd*. (hereinafter 'Times Now case'); Special Civil Suit No. 1984/2008. Decision available on: http://*inform.files.wordpress.com/2011/11/judgment.pdf*.
[2] Accessible at: *http://news.outlookindia.com/items.aspx?artid=741445&commentid=36698#36698*.
[3] Accessible at: *http://www.firstpost.com/india/times-now-case-katju-says-sc-order-incorrect-132458.html*.
[4] See*: http://www.thehindu.com/news/national/article2642833.ece*.
[5] See: *http://blogs.outlookindia.com/default.aspx?ddm=10&pid=2642*.

Kamat who conveyed the channel about the catastrophe it conducted.[6] Yet, there was no clarification, rectification, and apology by the channel. Piqued Justice Sawant slapped a legal notice threatened to follow it up with a libel suit, and demanded half a billion as damages.[7] Times Now then came up with a corrigendum and dubbed the same as an apology. However, having felt the apology as insincere and inappropriate, Justice Sawant resolved to file a case against the channel and urged for an enhanced amount of damages. A district court in pune awarded exemplary damages without bearing out its decision.[8] The High Court of Bombay (hereinafter' high court'), on an appeal against the decision, imposed a pre-condition asking Times Now to deposit 20 crore rupees in cash with the registry of the court, and furnish a bank guarantee of eighty crore Indian rupees to decide the case on merits.[9] Feeling dissatisfied and aggrieved, Times Now approached the Supreme Court of India which let the order stand as it is.[10]

THE RIGHT OF FREE SPEECH AS VESTED WITH THE MEDIA

The right to free speech is enshrined in article 19(1) (a) of the Indian Constitution.[11] The Indian Constitution guarantees the right to free speech to all the citizens indiscriminately. However, this right is not unbridled. It's subject to a few limitations envisaged in article 19(2) of the Indian Constitution, such as libel, security of the nation and friendly relations with foreign states.

The freedom of press finds no explicit mention in the Indian Constitution. The jurisprudence of the Supreme Court and the other Indian High Courts drives us to the conclusion that the freedom of press had been developed through judicial pronouncements and the freedom of press is put on similar footing with the freedom of an Individual.[12] As such, the limitations that bind the individuals' bind the Indian press and the media. In a series of Judgements, starting with *M.S.M Sharma* v. *Krishna Sinha*,[13] the courts have affirmed the rights of press as guaranteed by article 19(1)(a). In *M.S.M Sharma* v. *Krishna Sinha*, the Supreme Court observed:

[6] *Times Now* case, para. 4.
[7] *Id*., para 5.
[8] *Id*., para 52.
[9] *Times Now Global Corporation Co. Ltd.* v. *P.B Sawant* 2011(113) BomLR3801.
[10] See: *http://www.thehindu.com/news/national/article2627716.ece.*
[11] M.P Jain, *Indian Constitutional Law*, Lexis Nexis Butterworths Wadhwa Nagpur, Gurgoan, 2010, p. 1078.
[12] Madhavi Goradia Divan, *Facets of Media Law*, Eastern Book Company, Lucknow, 2006, p.3.
[13] AIR 1959 SC 395.

The liberty of the press in the India stands on higher footing than the freedom of speech and expression of the citizen and that no privilege attaches to the press as such, that is to say, as distinct from the freedom of the citizen.

In fact, successive judgments struck down laws that abridge the freedom of press.[14] As such, the Indian Media enjoys no elevated status and privileges. The constitutional rights aside, there is no law to govern the *modus operandi* of the Indian Media.

THE FALLACIES IN THE QUANTIFICATION OF THE DAMAGES

The decision of the District Court is rather surprising and accompanied with no well-reasoned rationale behind the quantification of the damages. It's replete with inconclusive and unpersuasive findings. The district court's first finding that the telecast was defamatory is devoid of a strong foundation. The relevance of Intention, which plays a weighty role, in determining the liability was not thoroughly considered, and so is the outreach of the channel. Importantly, the established standards relating to exemplary damages did not attract the attention of the court.

The telecast could not be defamatory per se

The district court's first finding is that the questioned telecast on the multi-crore scam is *per se* lowly of Justice Sawant is hollowed.[15] The law of defamation enunciates that an individual is defamed only when his or her reputation is lowered in the minds of the right-thinking members of the society.[16] This enunciation necessitates the courts to ascertain if the impugned telecast was lowly of Justice Sawant in the minds of the right-thinking members of the society.

Not all viewers of the telecast would feel Justice Sawant is defamed. Any reasonable observer and right-thinking viewer in the know of justice Sawant would comprehend the telecast as lopsided, and would tend to get confounded on watching the story as the name displayed was that of Justice Samantha, and the picture put up was that of Justice Sawant. Thereby, the reputation of Justice Sawant remained unimpaired the minds of the persons who knew him. The other segment of viewership that the telecast could have had would

[14] *Romesh Thapar* v. *State of Madras*, AIR 1950 SC 124; *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129; *Express Newspapers Ltd.* v. *Union of India*, AIR 1958 sc 578; *Sakal Papers* v. *Union of India*, AIR 1962 SC 305*; Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788.
[15] *Times Now* case, para 8.
[16] P.S.A Pillai, *Law of Tort*, Eastern Book Company, Lucknow, 2009, p. 41.

encompass those not acquainted with Justice Sawant. This segment of the viewership would think the matter to be vituperative of Justice Sawant. In this manner, in the minds of the first segment of the viewership, Justice Sawant was not defamed. The district court made no attempt to classify the viewers. It faltered in concluding that all viewers construe the matter as defamatory. Bifurcation of the viewership, as is stated here, is demanded by the law of defamation. Any effort to bifurcate would have crystallized the issue, and could have added some merit to the decision.

The Relevance of Intention and the overlooked Sullivan standard

The court apparently deciphered the intention of Times Now through its indifference in initiating corrective steps and not publishing an apology.[17] This indifference cannot be taken to mean that the channel intended to defame Justice Sawant. Channel's delay in not amending the telecast signifies an omission on its part. Thus, one could not help but ask what made the court characterize the mistake of the channel as intentional.

The relevance of intention, albeit immaterial in Indian law of torts,[18] now holds key in deciding libel suits entailing public officials. In 1994, the Supreme Court of India, deciding the case of *Rajagopal* v. *State of Tamilnadu*(Hereinafter 'Rajagopal'),[19] famously applied the standards laid down by the Supreme Court of the United States in *New York Times* v. *Sullivan(*Hereinafter 'Sullivan'),*[20]* where the Supreme Court acquitted the accused despite its allegations against a few public officials turning out to be false. The New York Times Newspaper carried a full-page editorial advertisement in March 1960 alleging that the police in Montgomery, Alabama, had committed grave civil rights atrocities. The Police Commissioner sued the newspaper as some of the allegations turned out false. The Supreme Court of the United States, refused to find the newspaper liable, holding that the since the case involved public officials, defamation would found only on showing of actual malice, that is, only if the newspaper acted with the knowledge that it committed a mistake or with reckless disregard for the veracity of the statements.

The motive behind the court's decision was not to penalize honest mistakes, and in fact, the court acknowledged the mistakes were inevitable, and they have to be accommodated to

[17] *Times Now* case, para. 25.
[18] *D.P. Choudhary And Ors.* **v.** *Kumari Manjulata*, AIR 1997 Raj 170.
[19] JT 1994 (6) SC 514.
[20] 376 U.S. 254 (1964).

foster debates on political issues.[21] In 1974, the standard was extended to those who have assumed in the affairs of society, i.e, to public figures as well.[22]

In *Rajagopal*, an autobiography of a prisoner on the death row exposed to convicted murderer's link with the prison officials. The state resolved to impose a prior restraint on its publications, because the biography was false and defamatory. Justice P.B Sawant, importing the standard of the *Sullivan* case, refused to allow the plea to impose a prior restraint and said the officials could not obtain compensation unless the publications were made with utter recklessness. [23]

The district court completely overlooked the *Sullivan* standard, and went on to hold the channel accountable. This act of court falls foul of article 141 of the Indian Constituion which obligates subordinate courts to abide by the decisions of the Supreme Court. Times Now's publication of Justice Sawant's picture was unintentional. It had no intention to publish his picture, and this unintentional make negates the presence of malice, for malice refers to knowledge with which the act is committed, not merely ill-will or spite as observed by the district court while deciding the case.[24] The Mistake of times now was an honest mistake, though not inevitable, and should have been accommodated in keeping with the Supreme Court's ruling in the *Rajagopal's* case.

The channel's nonchalance towards publishing an instantaneous apology cannot be a reason for punitive damages. Despite being informed about the *faux pas* committed by the channel through its telecast, the channel came up with no corrigendum until Justice Sawant slapped a legal notice. But, would this omission, regardless of the gravity, and indifference fit the award of the unprecedented exemplary sum as damages?

The standards relating to awards of exemplary damages

In 1970, the High Court of Bombay, in *Rustom K. Karanjia* v. *Krishnaraj M.D Thackersery*,[25] said there is no room for importing the concept of exemplary or punitive damages except In well-defined categories of cases. The first category is of those where the plaintiff is injured by the oppressive, arbitrary or unconstitutional action by the executive or the servants of the government. The second category comprised those cases in which the

[21] See: *http://www.outlookindia.com/printarticle.aspx?279141*.
[22] *Curtis* v. *Butz* 388 U.S. 130 (1967).
[23] *Supra* note 20.
[24] J.N Pandey, *Law of Torts and Consumer Protection Act*, Central Law Publications, Allahabad, 2005, p. 25.
[25] AIR 1970 Bom 424.

defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. As noted in the antecedent discussion, the channel's mistake was inadvertent; there was no clear-cut knowledge, and the channel had no motive no profiteer out of its mistake. The two-categories defined by the Bombay High court would not seek to include in their ambit the case *sub judice*. Ergo, it is argued that exemplary damages could have been averted had these principles been given due weight.

It is not to mean Times now did not conduct a grave mistake and that Justice Sawant is not to receive gargantuan damages. But, would any level of indifference in coming up with a corrigendum justify the damages to the tune of a billion Indian rupees corrigendum when the story was amended and not put up in its further broadcast?

The dwarf reach of the English News Channels

On the point of the outreach of the circulation, the court's observations that the channel is a leading channel does not suffice in bearing out its award of a hundred crore rupees. The district court in the Times Now case did not embark on to the task of measuring the outreach of the channel. Times Now's nationwide viewership should not make us lose sight of the fact that Times Now is an English channel. In India, regional channels stand next to Hindi channels in respect of viewership.[26] The English News channels only account for about one percent of the total viewership.[27] Without really gauging the reach of the channel, television rating points that Times Now garners, relying on the channel's status as a leading channel amongst all the English channels to award a billion rupees leaves a lot to be desired.

THE IMPOSITION OF A PRE-CONDITION BY THE HIGH COURT: WAS IT INDISPENSABLE?

The High Court of Bombay, on an appeal against the order of the District Court, imposed a pre-condition to hear the appeal on the merits. The imposed pre-conditions enjoins Times Now to pay twenty crore rupees in cash and furnish a security of eighty crore rupees by way of a bank guarantee.[28] The Interim of the order of the High Court is in keeping with order 41 Rule 1(3) of the Civil procedure Code. This rule powers, as submitted by Mr. Chinoy, appearing for the Times Now, the court to exercise its volition to direct deposit of the decretal amount or to direct furnishing security for the said amount.

[26] See: *http://www.indianexpress.com/news/the-view-from-the-couch/638431.*
[27] *Id.*
[28] *Supra* note 9.

The High Court, in this case, referred to two decisions before it imposed a pre-condition requiring Times Now to pay. The first is, the *Malwa Strips Pvt. Ltd*. v. Jyoti *Limited*,[29] where the apex court proceeded on the presumption although the word "shall" has been used in Order 41 Rule 1(3), the same is not mandatory in character and thus, may be read as directory. The second case is, *Sihor Naga Palika Bureau* v. *Bhablubha Virabhai and Co*,[30] wherein the Supreme Court on the power said order 41 rule 1(3) provides that in an appeal against a decree for payment of amount the appellant shall, deposit amount disputed in the appeal or furnish such security in respect thereof as the court think may fit and Order 41 rule 5(5), a deposit or security is a condition precedent for an order by the appellate court. Thereafter, it squarely said it's invested with the power to grant a stay to the execution of the challenged order when an exceptional case is made out and refused to grant an unconditional stay.

Times Now's reckless attitude was very weak an argument to decide not to grant an unconditional stay. A sum of billion was never awarded hitherto. In *S.N.M Abdi* v. *Prafulla Kr. Mahanta*,[31] the plaintiff was a chief minister. He sued a magazine which defamed him. The magazine offered no apology and evidence to support its statements. Yet, the court awarded five lakh rupees as damages. The damages were further mitigated to fifty thousand rupees by the High Court of Assam. In the Bhopal Gas Tragedy, the compensation worked out to approximately to two lakh rupees per capita.[32] Again, as recently as in October 2011, the Supreme Court awarded Rs 10 lakh in damages to the families of those who died in a fire at a cinema in Delhi.[33]

Howsoever reckless Times Now may be and regardless of the fact that the Times Now defamed a retired judge of the Supreme Court, the high court should have dispensed with the pre-condition since the amount involved was exceptionally high to the point of making out an appropriate case to grant an unconditional stay to the district court's decree.

THE KNOCK-ON IMPACT OF THE DECISION

The Indian Media and the press played a pro-active role in the bringing many offenders to account. It played a pro-active role in unearthing many scams. Ignominious practices of the

[29] (2009) 2 SCC 426.
[30] (2005) 4 SCC 1.
[31] AIR 2002 Gau 75.
[32] See: *http://articles.timesofindia.indiatimes.com/2011-11-24/edit-page/30433876_1_damages-awards-in-libel-cases-indian-media.*
[33] *Id.*

public officials would not have seen the light of the day, if not for the audacious sting operations the media conducted.[34] High damages would spell disasters for the media. They act as inappropriate deterrents and dampeners to the media. Owing to high exemplary damages, media might be unjustifiably precluded from showing up the filth in the society.

In addition, akin high damages are liable to prompt identical claims of damages. Shashi Taroor's case is an eye-opener for the courts. He sued a magazine claiming ten crore rupees as damages.[35] Former Odisha Agricultural Minister Pradeep Maharathy mulled the idea of filing a libel suit against a newspaper for implicating him in a rape case.[36] High libel suits may become a norm and be used for personal vendetta. In addition, public officials may try to use libel suits to threaten the media and wield it.

CONCLUSION

A free and healthy press is essential to the functioning of a true democracy. In a democratic set-up, there has to be active and intelligent participation of the people in all spheres and affairs of their community as the state. It is their right to kept informed about current political, social, economic and cultural life.

Doubtless, media does add a dose of sensation to the news and repeats it ad nauseam. But, it does and did play a very laudable role in exposing the reprehensible practices of the public officials. When all is said and done, the media's slipshod attitude should be kept under incessant checks. It ought to be restrained and penalized to strike a balance between the rights of the media and the societal interests, given its attitude to sensationalize things. But, restraints should never act as impediments to it.

Indeed, as the Supreme Court opined in the *Rajagopal's* case, honest mistakes have to be accommodated for a politically and socially aware society. Indian courts have never awarded high level of damages. An error, which completely qualifies as a genuine error, should not be denounced with decrees of exemplary damages. They, in all likelihood, constrict the freedom of media and serve as a means to for the public officials to threaten the media and make it toe their line.

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[34] See: *http://www.thehindu.com/opinion/Readers-Editor/article1704108.ece.*
[35] See*: http://www.asianage.com/india/shashi-tharoor-files-defamation-suit-against-magazine-813.*
[36] See: *http://expressbuzz.com/states/orissa/Gangrape-remark-Minister-mulls-legal-action/370391.html.*