Vol 3|No 1| Jan-June 2019

ISSN : 2581-6837

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JIMS JOURNAL OF LAW

A Bi-Annual Peer Reviewed Journal

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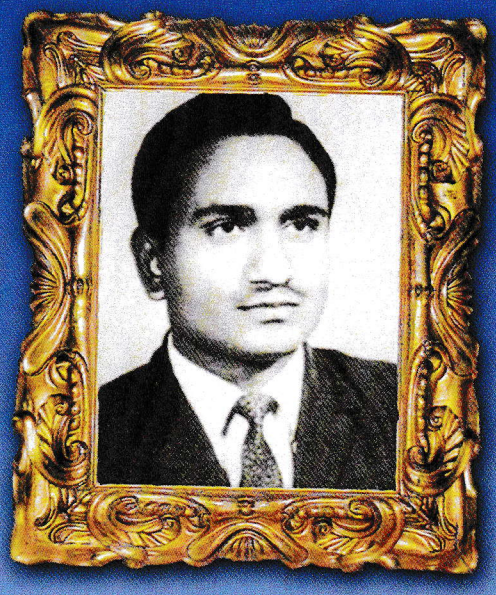
"You see things and you say **Why***? But I dream of things that never were and say* **Why** *not?"*

- George Bernard Shaw



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(1950 - 1980)

Also a true visionary...who dared to dream!
He lives no more but his dreams live on....and on!

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Vol. 3 Issue 1, Jan - Jun 2019

ISSN :2581- 6837

Editor's Desk

It is a matter of immense pleasure to publish this issue of JIMS Journal of Law. The Editorial Board is grateful to all the authors who have contributed scholarly articles of contemporary relevance and look forward for more academic endeavours from prospective authors. This issue of JIMS Journal of Law presents multiple facets of contemporary legal issues providing valuable legal insight. It covers evolution of the patent system in India. For the first time in India, a patent administration system was formed in 1911 under the direction of the Controller of patents. Authors suggesting that inventor must provide the description of the invention in return for the privileges and not keep it a secret. This issue also covers a topic in the name of climate change mitigation wherein author has observed that despite international commitments and world class legislations, an institution polices and machinery, India is lagging behind its expectations to improve the environment conditions. One of the articles deals with rise in life insurance frauds in India. Author here is of view that life insurance is a husband's privilege, a wife's right and a child's claim. One of the articles deals with cyber voyeurism. Author is of the view that number of individuals using the social networking sites as a means of social interaction between individuals on the internet is increasing day by day which has led to the increase in the number of infringement cases of individual's right of privacy in the realm of the cyberspace especially of juvenile's persons which constitutes majority of the internet users. This issue also covers the rights of victims in our criminal justice system. Our criminal justice system is more or less centred on the accused and as a result victim is often ignored by the courts. Author is of the view that victims' rights should be treated as main component of the Criminal Justice System. One of the articles deals with patent pooling.

It can be manifested that, patent pools are not per se anti-competitive. Author is of the opinion that some factors are to be considered to determine whether the pools are supportive or unsupportive of the competition prevalent in the market. This issue also covers concept of right to privacy wherein author is of the opinion that the scope of personal liberty has been and is being expanded to a great extent, with the advancement of civilization in the free society. One of the articles deals with concept of merger control in takeover regime in India.

Author is of the view that there are various reasons which can be attributed to the growth in the mergers, acquisition and takeovers in India. I take utmost pleasure and privilege in presenting this intellectual and thought provoking issue of JIMS Journal of Law to Bar, Bench and academia with a huge expectation that this issue will bring reforms in the society by raising legal awareness and achieving access to justice for all.

Thanking You

Vol. 3 Issue 1, Jan - Jun 2019 ISSN :2581- 6837

As an active practitioner and scholar in the field of law, you must have experienced the need for a journal with conceptual richness, which is normally missing in various law journals. In response to this need, a team of competent and dynamic professionals, at JIMS Engineering Management Technical Campus, Gr.Noida, publishes bi-annually a journal titled JIMS Journal of Law. The opinions, notes and comments expressed in the articles are those of the authors themselves and do not necessarily reflect the views of either publisher or of the editors. Full copyright for all the articles, notes and other comments published in the JIMS Journal of Law vests in the journal and no part thereof may be reproduced by anyone without taking written permission from the Publisher and editors.

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OVERVIEW OF THE EVOLUTION OF THE PATENT SYSTEM

Dify Doyil
Assistant professor, JEMTEC, School of Law

The Patent Act of 1970 was an excellent piece of legislation given to India by the brilliant Ayyengar Committee. The Act struck a perfect balance between right of Patent holders and the right of public to health. The 1970 Act allowed only process patent for foods, medicines and drugs, that too for a period of 7 years. After 7 years, the drugs would be open to public access. This encouraged the Indian Pharma industry to engage and reverse engineering and produce generic versions of the highly patented drugs and much cheaper costs. The United states demanded stronger protection of IPR in India by introduction of "Product Patent" in the Indian Patent Legislation. India had always opposed the inclusion of IPR in GATT. However, India was forced to pursue progressive liberalization, as it feared imposition of trade sanctions. India then signed the Marrakesh Agreement. With the signing of the agreement, India was now required to align its Patent Legislation as per the TRIPS agreement. Hence "product patenting" was introduced in the Indian Patent Legislation for food, medicines and drugs.

Key words : TRIPS Agreement, Process patent, Product patent.

MEANING OF PATENT

The term 'Patent' has been derived from the term "Letters Patent".[1] "Letters patent", were open letters under the Great Seal of the King of England.[2] These letters were addressed to all the subjects at large by the Crown.[3] Through these letters, the Crown conferred certain rights and privileges to one or more individuals in the kingdom.[4] The monopoly right conferred by Patent Office on an inventor to exploit his invention is known as a Patent.[5] Through a patent, the commercial exploitation of his invention, by any other party, can be prevented by the inventor.[6] The word 'patent is used for denoting a monopoly right in respect of an invention.[7] Undoubtedly, Patent creates a statutory monopoly, protecting the patentee against any unlicensed user of the patented device.[8] A monopoly of the patent is the reward of the inventor.[9] Through a patent, the owner obtains a legal right to exclude others from using or making that particular invention.[10] In most of the countries, this right is granted for a period of 20 years from the date of submission of application.[11] The main objective behind Patent is to encourage

[1]B.L. Wadehra, "LAW RELATING TO INTELLECTUAL PROPERTY", Universal Law Publishing Co., p.3, 5th Edn. 2011
[2]ibid
[3]ibid
[4]ibid
[5]V.K. Ahuja, "LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS", LexisNexis, p.479, 2nd edn. 2013
[6]ibid
[7]Bajaj Auto Ltd. v. TVS Motor company Ltd., 2008 (36) PTC 417 (Mad.)
[8]Telemechanique&Controls (I) Limited v. Schneider Electric Industries SA, 2002 (24) PTC 632 (DEL) (DB)
[9]ibid
[10]WIPO, "Fields of Intellectual Property Protection", available at http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch2.pdf, last visited on 6th July 2017 At 1:35 p.m.
[11]WIPO, "WIPO- Most Intermediate Training Course on Practical Intellectual Property issues in Business", available at http://www.wipo.int/edocs/mdocs/sme/en/wipo_ip_bis_ge_03/wipo_ip_bis_ge_03_2-main1.pdf, last visited on 6th july 2017 at 1:42 p.m.

inventive activity, by providing the inventor the exclusive rights to exclude a third party from making, selling or using the invention for a limited period of time and thereby preventing imitation in a short span of time.[12] It is the duty of the Inventor to provide the description of the invention in return for the privileges and not keep it a secret, do that with the description as basis, people can make more inventions.[13] "Invention" means a new product or process involving an inventive step and capable of industrial application.[14] Therefore, for a product to be termed as an invention, it need not be a totally new product. Even if a substantial improvement is carried out on the product, it would be termed as an invention.[15] "New invention" means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing or patent application with complete specification, i.e. the subject matter has not fallen in public domain or that it does not form part of the state of the art.[16]

ORIGIN OF PATENTS IN INDIA

COLONIAL ERA

In India, the patent system was introduced by the Great Britain.[17] It is from this system that the patent law in India evolved.[18] The East India Company landed on the Indian soil in 1608 and continued ruling for the next 250 years.[19] In the aftermath of the Great Indian uprising of 1857-58, the full control of India went into the hands of the British crown.[20] In 1877, Queen Victoria was declared the empress of India.[21] Almost twenty per cent of Britain's exports were being imported to India during the period 1858-1905.[22] While imposing economic policies on India, the British were more concerned about the protection of their interests rather than the welfare of the people of India.[23] In 1856, the first patent statute implemented by the British was based on the British Patent Law of 1852.[24] Certain exclusive privileges to inventors of new manufactures for period of 14 years was provided by India's

[12]Druid Working Paper 06-28, "Inventive activities, Patents and Early Industrialization : A Synthesis of Research Issues", available at http://www3.druid.dk/wp/20060028.pdf, last visited on 6th July 2017 at 1:50 p.m.
[13]ibid
[14]Sec. 2(1)(j), Patents Act,1970.
[15]Dhanpat Seth & Others v. Nil Kamal Plastic Crates Ltd., 2008 (36) PTC 123 (HP) (DB)
[16]Section 2(1)(I), Patents Act, 1970
[17]Controller General of Patents, Designs & Trademark, "History of Indian Patent System", available at http://www.ipindia.nic.in/history-of-indian-patent-system.htm, last visited on 6th July, 2017 at 4:25 p.m.
[18]ibid
[19]Anonymous, "East India Company", available at https://www.sscnet.ucla.edu/southasia/History/British/EAco.html, last visited on 6th July 2017 at 4:41 p.m.
[20]New World Encyclopaedia, "Indian Rebellion of 1857", available at http://www.newworldencyclopedia.org/entry/Indian_Rebellion_of_1857, last visited on 6th July, 2017 at 4:52 p.m.
[21]Kallie Szczepanski, "What was the Indian Revolt of 1857", available at https://www.thoughtco.com/the-indian-revolt-of-1857-195476, last visited on 6th July 2017 at 5:03 p.m.
[22]Pratik Sharma, "British Rule in India: Stages and Consequences", available at http://www.historydiscussion.net/history-of-india/economic-history/british-rule-in-india-stages-and-consequences-history-of-indian-economy/5968, last visited on 6th July 2017 at 8:07 p.m.
[23]Anonymous, "Economic and Social impact of Colonial Rule in India", available at http://www.ggdc.net/maddison/articles/moghul_3.pdf, last visited on 6th July, 2017 at 8:47 p.m.
[24]supra note 17

act VI of 1856 on "Protection of Inventions."[25] In 1859, the Act of 1856 was renamed at "Act for granting exclusive privileges to inventors."[26] Enabling English patent holders to acquire control over the Indian market was the main objective of this legislation.[27] In the year 1872, Patents and Designs Protection Act was enacted, which was followed by Protection of Inventions Act of 1883.[28] Thereafter, the 1872 and the 1883 acts were consolidated into the Inventions and Designs Act of 1888.[29] India's domestic technology grew while the British evolved the Patent system they had imposed on India.[30] Although India was still and agriculture based economy, its technology industry grew from 1800 onwards.[31] Much of this expansion was led by J.N. Tata.[32] India was ranked 14th among the industrialized nations by the World War I.[33] Even though this period was dominated by the production of textiles, food processing etc., Pharmaceutical production was not a part of this success story.[34]

In 1911, the British enacted the Patents and Designs Act, 1911. Under this Act, for the first time in India, a patent administration system was formed under the direction of the Controller of patents.[35] However, patent filings in India remained low, despite these developments.[36]

POST-COLONIAL ERA

India gained independence in 1947. With a view to revamp the patent system, a committee was appointed by the new government.[37] The Indian government wanted a patent system which would cater to the welfare and the interests of the Indian population.[38] The Tek Chand Committee submitted a report called the Chand report in 1950. This report noted that strong protections were given to the foreign multinationals by the prevalent Indian patent system and to prevent abuses in the system, issuance of Compulsory licenses was required.[39]

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[25]G. Krishna Tulasi & B. Subba Rao, "A detailed study of patent system for protection of Inventions", available at http://www.ijpsonline.com/articles/a-detailed-study-of-patent-system-for-protection-of-inventions.html, last visited on 6th July 2017 at 9:23 p.m.

[26]Weinian Hu, "INTERNATIONAL PATENT RIGHTS HARMONIZATION", Routledge publications, first edn., 2017

[27]ibid

[28]Supra note 24

[29]ibid

[30]Janice M. Mueller, "In depth Analysis of Indian Patents Law", available at http://www.nalsarpro.org/CL/Articles/InDepthAnalysisofIndianPatentLaw.pdf, last visited on 7th July 2017 at 9:38 a.m.

[31]ibid

[32]ibid

[33]ibid

[34]ibid

[35]Supra note 29

[36]Justice Bakshi Tek Chand Committee

[37]Srividhya Raghavan, "PATENT AND TRADE DISPARITIES IN DEVELOPING COUNTRIES", Oxford University Press, 2012

[38]Reto M. Hilty & Kung Chung Liu, "COMPULSORY LICENSING: PRACTICAL EXPERIENCES AND WAY FORWARD", Springer Publications, 2015

[39]ICRIER, "India's IPR regime : Reconciling Affordable Access with Patent Protection", available at http://icrier.org/pdf/India%27s_IPR_Regime.pdf, last visited on 7th July 2017 at 12:23 p.m.

In 1959, a second report, known as the Ayyangar Committee report, was commissioned by the government.[40] India relied heavily on the Ayyangar committee report for its patent policy, until it joined the WTO in 1994.[41]

Justice V.R. Krishna Iyer expressed his appreciation for the Ayyengar Committee Report by stating : "A well debated, development oriented and patriotically processed Statute of 1970, with a progressive perspective, and successful sequel passed after a thorough study, proved a tremendous national triumph for the consumer and the manufacturer alike."[42] This report examined how the national ambitions could be achieved through an IP regime.[43] A detailed study of the patent laws and successful public welfare models of several other nations was carried out by the Ayyengar Committee. Abolition of "product patent" was strongly advocated by the committee in its report.[44] The Committee found that the foreign nationals were exploiting India's Patent system as they held 80-90% patents in India, but exercised only 10% in India.[45] After much deliberation in the Parliament, the committee recommendations culminated in The Patents Act, 1970.[46]

1970- PRESENT

The 1970 Act, expressly revoked pharmaceutical patent.[47]There was prohibition of patents on "substances intended for use or capable of being used as food or medicine or drug....or relating to substances prepared or produced by chemical processes."[48] However, pharmaceutical compounds were allowed to be patented by the Act.[49] A deliberate effort to stimulate the lagging Indian drug industry was made through the 1970 Act.[50] Due to his, over time, India developed a reputation of being a producer of low-priced generic drugs.[51] On 1st January 1995, India participated in the GATT (and later the WTO).[52] Inclusion of Intellectual Properties in the International Trade Agreement was initially opposed by India.[53] India feared that its non- acceptance of TRIPS would lead to a restriction on its exports.[54] At the Uruguay round of the WTO, strong I.P.R. protections were proposed to be introduced by the U.S.A. under a pressure from their pharmaceutical corporate lobby.[55] Promotion of

[40]N. Rajagopala Ayyengar, "Report on the Revision of the Patents Law", available at https://spicyip.com/wp-content/uploads/2013/10/ayyangar_committee_report.pdf, last visited on 7th July 2017 at 12:28 p.m.
[41]Supra note 37
[42]V.R. Krishna Iyer, "GATT, TRIPS and Patent Law – 1", THE HINDU, Sept. 11, 2000, available at http://www.thehindu.com/2000/09/11/stories/05112524.htm, last visited on 7th July 2017 at 12:45 p.m.
[43]Supra note 41
[44]Supra note 39
[45]Shamnad Basheer, "India's Tryst with TRIPS : The Patents Amendment Act, 2005", available at http://ijlt.in/wp-content/uploads/2015/08/Basheer-Indias-Tryst-with-TRIPS-The-Patents-Amendment-Act-2005- 1-Indian-J.-L.-Tech.-15.pdf, last visited on 7th July, 2017 at 3:20 p.m.
[46]ibid
[47]Supra note 30
[48]ibid
[49]ibid
[50]Mrinmoi Chatterjee, "Law on Pharmaceutical patents" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332831, last visited on 7th July 2017 at 4:14 p.m.
[51]ibid
[52] P.K. Vasudeva, "INDIA AND THE WORLD TRADE ORGANIZATION: PLANNING AND DEVELOPMENT",P.62, S.B. Nangia & APH Publishing Corporation, 2000
[53]Michael L. Doane, "TRIPS and International Intellectual Property Protection in an Age of Advancing Technology", available at http://www.adduci.com/node/115, last visited on 8th July 2017 at 10:12 a.m.
[54]supra note 34
[55]Amit Shovon Ray & Sabyasachi Saha, "India's Stance at the WTO : Shifting Coordinates, Unaltered paradigm", available at http://www.jnu.ac.in/sis/citd/discussionpapers/wto.pdf, last visited on 8th July 2017 at 10:42 a.m.

competition and free trade is the core philosophy of WTO.[56] In spite of this, a strong IPR regime was proposed as a part of a multilateral trading agreement through the TRIPS agreement.[57] Moreover, the determination of IPR regime must be done endogenously within the economy and should be in accordance with the technological learning and capability levels of the country in question.[58] This fact is supported by a large body of theoretical and empirical literature.[59] The process of technological catch-up may be severely hindered through a exogenous imposition of strong IPR regime.[60] During their process of development and technological learning, the developed nations had sufficient time and flexibility to adopt an appropriate IPR regime according to the needs and priorities.[61] Ironically, there is sufficient evidence to support this fact.[62]

India was going through a "know - why" process, beginning in the 1970's and well into the 1980's.[63] It was through reverse engineering, that India built its process development capabilities.[64] The process patent allowed by the Indian Patents Act 1970 was the main factor behind the emergence of the Indian pharmaceutical industry as a strong generics player.[65]The generic versions of blockbuster drugs were being produced at very low prices by the domestic competitive generic market in India.[66] As compared to the drugs sold by the US and EU pharmaceutical companies, these generic drugs costed only 5%.[67] There has been a huge demand for Indian generic AIDS drugs across the third world countries.[68] The price of antiretroviral drugs was lowered as much as 98% due to the role played by the generic drugs from India. 3.7. million Africans with AIDS, lacking access to treatment benefitted abundantly from this.[69]

A premature halt would have been put on this development, if India shifted to a product patent regime.[70] The Indian Pharmaceutical industry was extremely apprehensive about the TRIPS agreement, as the phenomenal growth of the industry was mainly due to the process patent regime.[71]

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[56]WTO, "Understanding the WTO", available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf, last visited on 8th July 2017 at 10:54 a.m.

[57]Supra note 55

[58]Ramakrishna B. & Anil Kumar H.S., "FUNDAMENTALS OF INTELLECTUAL PROPERTY RIGHTS : FOR STUDENTS, INDUSTRALIST AND PATENT LAWYERS", Notion Press, 2017

[59]ibid

[60]ibid

[61]ibid

[62]ibid

[63]supra note 55

[64]Ajay D'Souza, "Future of Indian Pharma lies beyond generics", The Hindu, April 22nd 2012, available at http://www.thehindu.com/business/future-of-indian-pharma-lies-beyond-generics/article3339963.ece, last visited on 8th July 2017 at 11:59 a.m.

[65]ibid

[66]Jean O. Lanjouw, "The introduction of pharmaceutical product patents in India: heartless exploitation of the poor and suffering", available at http://www.nber.org/papers/w6366.pdf, last visited on 8th July 2017 at 2:47 p.m.

[67]International Centre for Trade and Development, "Indian Parliament approves Controversial Patent Bill", available at http://www.ictsd.org/indian-parliament-approves-controversial-patent-bill, last visited on 8th July 2017 at 4:15 p.m.

[68]Mike Ludwig, "Big Pharma Lobbies Hard to End India's Distribution of Affordable Generic Drugs", Truth-Out, October 10th 2014, available at http://www.truth-out.org/news/item/26721-big-pharma-lobbies-hard-to-end-india-s-distribution-of-affordable-generic-drugs, last visited on 8th July 2017 at 4:38 p.m.

[69]Prabhu Ram, "India's New TRIPS Compliant Patent Regime", available at http://studentorgs.kentlaw.iit.edu/ckjip/wp-content/uploads/sites/4/2013/06/11_5JIntellProp1952005-2006.pdf, last visited on 9th July 2017 at 1:40 p.m.

[70]supra note 63

However, there was a surprising turn of events in 1989. Instead of maintaining its strong opposition towards the product patent regime, India eventually gave in to the proposal. This was mainly due to the immense pressure from the U.S.[72] Linkages have been drawn between the threat of U.S. to use the Special 301 Law and the change in India's position regarding the application of product patent regime.[73] The TRIPS agreement set out certain minimum standards which were required to be followed by India, in order to continue its connection with the WTO.[74] Article 27.1 of the TRIPS Agreement stated that "all members' nations must make patents available for any inventions whether products or processes, in all fields of technology subject to standard requirements of novelty, utility and non-obviousness." This clearly shows that the TRIPS Agreement requires full patent protection for all pharmaceutical products.

In order to comply with the TRIPS Agreement, a transition period of 10 years was provided to India by the WTO.[75] In order to make patents available for pharmaceutical products, India had to amend its Patent regime by January 1, 2005[76]. The 1970 act underwent three amendments. The first amendment required the patent system to provide for filing of patent applications during the transition period.[77] The second amendment extended the patent term to twenty years, modified the compulsory licensing requirements and burdens of proof for patent infringement.[78] The Patents (Amendment) Act of 2005 allowed both product and process patent for pharmaceutical products.[79]

2.3 INTERNATIONAL CONVENTIONS ON PATENTS

International Patent system never existed in the past.[80] It was realized by the nations over the years that there would be an increase in efficiency and reduction in costs if the Patent system was internationalized.[81]This is the main reason for formation of treaties and conventions relating to patents.[82] The shaping of patent law, be it national or international, has, to a large extent been

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[71]ibid

[72]Anitha Ramanna, "India's Patent Policy and Negotiations in TRIPS : Future options for India and other Developing Countries" available at https://www.iprsonline.org/ictsd/docs/ResourcesTRIPSanita_ramanna.doc, last visited on 8th July 2017 at 12:45 p.m.

[73]ibid

[74]WHO, "WTO and the TRIPS Agreement", available at http://www.who.int/medicines/areas/policy/wto_trips/en/, last visited on 9th July 2017 at 1:59 p.m.

[75]K.D. Raju, "WTO-TRIPS Obligations and Patent Amendments in India : A Critical stocktaking", available at http://www.niscair.res.in/sciencecommunication/researchjournals/rejour/Jipr/Fulltextsearch/2004/May%202004/JIPR-vol%209-May%202004-pp%20226-241.htm, last visited on 9th july 2017 at 2:25

[76]Jaya Bhatnagar & Vidhisha Garg, "India: Patent Law in india", available at http://www.mondaq.com/india/x/54494/Patent/Patent+Law+in+India, last visited on 9th July 2017 at 2:42 p.m.

[77]Supra note 75

[78]N.S. Gopalakrishnan, "The Patents (Second Amendment) Bill, 1999- An Analysis, available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=135&do_pdf=1&id=1038, last visited on 9th July 2017 at 3:08 p.m.

[79]Shamnad Basheer, "India's Tryst with TRIPS : The Patents (Amendment) Act, 2005" available at http://docs.manupatra.in/newsline/articles/Upload/3EB650D0-BB14-48C0-AA47-B8AA992D5FF7.pdf, last visited on 9th July 2017 at 3:40 p.m.

[80]Karnika Seth, "History and Evolution of Patent Law – International and National Perspectives", available at http://www.karnikaseth.com/wp-content/uploads/history-and-evolution-of-patents1.pdf, last visited on 9th July 2017 at 9:19 p.m.

[81]ibid

[82]ibid

dependent on International treaties.[83]

PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY, 1883

During the last century, there was no existence of any international convention in the field of industrial property.[84] Due to the diversity of laws in different countries, obtaining protection for industrial property in different countries, was a difficult task.[85] Moreover, in order to protect the novelty of the invention, the patent application had to be made at the same time in all the countries. Hence there was a strong desire to overcome such difficulties.[86]During the second half of the last century the development of a more internationally oriented flow of technology and the increase of international trade made harmonization of industrial property laws urgent in both the patent and the trademark field.[87]

In 1873, the government of the Empire of Austria-Hungary had organized an international exhibition of inventions in Vienna and invited all the countries to participate in the same. However, due to lack of legal protection for inventions, the countries refused to participate in the exhibition. This led to the grant of a temporal protection to the inventions of all the foreigners participating in the exhibition. This protection was granted through an Austrian Law.[88] In the same year,1873, Congress of Vienna for Patent Reform was convened, which laid down a number of principles on which patent should be based.[89]

In 1878, an International Congress on Industrial Property was convened at Paris in 1878. Its main outcome was that one of the governments should be asked to convene an international diplomatic conference "with the task of determining the basis of uniform legislation" in the field of industrial property.[90]

Following that Congress, France prepared a final draft proposing an international "union" for the protection of industrial property. This draft was sent to a number of countries by the French government. In 1883, a Diplomatic Conference was convened in Paris. This ended with the final approval and signature of the Paris Convention for the protection of Industrial Property. The convention was signed by 11 states.

SUBSTANTIVE PROVISIONS OF THE PARIS CONVENTION

There are three substantive provisions of the Paris Convention, namely – National Treatment, Right of Priority and Common rules.

1. Under the provisions of National Treatment, the convention states that as regards protection to industrial property, one contracting state shall not accord discriminatory treatment to other contracting

[83]ibid
[84]WIPO, "International treaties and conventions on Intellectual property", available at http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf, last visited on 9th July 2017 at 9:33 p.m.
[85]ibid
[86]ibid
[87]ibid
[88]id
[89]ibid
[90]ibid

states.[91] If protection of industrial property is being given by a contracting state to another state, the same protection shall be given by that state to all the other contracting states.

2. The second substantive provision is that of the Right of priority. As per this provision, where an applicant makes a patent application for an invention in one contracting state, he may within within 12 months apply for a patent in other contracting states as well.[92] All his other applications will be regarded as having been filed on the same date as the first application. In other words, his application will have priority as against any other applications filed with regard to that particular invention. One advantage of this provision is that in order to obtain protection in several other countries, the applicant need not present all of his applications at the same time. He can take the prescribed time and decide the countries where he wishes to obtain protection.[93]

3. The Convention provides certain Common Rules for patents, which are as follows :-

Independence of patents:This rule provides that the examination, grant or denial of a patent application in one country of the Union, is independent of the applications filed for the same or related inventions in other countries of the Union.[94]

Right of the inventor to be mentioned : The inventor has a right to be mentioned in the Patent.

Patentability not effected by Restrictions on the Patent : Sometimes, restrictions may be put on the sale or importation of a product. However, this will not lead to a refusal or invalidation of patent granted on such product.[95]

Failure to work Compulsory licenses : In order to prevent abuses that might result from the exclusive rights conferred by a patent for invention, Article 5A (2) through (4) allows countries to enact protectionist legislative measures granting compulsory licenses.[96] In order to grant Compulsory License, four years must have passed from the date of filing the patent application or three years must have passed from the grant of patent.[97] It is necessary for the Compulsory license to be non-exclusive.[98] Where the patent affects a vital public interest, Compulsory License may be granted even if there is no abuse on the part of the Patent owner.[99]

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[91]WIPO, "Summary of the Paris Convention for the Protection of Industrial Property", available at http://www.wipo.int/edocs/pubdocs/en/intproperty/442/wipo_pub_442.pdf, last visited on 10th July 2017 at 7:05 a.m.
[92]ibid
[93]ibid
[94]Seth M. Reiss, "Commentary on the Paris Convention for the Protection of Industrial Property", available at http://www.lex-ip.com/Paris.pdf, last visited on 10th July, 2017 at 7:33 a.m.
[95]id
[96]ibid
[97]ibid
[98]ibid
[99]ibid

Grace period for maintenance fees : A grace period 6 months shall be granted to the patent holder to pay the maintenance fees. Where the patent has lapsed due to non-payment of maintenance fees, restoration of patent shall also be allowed once the fees is paid.[100]

Patents in International Traffic : Sometimes, patented devices which are on board ships, Aircraft, vessels or land vehicles, may accidently enter into another country. No compulsory license or approval from the patent owner is required in case of such accidental intrusion.[101]

Inventions shown and marks exhibited at International Exhibitions : When inventions are displayed at international exhibitions held within the territory of a member nation, which are "officially recognized", such member nation shall provide temporary protection to the inventions of other members nations which are displayed in such exhibition.[102]

PATENT COOPERATION TREATY (PCT)

Patent cooperation treaty is a multilateral treaty administered by the World Intellectual Property Organization. It facilitates the worldwide filing of patents. This treaty was concluded in 1970, amended in 1979 and later modified in 1984 and 2001.[103] On 24 January 1978, the treaty came into force with thirteen contracting states.[104] The treaty started accepting applications by 1 June 1978. By this time, the number of contracting states in the treaty increased to eighteen.[105] The number increased to 128 by 2005 and by 2006, several other countries announced their intention to join the treaty.[106]

Basic Objectives of PCT[107]

1. As its name suggests, the Patent Cooperation Treaty is an agreement for international cooperation in the field of patents. It is often spoken of as being the most significant advance in international cooperation in this field since the adoption of the Paris Convention for protection of industrial property. It is, however, largely a treaty for rationalization and cooperation with regard to the filing, searching and examination of patent applications and the dissemination of the technical information contained therein.

2. The PCT does not provide for the grant of international patents. The task of and responsibility for granting patents remains exclusively in the hands of the patent offices of, or acting for, the countries where protection is sought. The PCT does not compete with but, in fact, complements the Paris

[100] ibid
[101] ibid
[102] ibid
[103] WIPO, "Patent cooperation Treaty", available at http://www.wipo.int/pct/en/treaty/about.html, last visited on 10th July 2017 at 8:47 a.m.
[104] Jay Erstling & Isabelle Boutillon, "The patent cooperation treaty at the Centre of the international Patent System", available at http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1015&context=facsch, last visited on 10th July 2017 at 9:36 a.m.
[106] ibid
[107] Biotech4u, "Basic objectives of PCT", available at http://biotech4you.com/biotech-notes/ipr/284-basic-objectives-of-pct, last visited on 10th July 2017 at 9:50 a.m.

Convention. Indeed, it is a special agreement under the Paris Convention open only to States which are already party to that Convention.

3. The principal objective of the PCT is, to improve on the previously established means of applying in several countries for patent protection for inventions. This acts both in the interests of the users of the patent system and the offices which have responsibility for administering it.

To achieve its objective, the PCT[108] :-

1. Establishes an international system which enables the filing, with a single patent office (the receiving office), of a single application (the international application)in one language having effect in each of the countries party to the PCT which the applicant names (designates) in the application;

2. Provides for the formal examination of the international application by a single patent office, the receiving office;

3. Subjects each international application to an international search which results in a report citing the relevant prior art (mainly published patent documents relating to previous inventions) which may have to be taken into account in deciding whether the invention is patentable;

4. Provides for centralized international publication of international applications with the related international search reports, as well as their communication to the designated offices;

5. Provides an option for an international preliminary examination of the international application, which gives the applicant and subsequently the offices that have to decide whether or not to grant a patent, a report containing an opinion as to whether the claimed invention meets certain international criteria for patentability.

The procedure described above is commonly called the international phase of the PCT procedure. The national phase pertains to the last part of the patent granting procedure, which is the task of the designated offices, i.e., the national offices of, or acting for, the countries which have been designated in the international application.

In PCT terminology, a reference to national office, national phase or national fees includes the reference to the procedure before a regional patent office. In more developed countries with a greater number of patent applications, patent offices have been struggling for years with heavy workloads (leading to delays) and with questions of how best to allocate resources, so as to ensure that the patent system yields the greatest return from the available manpower.

Under the PCT system, by the time the international application reaches the national office, it has already been examined as to form by the receiving office, been searched by the International Searching Authority and possibly examined by an International Preliminary Examining Authority. These centralized procedures of the international phase thus reduce the workload of the national patent offices.

[108] ibid

Further main objectives of the PCT are to facilitate and accelerate access by industry and other interested sectors to technical information related to inventions and to assist developing countries in gaining access to technology.

ADVANTAGES OF PCT[109]

The procedure under the PCT has great advantages for the applicant, the patent offices and the general public:

(i) the applicant has up to 18 months more than he has in a procedure outside the PCT to reflect on the desirability of seeking protection in foreign countries, to appoint local patent agents in each foreign country, to prepare the necessary translations and to pay the national fees; he is assured that, if his international application is in the form prescribed by the PCT, it cannot be rejected on formal grounds by any designated Office during the national phase of the processing of the application; on the basis of the international search report or the written opinion, he can evaluate with reasonable probability the chances of his invention being patented; and the applicant has the possibility during the international preliminary examination to amend the international application to put it in order before processing by the designated Offices;

(ii) the search and examination work of patent offices can be considerably reduced or virtually eliminated thanks to the international search report, the written opinion and, where applicable, the international preliminary examination report that accompany the international application;

(iii) since each international application is published together with an international search report, third parties are in a better position to formulate a well-founded opinion about the patentability of the claimed invention.

TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

The Trade Related aspects of Intellectual property (TRIPS) is a multilateral trading agreement which was negotiated and concluded as an integral part of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).[110] Since the World trade organization (WTO) is the successor of GATT, the provisions of GATT are equally applicable on the members of the WTO. TRIPS is binding on all the members of the WTO.[111] It is imperative for a country to be a party to TRIPS in order to be a

[109]WIPO, "Patent cooperation Treaty (PCT) 1970", available at http://www.wipo.int/pct/en/treaty/about.html, last visited on 10th July 2017 at 9:55 a.m.
[110]Mart Leesti, "Historical Background, General Provisions and basic Principles of the TRIPS Agreement and Transitional Arrangements", available at http://nopr.niscair.res.in/bitstream/123456789/19551/1/JIPR%203%282%29%2068-73.pdf, last visited on 10th July 2017 at 3:49 p.m.
[111]ibid

member of the WTO.[112] The WTO had 131 members and 29 accessions to membership under consideration as on May 1997.[113]

The Agreement came into effect on 1 January 1995 and is the most comprehensive multilateral trading agreement on intellectual property rights.[114] The main areas covered by TRIPS are :- Copyright and related rights (i.e. the right of performers, producers of sound recordings, and broadcasting organizations); Trademarks including service marks; Geographical Indications including appellations of origin, industrial designs; patents including the protection of new varieties of plants; the layout designs and undisclosed information including trade secrets and test data.[115]

BACKGROUND

The GATT Uruguay Round

The final Act of the Uruguay round was signed on 15th April 1994 at Marrakesh.[116] Before the Uruguay rounds, the organization of world trade had a number of features which were an impediment to trade. Although in the 1960's, the tariffs had been reduced significantly, in the 1970's, the use of non-tariff barriers in agriculture, clothing and textiles, steel, automobiles, and consumer electronic goods had eroded the benefits to trade.[117] The Uruguay rounds consisted of principal agreements[118] related to reduction of tariff by one-third over ten years, reduction of protection in agriculture, conversion of all barriers to trade in clothing and textiles to tariffs over 15 years, imposition of new restrictions on subsidies, increasing the authority of the GATT dispute settlement systems, giving the GATT secretariat authority to review the trade policy of members, establishing multilateral trade rules for liberalization of trade in services and creation of a World Trade Organization to administer the GATT.

The World Trade Organization

The structure of the WTO is headed by a ministerial conference.[119] This ministerial Conference is composed of representatives of all the members which shall meet at least once every two years.[120] There shall also be a General Council composed of representatives of all the members which shall meet as appropriate.[121] In between the intervals of the Ministerial conference, its activities shall be carried out by the general council.[122] The WTO shall facilitate the implementation and furtherance of

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[112] ibid
[113] ibid
[114] WTO, "Overview: the TRIPS Agreement", available at https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm, last visited on 10th july 2017 at 3:57 p.m.
[115] ibid
[116] Supra note 113
[117] Alan Oxley, "The Achievements of the GATT Uruguay Round", available at http://press-files.anu.edu.au/downloads/press/p42481/pdf/article0519.pdf, last visited on 10th July 2017 at 6:18 p.m.
[118] ibid
[119] WTO, "The Marrakesh Agreement Establishing the World Trade Organization", available at https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm, last visited on 10th July 2017 at 10:07 p.m.
[120] ibid
[121] id
[122] ibid

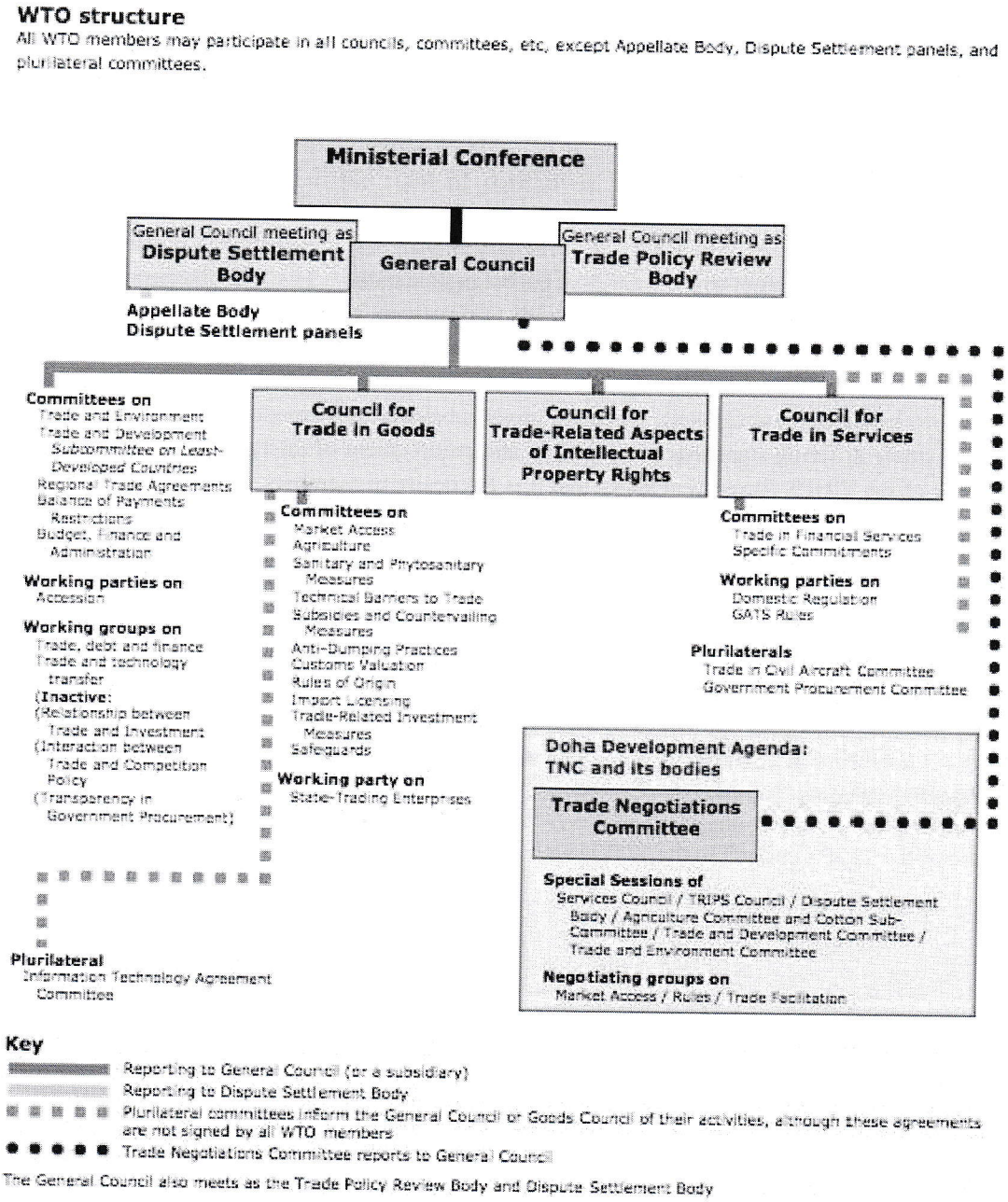
the objectives of the multilateral trade agreements.[123] It shall administer the Dispute Settlement Understanding(D.S.U.) as well as the Trade Policy Review Mechanism(T.P.R.M.).[124]

TRIPS Agreement

TRIPS Agreement entered into force on 1 January 1995.[125] The Agreement is annex 1C of the Marrakesh Agreement establishing the World Trade Organization.[126] The TRIPS agreement is binding on each member of the WTO from the date the WTO agreement becomes effective for that country.[127] The original WTO members were granted different transitional periods as per their development, to comply with the TRIPS agreement. The Council of TRIPS administers the agreement. This council then reports to the General Council. The main impetus behind the formation of the TRIPS agreement was the widely differing standards of protection and enforcement of intellectual property rights. The Preamble of the TRIPS Agreement states that it is the desire of members – "to reduce distortion and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights and to ensure that measures and procedures to enforce intellectual property rights, do not themselves become barriers to legitimate trade." There are three main features of the TRIPS agreement[128] – Standards, Enforcement and Dispute Settlement. The TRIPS Agreement sets out minimum standards of protection to be provided in respect of each category of intellectual property by each member of the WTO.[129] The Agreement also lays down certain general procedures applicable to all IPR enforcement procedures.[130] All the disputes among the WTO members with respect to TRIPS obligations shall be subject to the WTO's Dispute settlement procedures.[131]

The place of the TRIPS council in the WTO can be seen from the following figure -

[123] ibid
[124] ibid
[125] Supra note 115
[126] WTO, "Agreement Establishing the WTO", available at https://www.wto.org/english/res_e/booksp_e/agrmntseries1_wto_e.pdf, last visited on 11th July 2017 at 7:49 A.M.
[127] Antony Taubman, "A HANDBOOK ON THE WTO TRIPS AGREEMENT", Cambridge University Press, 2012
[128] Supra note 125
[129] ibid
[130] ibid
[131] ibid



Source : WTO, "Introduction to the TRIPS Agreement", available at https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules1_e.pdf.

BASIC PRINCIPLES UNDERLYING THE TRIPS AGREEMENT

a) National Treatment

One of the central principles of the TRIPS Agreement is that of the "National Treatment".[132] It is provided under Article 3 of the Agreement.[133] As per this agreement, imports and domestic "like" products must not be subject to discriminatory treatment by the members.[134] This rule not only prevents countries from taking discriminatory measures but also prevents them from using non- tariff measures which offset the effects of tariffs.[135] Eliminating "hidden" domestic barriers to trade is the main motive of the national treatment principle.[136] Therefore, the members must accord imported products no less favourable treatment that accorded to domestic "like" products.[137]

b) Most-Favoured Nation (MFN)

MFN is a core principle of the WTO. This principle requires the members to accord the most favourable tariff and regulatory treatment given to the product of any one member at the time of import or export of "like products" to all the other members.[138] This principle is stated under Article 4[139] of the TRIPS Agreement.

TRANSITIONAL ARRANGEMENT

There is no obligation on the members to comply with the rules of the TRIPS Agreement before the expiry of one year from the date on which the Agreement came into force i.e. 1

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[132] WTO, "Introduction to WTO Basic Principles and Rules", available at https://ecampus.wto.org/admin/files/Course_385/Module_1562/ModuleDocuments/BP-L1-R1-E.pdf, last visited on 11th July 2017 at 10:02 a.m.

[133] ibid

[134] Lakshmi Neelakantan, "National Treatment Principle - Analysis of GATT Article III", available at http://cn.lakshmisri.com/News-and-Publications/Publications/Articles/Tax/National-Treatment-principle-Analysis-of-GATT-Article-III, last visited on 11th July 2017 at 10:07 a.m.

[135] ibid

[136] WTO, "Principles of Non-Discrimination", available at http://phase1.nccr-trade.org/images/stories/mira/WTO%20-%20Chapter%204_non-discrimination.pdf, last visited on 11th July 2017 at 10:13 a.m.

[137] ibid

[138] UNCTAD, "Most-Favoured-Nation Treatment : A sequel", available at http://unctad.org/en/Docs/diaeia20101_en.pdf, last visited on 11th July 2017 at 10:47 a.m.

[139] Article 4 of TRIPS: With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member: (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property; (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

January 1995.[140] The developing and the least developed nations have been permitted additional delays to comply with the trips Agreement.[141]

Developed Nations

The developed country members were required to comply with the TRIPS obligations by 1 January 1996.[142]

Developing Nations

A developing country member which is in the process of transformation from a centrally planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may be granted a further period of four years.[143]An additional extension of five years may be availed by a developing country in order to extend product patent protection to the areas of technology not protected on the date of application of the TRIPS Agreement.[144] Where a developing country avails of the transitional period, any changes in law or rules or regulations by the developing nation, during the transition period, shall be in consistency with the TRIPS provisions.[145]

Least Developed Nations (LDC's)

The least developed country members have been provided a transition period of ten years.[146] This in in view of the special needs and requirements of least developed country members, their economic, financial and administrative constraints and their need for flexibility to create a viable technological base.[147] On a duly motivated request of the least developed country member, the Council may extend this period even further.[148]

[140]WTO, "Part – VI Transitional Arrangements", available at https://www.wto.org/english/docs_e/legal_e/27-trips_08_e.htm, last visited on 11th July 2017 at 11:07 a.m.

[141]ibid

[142]WIPO, "WIPO-EPO Regional Seminar on the Implications of the Agreement on Trade Related Aspects of Intellectual Property Rights", available at http://www.wipo.int/mdocsarchives/WIPO_EPO_IP_BAK_97/WIPO_EPO_IP_BAK_97_1_E.pdf, last visited on 11th July 2017 at 1:02 p.m.

[143]Art. 65 of the TRIPS Agreement

[144]ibid

[145]ibid

[146]Art. 66 of the TRIPS Agreement

[147]ibid

[148]ibid

WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

The WIPO convention was signed at Stockholm, on July 14, 1967.[149] The convention came into force in 1970 and was amended in 1979.[150] WIPO is one of the specialized agencies of the United Nations System of Organizations.[151]

The main purposes of WIPO are[152] :- 1) to promote the protection of intellectual property throughout the world through cooperation among states, and where appropriate in collaboration with any other international organization; and 2) to ensure administrative cooperation among the unions.

In order to attain these objectives, WIPO, in addition to performing the administrative tasks of the Unions, undertakes a number of activities, including[153]: (i) normative activities, involving the setting of norms and standards for the protection and enforcement of intellectual property rights through the conclusion of international treaties; (ii) program activities, involving legal and technical assistance to States in the field of intellectual property; (iii) international classification and standardization activities, involving cooperation among industrial property offices concerning patent, trademark and industrial design documentation; and (iv) registration and filing activities, involving services related to international applications for patents for inventions and for the registration of marks and industrial designs.

Membership in WIPO is open to any State that is a member of any of the Unions and to any other State satisfying one of the following conditions[154]: (i) it is a member of the United Nations, any of the specialized agencies brought into relationship with the United Nations, or the International Atomic Energy Agency; (ii) it is a party to the Statute of the International Court of Justice; or (iii) it has been invited by the General Assembly of WIPO to become a party to the Convention. There are no obligations arising from membership of WIPO concerning other treaties administered by WIPO. Accession to WIPO is effected by means of the deposit with the Director General of WIPO of an instrument of accession to the WIPO Convention.

The WIPO Convention establishes three main organs[155]: the WIPO General Assembly, the WIPO Conference and the WIPO Coordination Committee. The WIPO General Assembly is composed of the Member States of WIPO which are also members of any of the Unions. Its main functions are, inter alia, the appointment of the Director General upon nomination by the Coordination Committee, review and approval of the reports of the Director General and the reports and activities of the Coordination Committee, adoption of the biennial budget common to the Unions, and adoption of the financial regulations of the Organization.

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[149] WIPO, "Summary of the Convention Establishing the World Intellectual Property Organization (WIPO Convention) (1967)" available at http://www.wipo.int/treaties/en/convention/summary_wipo_convention.html, last visited on 11th July 2017 at 11:22 a.m.

[150] ibid

[151] ibid

[152] International Bureau of WIPO, "Introductory Seminar on Industrial Property", available at www.wipo.int/edocs/mdocs/innovation/en/isip_96/isip_96_1.doc, last visited on 11th July 2017 at 11:39 a.m.

[153] ibid

[154] ibid

[155] ibid

Vol. 3 Issue 1, Jan-Jun 2019 ISSN :2581-6837

CLIMATE CHANGE MITIGATION: RELEVANT LAWS AND INSTITUIONS THEIR LEGAL ISSUES IN INDIA

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1. Introduction

Etymologically the term, "Environment" connotes surrounding. It is a composite term referring to conditions in which organisms consisting of air, water, food, sunlight etc., live and become living sources for all the living and non-living beings includes 17 temperature, wind, electricity, etc., Environment is the life support system. It is from the Environment that all the essential necessities of life are derive. [1] Nature constitutes the Environment or the ecology of man. Not only the beauty but also the very existence of life depends on nature. "Environment includes water, air and land and the inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants, micro-organism and property[2] The word environment embraces the conditions or influences under which any individual or things exists, lives or develops.3 The environment defined as that outer physical and biological system in which man and other organisms live is a whole Albert a complicated on which many interacting components.4 The usually identified components of the environment generally include: its rocks, minerals, soils and waters, its lands and their present and potential vegetation, its animal life and potential for live stock husbandry and its climate. Environment has been considered as the aggregate of all external conditions and influences affecting the life and development of an organism.[3]

Environmental pollution is one of the serious problems faced by the people in the country. Rapid population growth, industrialization and urbanization in country are adversely affecting the environment. Though the relationship is complex, population size and growth tend to expand and accelerate these human impacts on the environment. All these in turn lead to an increase in the pollution levels. However, environmental pollution not only leads to deteriorating environmental conditions but also have adverse effects on the health of people. India is one of the most degraded environment countries in the world and it is paying heavy health and economic price for it. The present paper is an attempt to examine population growth, increasing urbanization and its influence on the environment and health of the people. The secondary analysis conducted of changes and trends over last fifty years. The analysis reveals that rapid population growth plays an important role in environmental problems of the country, from deforestation to land degradation, air and water pollution to the spread of disease. The considerable magnitude of air and water pollution pulls up the number of people suffering from respiratory and water borne diseases and many a times leading to deaths and serious health hazards. The analysis suggests that there is an urgent need to control population and environmental pollution in the country for better health of present and future generation.[4]

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[1] Dr.N.maheswara Swamy's Law relating to Environmental pollution & protection, 1998, p.2

[2] Section 2(a) of the Environment Protection Act, 1986. Section 2(a) of the Environment Protection Act, 1986.

[3] "The state of World Environment" United Nations Environment Programme, Annual Review (1980), p.6.

[4] Dr. Dewaram A. Nagdeve "Environment and Health in India" presented at IUSSP Regional Population Conference on 'Southeast Asia's Population in a Changing Asian Context at Bangkok, Thailand, 10-13 June 2002.

Environmental pollution or climate change is a serious global environmental concern. It is primarily caused by the building up of Green House Gases (GHG) in the atmosphere. The global increases in carbon dioxide concentration are due primarily to fossil fuel use and land use change, while those of methane and nitrous oxide are primarily due to agriculture. Global Warming is a specific example of the broader term "Climate Change" and refers to the observed increase in the average temperature of the air near earth's surface and oceans in recent decades. Its effect particularly on developing countries is adverse as their capacity and resources to deal with the challenge is limited. As in many other countries, India has a number of legislations, policies and institutions that, while not driven by climate concerns, contribute to climate mitigation by reducing or avoiding GHG emissions. It is proposed to study legal and institutional framework for mitigation of GHG emissions in India.

It will comprise an evaluation of relevant constitutional provisions and legislations and working of institutional machinery that deal with protection of environment bringing down degradation of environment and GHG emission in the economy and, in turn, address possible impacts of climate change. Apart from it, an effort will be made to understand judicial response as reflected in different cases mainly concerning industrial pollution and mitigation of GHG through different tools and techniques. It will help in examining gaps and shortcomings in the existing legal and institutional framework that addresses the issue of GHG mitigation in India. It will enable to provide some possible solutions and recommendations to improve the present legal and institutional framework dealing with the issue of climate change (GHG) mitigation in India.

India is vast countries where both mitigation and adaptation requirements are high and at the same time is very daunting task. This is because India has largest population after china in for meeting the needs of human and social development needs, an increase in GHG emissions for a few years would be obvious. However, changing climate, the challenge for India is to decrease the rate of increase of emissions in the economy per unit growth while meeting its development wants. This means that carbon intensity of the economy should fall, which can be achieved through sustainable productivity, conservation of resources, technology transformation, accompanied by sustainable consumption behavior .Thus, India's answer to climate change mitigation,

1. Relevant Ministries, Government Institutions and other Bodies

India's climate change policy framework is where national governments play a central role in setting targets, institutions, and policies for climate change mitigation; as well as provide necessary support to the states and local governments. [156]The Ministry of Environment, Forest and Climate Change (MoEFCC) is the nodal agency responsible for coordinating all activities related to environment and climate change in India. Several other ministries which are actively involved in climate change activities that lie within their jurisdiction. [157]The Prime Minister's Council on Climate Change (PMCCC) was set up in 2007 as the High Level Advisory Group on Climate Change responsible for formulating and coordinating the

[156] http://envfor.nic.in/
[157] http://pib.nic.in/newsite/PrintRelease

assessment, strategies and planning of climate change related activities in the country. The council was reconstituted in November, 2014 under the new Central Government. The council coordinates the action plan and advice the government on proactive measures that can be taken to deal with the challenge of climate change, facilitate inter-ministerial coordination and guide policy in relevant areas. [158]The National Action Plan on Climate Change (NAPCC) was launched by the council in 2008 as a strategic guidance document. The council periodically monitors key policy decisions in the area of climate change. The MoEFCC is the nodal agency responsible for coordinating the implementation of overall NAPCC activities, while each of the eight missions within the plan, and fall within the purview of specific nodal implementing ministries. After the launch of the NAPCC, civil societies and state governments have also emerged as key stakeholders in the area of climate change, where state governments are given the responsibility to implement NAPCC through their respective state action plans (SAPCC). Ministry of Finance while does not directly involve in policy making on climate change mitigation, it remains an important institution concerning matters related to climate change finance. The Expert Group on Low Carbon Development strategies for inclusive growth was also constituted by the erstwhile Planning Commission of India to identify potential low carbon growth strategies for the country till 2030.

Ministries/ Expert Groups responsible for climate change actions in India [159]

Cross sectors	Participating ministries/bodies
Prime Ministers' Council on Climate Change	Prime Minister(Head of Council) Minister for External Affairs, Union Finance Minister, Union Minister for Environment, Forests and Climate Change, Union Minister for Water Resources, River Development and Ganga Rejuvenation, Union Minister for Agriculture, Union Minister for Urban Development, Union Minister for Science and Technology, Union MoS of Power, Coal and NRE, Principal Secretary to PM (Member-convener of this panel), Cabinet Secretary. Foreign Secretary, Secretary, Ministry of Environment, Fore and Climate Change
Expert Group on Low Carbon	Expert advisory group with domain experts from

[158] http://www.moef.nic.in/downloads/home/Pg01-52.pdf
[159] www.teriin.org

Strategies for Inclusive Growth	different areas/ sectors
Ministry of Environment, Forest and Climate Change	Nodal
Ministry of Finance	Cross-sectoral
Sector Specific	
Energy Sector	Ministry of Power, Bureau of Energy Efficiency, Central Electricity Authority, Central Electricity Regulatory Commission, State Electricity Regulatory Commission, Ministry of Power, Coal and Renewable Energy
Transport	Ministry of Urban Development, Ministry of Road Transport and Highways, Central Pollution Control Board, State Pollution Control Board
Industry	Ministry of Industry, Ministry of Iron and Steel, Ministry of Power, Coal and MNRE, BEE
Agriculture	Ministry of Agriculture and Cooperation, DARE
Buildings and waste	Ministry of Urban Development, Ministry of Housing and Urban Poverty and Alleviation
Forest	Ministry of Environment, Forest and Climate Change
Strategic Knowledge Management on Climate Change	Ministry of Science and Technology

2. Key Mitigation Initiatives at The National Level

In 1990s, India adopted various policies, legislative and regulatory framework that is related to environmental protection which has direct bearing on impact on GHG mitigation. Early policies were related to energy security and poverty alleviation the current government policies have focused on GHG mitigation with developmental issues. Altogether, the policies range in wide variety of actions, covering all major GHG emitting sectors.

3. Five Year Plans and Climate Change Mitigation

The five year plans have given guidance to the government of India for formulating domestic policies and goals for the in five years. FYPs have considered climate change in its agenda over years in growth and sustainable development agenda for the sectors such as agriculture, forestry, water, energy and non-renewable etc

The Twelfth FYP (2012□2017) gave much significance to sustainable growth where science and technology were given significance to more critical role through increase in budgetary expenditure from 1% to 2% of GDP. Climate Change Action Programme was set up to scientific research, assessment of Climate Change, creating an institutional capacity for research and studies in the area of Climate Change mitigation (National Carbonaceous Aerosols Programme (NCAP), Long Term Ecological Observatories (LTEO), and Coordinated Studies on Climate Change for North East region (CSCCNE)). NAPCC and domestic mitigation resolution got speed through a sustainable development strategy. However, the Government of India has change the structure of the planning commission which prepares India's Five Year. Now planning commission is known as Niti Ayog.

4. International Commitments

Climate change issues got significance when a framework was entered into by world including India in 1992 to combat the challenge of climate change by adopting of the United Nations Framework Convention on Climate Change (UNFCCC). At that time, India was supporter of Article 4.7 of UNFCCC which recognizes poverty eradication and socioeconomic development of developing countries' and of Article 3.1 recognizing the 'principles of equity and of common but differentiated responsibilities' among nations. India is party to the other important environmental agreements of the world originating from the Stockholm Declaration in 1972 to the ratification of Kyoto Protocol in 2002. Keeping promises made to the global climate change issues, in the 13th Conference of Parties in 2007, India publically declared its intentions to not exceed its limits and reduce GHG

At Copenhagen, India showed its willingness to take on global leadership according to its capacity development issues. India is ready to reduce the emissions of its GDP by 20-25% by. India legislated legislation and policies to integrate environment protection into development planning in its Twelfth and Thirteen Five Year according to the aim set in CBDR, India will adopt all issues of mitigation, adaptation, finance, technology development and transfer, capacity building and transparency of actions in a balanced manner, It would cover all the national missions and other steps under National Action Plan on Climate Change and State Action Plan on Climate Change.

5. National Action Plan on Climate Change

In 2008, NAPCC was launched by the Government of India as a guiding framework for addressing issues related to climate change mitigation in the country. The action plan identified eight national missions running through 2017 to 2022 highlighting India's most pressing climate concerns and outlines independent targets for emission mitigation within the different sectors. The missions are:

- National Solar Mission (mitigation focus)
- National Water Mission (adaptation focus)
- National Mission on Enhanced Energy Efficiency (mitigation focus)

- National Mission on Sustainable Habitat (mitigation and adaptation focus)
- National Mission on Sustainable Agriculture (adaptation focus)
- National Mission on Sustainable Himalayan Eco-systems (adaptation focus)
- National Mission on Strategic Knowledge Management (mitigation and adaptation focus)
- National Mission for a Green India (mitigation and adaptation focus)

7. Enforcement of Environmental Regulations

A State implements an international norm at the domestic level in three phases: first, by adopting national legal measures; second, by enforcing them; and third, by reporting on the implementation measures. National legal measures might include enacting legislation, formulating policies or administering resources. The domestic implementation measures adopted need to be appropriate for the purpose of meeting obligations under the international treaty, so as to achieve 'compliance' with treaty obligations. The mere fact that an implementation measure is taken does not mean that it is adequate to meet a treaty obligation nor that the State is necessarily compliant with its obligation. The term 'compliance' is part of a range of terminology used to describe patterns of conformity with legal norms. Compliance is defined here as 'the fulfillment by the contracting Parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement'. However, it should be observed that compliance is not an 'all or Gaps in the implementation of environmental law 9 nothing' game. The fact that a Party is not fully compliant does not mean that it is fully noncompliant. Despite the binary nature of the language used, compliance occurs across a scale of shades of grey[160]

Enforcement of environmental regulations in India has been a major bone of contention for the legislature. The concern was highlighted in as many words by the Chief Justice of India, Justice S.H. Kapadia. In a recent speech, Kapadia suggested amending various environmental laws so as to give them "more teeth" and also provide requisite machinery to implement them properly. In light of the current political climate vis-a-vis corruption, at the forefront of public attention are many projects and factories that are alleged to having been undertaken or proposed by large corporations in contravention of environmental law or being damaging to the environment. Many of these controversies have involved civil society and native or tribal population protests, alleging that these projects have been given the approval by the Ministry of Environment and Forests ("MoEF") and the state pollution control boards ("PCBs"), without a proper assessment of its impact on the environment and the local populace and their livelihood. Therefore, the issue at the heart of the debate regarding environmental protection has been striking a balance between environmental protection and economic development of India.[161]

[160] https://ro.uow.edu.au
[161] https://indialawnews.org

ISSN :2581-6837

Conclusion

Despite international commitments and world class legislations, an institution polices and machinery India is lagging behind its expectations to improve the environment conditions. Failure of the administrative machinery can be easily seen. Due to mal-function and non seriousness of administrative machinery Government of India had made an out of court settlement on behalf of the victims of the Bhopal gas tragedy. Whatever steps has been taken so far was taken by apex judiciary of India, judiciary is sole champion of the cause of environmental protection through public interest litigation Thus, it appears that it is the lack of an adequate legislative, regulatory and administrative framework that has compelled to the judiciary to interfere or to protect environmental cause in India but good thing is that condition is improving and people are becoming more aware about environmental issues.

Vol. 3 Issue 1, Jan-Jun 2019 ISSN :2581-6837

'RISE IN LIFE INSURANCE FRAUDS IN INDIA: COMPARATIVE ANALYSIS WITH U.K.'

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INTRODUCTION

"Fear" has just four letters in order like "love" yet the two have altogether different significance. Whatever a man accomplishes for the love of their families dependably begin with the foundation of dread. By and large such a variety of times we have been asking ourselves that, what will happen on the off chance that we were not there, but rather we continue approaching as opposed to helping out it. Time is valuable, it never stops for any one and we are living in the realm of instability of employment, the vulnerability of property and like this the story goes constant for the entire existence of a man. Life is precious and has always been very uncertain. As the general nature of man, he tends to pray to God for protection and security from time immemorial in order to secure life of those people are dependent of him for survival. In modern days, only praying will not help them. It's the time when Life Insurance Companies play their role.

"Life insurance is a husband's privilege, a wife's right and a child's claim.[162]" It offers the safest and surest means of establishing a socialistic pattern, perhaps not without a lot of sweat but certainly without blood and tears. It stabilizes the economic security of the policy holder and at the same time contributes its might to promotion of industry by providing the necessary capital and supports various social security measures.[163]

LIFE INSURANCE FRAUDS

The contract of insurance is a contract either to indemnify a person against a loss which may arise on the happening of an event or to pay a sum of money on the happening of some or any event for an agreed consideration. To put it in other words it is a contract under which one party undertakes to pay to another person a sum of money or its equivalent on the happening os a specified event. Therefore the relationship of between the insurer and the insured is based on the principle of utmost good faith. This implies that both parties will abide by the spirit of the contract rather than exploit its terms. In practice it implies that the insured will disclose all matters relevant to the policy and the insured risks, whether or not specifically asked to do so, and that the insurer will not take refuge in the policy terms and conditions to resist a claim which in essence is obviously legitimate. It should not be forgotten that insurance arises out of the need for protection against catastrophe: death, serious injury, major property loss; in the past, and even today, it may stand between the insured and personal ruin. The good faith of the companies is hence vital to the confidence of the insured.[164]

TYPES OF LIFE INSURANCE FRAUDS

[162] Huebner, LIFE INSURANCE, (Appleton Century Crofts, 1960 p.17-24).
[163] Supra Note 30.
[164] Michael Clarke, The British Journal of Criminology, Vol. 29, No. 1 (Winter 1989), pp. 1-20.

If we have a look at basic types of life insurance frauds which are committed in India, it can be divided into three major categories :-

i) The first type of life insurance frauds are committed by the people who are working in the insurance business such as employees or agents of a life insurance company.

ii) The second type of life insurance frauds are committed by those people who are availing the services of a life insurance company such as policy holders.

iii) The third type and the most unusual type of life insurance fraudsters are those people who are not directly connected to the business of insurance, but have an indirect connection such as doctors.[165]

There are certain ways through which the frauds in Life Insurance sector can be committed. In other words, there are few types of life insurance frauds which are mentioned as follows :-

i. Distortion - One of the type of life insurance frauds widely committed in the country is distortion of relevant information which is necessary to be provided by the insured to the insurer in the life insurance contract. The insured misrepresents the given information which relates to the profile of the person claiming insurance. One such example of distortion committed was in the case of Life Insurance Corporation of India vs. Permanent Lok Adalat and Anr[166], the High Court of Punjab and Haryana contended that "the contract of insurance is uberrima fides, i.e. of utmost good faith, therefore, non-disclosure of material facts and furnishing of incorrect and suppression of correct facts entitles the insurance company to repudiate the policy".

ii. Counterfeiting documents – Another type of life insurance frauds is of counterfeiting documents. For instance, the life insurance company wants one of its policyholder to give his signature in a particular document needed as a part of the formality, he himself is responsible to sign that particular document. Forging his signature by someone else will amount to life insurance fraud committed by the policy holder. In the case of Guruwinder Singh Chahal vs State of Punjab[167], the petitioner in this case along with two other petitioners were involved in the act of forgery in order to get the life insurance money back after the death of one of the petitioner. The Court held this offence to be one kind of life insurance fraud.

iii. Lack in the money management- This kind of life insurance fraud involves those kind of events where either there is delay in depositing premium amount in the bank, or there is some other mis management in regard to premium amount. For example, a third person was sent by the insurance company to the policy holder in collecting the premium amount. He collected the premium amount from the insured but he fails to deposit it in the bank. Later he get a policy lapsed letter from the insurance company in failure of giving premium amount.

iv. Misselling – This kind of life insurance fraud deals with those activities which involve practice wherein full and detailed information about the policy is not provided to the insured. In the case of Life Insurance Corporation Of ... vs

[165] International Journal of Marketing, Financial Services & Management Research Vol.2, No. 5, May (2013) www.indianresearchjournals.com (Last Accessed on 6th June, 2017 05:48 PM).
[166] MANU/PH/0841/2008.
[167] CRM-M-17326-2015 (O&M).

Mrs. Shashi Sethi And Ors[168], the Himachal High Court stated "the contract of insurance which is one of uberrima fides was discharged and no liability could be fastened on the defendant. Nondisclosure of necessary and essential facts would vitiate the entire contract and the misstatements made by the insured were of material nature which vitiated the entire contract.

v. Doctor's Interference – Life insurance frauds also includes fraudulent activities done by the medical practitioners. If any of the doctor is involved in hiding any information which is necessary to be known in the insurance contract.

IMPACT OF LIFE INSURANCE FRAUDS

The Indian insurance sector has shown a significant increase in its business in 10 years. With such growth of the sector came the emergence of frauds along with it. Insurance Frauds included illegal acts which caused a huge loss to the companies, policy holders and country as a whole. Therefore the companies dealing with the service of insuring people are getting aware of consequences of these insurance frauds. It is driving parties which are involved in insurance business crazy as they have to bear huge quantum of money. This also results in decrease in the amount of profits earned by the company. Hence the companies these days are in need of a strong anti-fraud policy which will protect themselves and others too in this business in detecting and controlling frauds.

INITIATIVES TAKEN BY U.K. GOVERNMENT TO TACKLE LIFE INSURANCE FRAUDS

The laws of India and United Kingdom are more or less same, but then also United Kingdom has battled this issue of life insurance frauds in far better way than India has done. There are a few initiatives taken by UK government to manage fraudulent or fraud activities, including:

i. Insurance Fraud Investigation Group (IFIG) – This initiative was taken by number of insurance fraud investigators representing major UK insurers in order to curb the problem of rise in insurance frauds including life insurance frauds during 1990s. Since that time, the membership in this particular initiative taken by the UK government started to increase and many insurers, investigators, lawyers etc joined IFIG making it a grow rapidly. IFIG aims at detecting and preventing frauds and started to work against insurance frauds as a whole.[169]

ii. Insurance Fraud Bureau (IFB) – As the loss suffered due to life insurance frauds was getting really high , UK government took an initiative to establish Insurance Fraud Bureau (IFB). IFB is winding up plainly more trustable and capable association contrasted with IFIG viably from 2006. The IFB additionally have an uncommon line, Fraud Cheat line, which empowers extortion to be accounted for as soon as could be allowed and the line is very successful following 5 years of alleviating and revealing insurance frauds in the UK.[170]

iii. National Fraud Authority (NFA) have additionally joined the Association of British Insurers (ABI) in Fighting Fraud Together in a 5 years activity that shows they will be joining an exertion over the field with a specific end goal to pick up on fraudsters on the economy.[171]

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[168] AIR 2008 HP 67.

[169] IFIG https://www.ifig.org/about-ifig/ (last accessed on 6th June, 2017 at 01:01 PM).

[170] IFB 2006 https://www.insurancefraudbureau.org/ (Last Accessed on 6th June 2017 01.06 P.M).

[171] NFA 2011 https://www.gov.uk/government/organisations/national-fraud-authority (Last Accessed on 6th June 2017 01.19 P.M.).

ISSN :2581-6837

The above mentioned initiatives taken by the United Kingdom government have done well in order to curb and control the problem of life insurance frauds which India has lacked in doing.

COMPARISON BETWEEN THE LEGISLATIONS CONTROLLING LIFE INSURANCE FRAUDS IN INDIA AND UNITED KINGDOM

In UK there are two principal statutes relating to Life Insurance Fraud, one is the Consumer Insurance (Disclosure and Representations) Act 2012 (hereinafter referred as the "CIDR Act, 2012") and the other is Insurance Act, 2015 (hereinafter referred as the "IA Act"). The IA Act applies only to non-consumer insurance contracts only.[172] Section 1 of the IA Act defines non-consumer insurance and it further says that the consumer insurance contract would have the same meaning as is defined under the CIDR Act, 2012.

Section 1 of the CIDR Act, 2012 defines "consumer insurance contract". Thus, there is a particular categorization which has been made in the Insurance Laws in UK, whereby an Insurance for consumers who avails insurance for their personalized use are treated separately from the consumers who avails insurance for their business or trade. It would be pertinent to note that no such distinction has been made under the Indian Insurance Act, 1938.[173]

Section 2 of the CIDR Act, 2012 makes provision about disclosure and representations by a consumer to an insurer before a Consumer Insurance Contract is entered into. Section 2(2) provides that it would be the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer. It further provides that a failure by the consumer to comply with the insurer's request to confirm or amend particulars previously given is capable of being a misrepresentation for the purposes of this Act.[174]

The CIDR Act, 2012, also provides that in the Consumer Insurance Contract, it must be seen that whether a consumer has observed reasonable care in disclosing relevant details or not. It puts an onus on the consumer to observe reasonable care while disclosing the relevant particulars and Section 3 of the Act, prescribes the parameters for determination of the standard of care like the type of consumer insurance contract in question and its target market.[175]

The 2012 Act, under Section 4 provides a remedy to an Insurer for a misrepresentation made by a consumer before a Consumer Insurance Contract was entered into. The remedy could only be availed if - (a) the consumer made the misrepresentation in breach of the duty set out in section 2(2), and (b) the insurer shows that without the misrepresentation, that insurer would not have entered into the contract at all, or would have done so only on different terms. The remedies for the same are set out in Schedule I of the Act, which provides that in case of a deliberate or reckless misrepresentation by the Insured, the insurer (a) may avoid the contract and refuse all claims, and (b) need not return any of the premiums paid, except to the extent (if any) that it would be unfair to the consumer to retain them. Thus, the Act, provides remedies in cases of both deliberate and reckless misrepresentation and here deliberate misrepresentation could be understood as a fraud.[176]

[172] Section 2(1) of the Insurance Act 2015.
[173] Section 1 of the CIDR Act, 2012.
[174] Section 2 of the CIDR Act, 2012
[175] Section 3 of the CIDR Act, 2012.
[176] Section 4 of the CIDR Act, 2012.

The Insurance Act, 2015 is a comprehensive law on Insurance in force in UK for all the non-consumer Insurance Contracts entered between the insured and the insurer. Just like in the CIDR Act, 2012, the IA Act, 2015 also puts a duty of fair presentation of the risk on the insured. Sub section 3 of Section 3 defines a fair presentation of risk as one (a) which makes the disclosure required by subsection (4), (b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and (c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.[177]

The disclosure required in Section 3(3)(a), would be a disclosure of every material circumstance, which the insured knows or ought to know or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances. Section 8 of the Act provides remedies for breach of the duty of fair presentation, which prescribes that the insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer— (a) would not have entered into the contract of insurance at all, or (b) would have done so only on different terms. The remedies are set out in Schedule 1, which further prescribes that in case of a breach, the insurer may avoid the contract and refuse all claims, and need not return any of the premiums paid.

Apart from the general remedies, Section 12 of the IA Act, 2015 also provides a remedy for fraudulent claims made by the insured. Thus, by looking at the above-mentioned relevant provisions of the two statutes, it is quite evident that in UK there is a comprehensive law on Insurance frauds, which deals with all the aspects of it.

Unlike in the UK, where there are comprehensive and specific laws dealing with Insurance Fraud, it is disheartening to see that in India, there are no such laws existing on this day. In India, the two main acts governing the field of Insurance are the Insurance Act, 1938 (hereinafter referred as the "IA Act") and the Insurance Regulatory and Development Authority of India Act, 1999 (hereinafter called the "IRDA Act"). While the former is an act to consolidate and amend the law relating to the business of insurance, the latter is an act to provide for the establishment of an Authority to protect the interest of holders of insurance policies, to regulate, promote and ensure orderly growth of the insurance industry and for matters connected therewith or incidental thereto.

Both the above-mentioned acts, do not have any provision dealing with Insurance Frauds. Though, in Section 45 of the IA Act, 1938, only prescribes a limitation on the insurer to question a policy on the basis of a misstatement made by the insured unless it was a material suppression made fraudulently or deliberately. However, the provision does not define insurance fraud and fails to provide any remedy for the same.

However, a remedy for an Insurance Fraud could be found in the Indian Contract Act, 1872, which is an act prescribing the law relating to the contracts or agreements in general. It is submitted that a relationship between an insured and an insurer is a contractual relationship, where both the parties are bound by the terms of the agreement. In India, the relationship is governed by the provisions of the Indian Contract Act, 1872 (hereinafter referred as the "Contract Act"). A detailed discussion on this aspect has been made in the preceding paragraphs, wherein the remedy for an Insurance Fraud under the Indian law has been described.

[177] Section 3 of the Insurance Act, 1938.

It is submitted that the law relating to insurance fraud as quite similar in UK as well as in India, one of the reasons being that India too is a common law country, where the concepts of Contract Law is the same as that of the UK. Though the definition of fraud is not provided in UK Insurance Law, 2015, yet the principles of that are governed by common law definition of Contractual Fraud, a provision for which also finds mention in Section 17 of the Indian Contract Act. Even the remedies prescribed under the UK Insurance Law resonate with the remedies provided under the Indian Contract Act, 1872 in case of breach of a Contract by Fraud.

CONCLUSION

Insurance Sector in today's global world has become one of the fastest growing sector, which can boost a nation's economy. Be it leading economies like China or South Korea, every one of them has tapped the potential of the Insurance Sector by making appropriate regulations and policies, which in effect has ensured smooth growth of Insurance Sector. With an annual growth rate touching 7%, it would be appropriate for the government to take initiates that would check the impediment of Insurance Fraud, in the way of a healthy and prosperous Insurance Sector.

The major difference between India and UK in curbing life insurance frauds, however, is the creation of independent bodies by the Government of UK to deal with the Insurance Frauds just like National Fraud Authority and Insurance Fraud Bureau. In India, there is no independent body to investigate Insurance Frauds and thus, many insurance Frauds go undetected or unnoticed. There is no regulation or regulatory body regulating the detection and investigation of an Insurance Fraud and here, it is left on the Insurer to carry out an investigation and adopt whatever procedure they feel right.

Therefore, there is a greater need today to create specialized bodies to regulate, investigate and try insurance offences. Further, it would be advisable if a legislation covering the entire subject, would be enacted by the Parliament in this behalf. Often, the Police Authorities in India treats an Insurance Fraud as a Civil matter refuses to initiate Criminal proceedings in the same. And that's why not many people opt to initiate criminal proceedings in this regard.

In my conclusion I wish to propose that although India has various laws under different statute or codes to initiate an action against an Insurance Fraud be it a civil remedy or a criminal one, the need of the hour is to create an investigative mechanism to detect insurance Fraud. The following are the broad three heads under which reforms could be made:-

(I) A specific law or code dealing specially with frauds in Insurance Sector including life insurance fraud.

(II) Establish and create a specialized National and State Level investigative bodies, having the sole function of detection of insurance fraud and to prevent the same. The bodies would create databases of the fraudulent insurance transactions and investigate or detect an insurance fraud either Suo Moto or on the Complaint of someone.

(III) Make Insurance Fraud a penal provision providing imposition of sentences in case of a wrong doing and payment of monetary fine. Also, grant a right to the Complainant to seek compensation in cases of such frauds (both insured and the insurer) and a quick disposal of cases thereof. This would motivate the Complainant to fight against any instance of insurance fraud.

(IV) A fee could be charged from the Complainant for providing investigative services or an actionable claim by the National or the state level investigative bodies.

(V) The investigative body would also study the use to newer technologies to prevent Insurance Frauds and to detect the same. The investigative body like the Telecom Regulatory Authority of India (hereinafter referred as "TRAI") would suggest measures from time to time or issue guidelines concerning the Insurance Fraud.

The above-mentioned suggestions could be adopted to make a comprehensive policy by the Government, and only a policy on these lines would be able to strategically counter the threat of insurance fraud.

Vol. 3 Issue 1, Jan-Jun 2019 ISSN :2581-6837

CYBER VOYEURISM: TERMINATION OF PRIVACY

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ABSTRACT

In the present scenario, as the number of individuals using the social networking sites as a means of social interaction between individuals on the internet is increasing day by day. Hence, this has led to the increase in the number of infringement cases of individual's right of privacy in the realm of the cyberspace especially of juvenile's persons which constitutes majority of the internet users. There are several ways in which the right to privacy of the individual can be infringed in cyber space. One of such ways is Cyber Voyeurism. Though, the Voyeurism has been duly inserted as an offence in the Indian Penal Code 1860 by Criminal Law Amendment Act 2013. But the offence of cyber voyeurism is neither recognised in Indian Penal code nor has the same been expressly recognised under the Information Technology Act 2000. If a person's privacy is infringed over internet, it involves various complex issues such as Whether Right to Privacy is only a legal right or a fundamental right?, what amounts to cyber voyeurism? Is the same been expressly recognised as an offence under the relevant law governing the cyber space?, In which case does Cyber Voyeurism amounts to infringement of individual's right to privacy? Where does the jurisdiction lies/? And ,what shall be the remedy provided under the law? What is the way forward? Recently, the Apex Court in the case of Justice K.S. Puttaswamy (Retired) Vs, Union of India and Others in WP (Civil) No. 494 of 2012 has recognised right to privacy as a fundamental right under Article 21 of the Constitution. So in the light of the aforesaid judgment, the present research paper aims to analyse the impact of the said judgment on the cyber voyeurism and on the basis of which concrete conclusions can be drawn as to the questions referred above and suggestions can be given to check the menace of cyber voyeurism.

Keywords: Voyeurism, Privacy, IPC, India, I. T. Act 2000

Introduction:

We are living in the digital age where information means known knowledge and Technology in the field of Computer and Internet is the means to attain that knowledge. But for some person, it is a means to intrude upon the privacy of another person. A Press Note released by the Telecom Regulatory Authority of India on 3 July, 20173[178] is indicative of the prevalence of telecom services in India as on 31 December, 2016. The total number of subscribers stood at 1151.78 million, reflecting a 11 percent change over the previous year. There were 683.14 million urban subscribers and 468.64 million rural subscribers. The total number of internet subscribers stood at 391.50 million reflecting an 18.04 per cent change over the previous quarter. 236.09 million were broadband subscribers. 370 million is the figure of wireless internet subscribers. The total internet subscribers per 100 population stood at 30.56; urban internet subscribers were 68.86 per 100 population; and rural internet subscribers being 13.08. The figures only increase.

[178] Press Release 45/2017, available at http://trai.gov.in/sites/default/files/PR_No.45of2017.pdf

As the number of users of the computer and internet are increasing day by day, it has come to the knowledge of the investigating agencies that offences pertaining to the computer and internet are also increasing at a much faster rate. Furthermore, Computer and Internet becomes a tool for social interaction amongst its users, such as the use of social networking websites whose use is most commonly found amongst the users especially youngsters but it has come to the knowledge of the investigating agencies that the some mischievous users of the said website are using the same for violating the other's person right and state have recognised the certain mischievous individual's acts as offence and these acts are categorised as offences under Information Technology Act 2000. Offences which are expressly mentioned under the IT Act 2000 are Hacking, Punishment for sending offensive messages through communication etc. Further, with the development of technology of computer and internet, the content of obscene material/information in electronic form on the social networking websites or other have also increased, thereby intruding upon the privacy of an women and children have come to the highlight. So to check the Privacy issues of an individual, certain amendments in the law have been made. One of the offence which came to the highlight is that of cyber voyeurism. But before we going further to the analyse about the said offence of Cyber voyeurism, we must understand the meaning of Privacy.

Meaning of Privacy

Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable[179]. Privacy' is "[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions".[180]

What seems to be essential to privacy is the power to seclude oneself and keep others from intruding it in any way. These intrusions may be physical or visual, and may take any of several forms including peeping over one's shoulder to eavesdropping directly or through instruments, devices or technological aids.[181]

In the digital age where information technology governs virtually every aspect of our lives, so to regulate the same, the Supreme Court of India in Justice Puttaswamy Versus Union of India has taken the task to impart constitutional meaning to individual liberty in an inter connected world and whether our constitution protects privacy, if yes, then to what extent. While deciding the said issue the Court presumes to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

Privacy, that is to say, the condition arrived at after excluding other persons, is a basic pre-requisite for exercising the liberty and the freedom to perform that activity. The inability to create a condition of selective seclusion virtually denies an individual the freedom to exercise that particular liberty or freedom necessary to do that activity.

The most popular meaning of "right to privacy" is - "the right to be let alone". In Gobind vs. State of Madhya Pradesh & Anr.[182],

Even in the ancient and religious texts of India, a well-developed sense of privacy is evident. A woman ought not to be seen by a male stranger seems to be a well-established rule in the Ramayana. Grihya Sutras prescribe the manner in which one ought to build one's house in

[179] Justice Puttaswamy (retired) versus union of India & others WP(C) 494 2012
[180] Supra
[181] Supra
[182] (1975) 2 SCC 148,

order to protect the privacy of its inmates and preserve its sanctity during the performance of religious rites, or when studying the Vedas or taking meals

It can also be said that privacy is opposite of publicity.

Journey of Right to Privacy as Fundamental Right.

In M.P. Sharma Versus Satish Chandra[183] Case: The judgment in M P Sharma holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions of Article 20 (3) of the Indian Constitution though the said judgment does not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19.

2 Kharak Singh[184] has held that the content of the expression 'life' under Article 21 means not merely the right to a person's "animal existence" and that the expression 'personal liberty' is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security. Kharak Singh also laid down that the dignity of the individual must lend content to the meaning of 'personal liberty'.

43 Maneka Gandhi v. Union of India[185]. The right to privacy is inextricably bound up with all exercises of human liberty – both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is distributed across the various articles in Part III and, mutatis mutandis, takes the form of whichever of their enjoyment its violation curtails. c. Any interference with privacy by an entity covered by Article 12's description of the 'state' must satisfy the tests applicable to whichever one or more of the Part III freedoms the interference affects.

3. The Majority in Justice Puttaswamy Vs. Union of India[186] decided on 24/08/2017 and other held the as under:-

Right to privacy is a fundamental Right thereby end to give it the status of the legal right. The main difference between the two is that in case of breach of fundamental an individual can approach directly to the Supreme Court as well as High Courts.

A. The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. M P Sharma is overruled to the extent to which it indicates to the contrary.

B. The first part of the decision in Kharak Singh which invalidated domiciliary visits at night on the ground that they violated ordered liberty is an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy is not a guaranteed right under our Constitution, is not reflective of the correct position. Similarly, Kharak Singh's reliance upon the decision of the majority in Gopalan is not reflective of the correct position in view of the decisions in Cooper and in Maneka. Kharak Singh to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled.

[183] (1954) SCR 1077
[184] (1964) 1 SCR 332
[185] (1978) 1 SCC 248 at para 48 40 b
[186] WP (C) 494 of 2012

A Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution;

(B) Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within;

(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;

(D) Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;

(E)Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty;

(F) Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;

(G) This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features;

H) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in

terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them; and

(I) Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.

4 Decisions rendered by this Court subsequent to Kharak Singh, upholding the right to privacy would be read subject to the above principles.

5 Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B N Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union government having due regard to what has been set out in this judgment.

6 The reference is answered in the above terms. .....

Test of Privacy: Puttaswamy judgment also laid down the test of Privacy Test: Principle of Proportionality and Legitimacy. The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State: " (i) The action must be sanctioned by law; (ii) The proposed action must be necessary in a democratic society for a legitimate aim; (iii) The extent of such interference must be proportionate to the need for such interference; (iv) There must be procedural guarantees against abuse of such interference."

Cyber Voyeurism: Though cyber voyeurism has not been defined under the law. But it has certain traces in the law. The word "Voyeurism" was not defined/mentioned under general criminal law of India i.e. Indian Penal Code 1860 till the Criminal Law Amendment Act that took place in 2013 and the same is effective from 03/2/2013. These amendment have done by the legislature under the wake of Delhi Gang Rape Case (popularly known as Nirbhaya Case). In common Parlance, the word Voyeurism means Voyeurism is the sexual interest in or practice of spying on people engaged in intimate behaviors, such as undressing, sexual activity, or other actions usually considered to be of a private nature.[187] Under the IPC 1860, it is recognised as one of the type of sexual harassment of women. The offence Voyeurism is defined under section 354 C of the Indian Penal Code as under.

"Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such

[187] Hirschfeld, M. (1938). Sexual anomalies and perversions: Physical and psychological development, diagnosis and treatment (new and revised edition). London: Encyclopaedic Press.

image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanations

1. For the purpose of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.
2. Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section".

The section clearly states that who have been watched, or recorded, without their consent and under circumstances where the victim could reasonably expect privacy, and where the victim's genitals, buttocks or breast have been exposed.[188]

The aforesaid said section does not define cyber voyeurism. But the scope has now been extended to cyber voyeurism. With the development of mobile telephony , computer, cameras and internet, observation of individuals engaged in both private and public places, through surreptitious means, has become both easier and more common. Putting cameras in changing room in toilets and changing room amounts to Voyeurism thereby infringing one's individual privacy. In other words, the offence of Voyeurism is an against the dignity of a person/women by infringing upon the individual to control the exposure of their bodies without their consent or knowledge, either through unwarranted observation of the individual, or through distribution of images or videos against the wishes or without the knowledge of the victim

Cyber Voyeurism under Information Technology Act, 2000 Though Cyber Voyeurism has not been specifically dealt under IT Act. But section 66 E of the I. T Act 2000 which is based upon a Federal Law of USA i.e. Section 1801 of ''Video Voyeurism Prevention Act of 2004'' as the same deals with the offending act of video voyeurism. The said section 66E was introduced by IT Amendment Act, 2008. The object behind the insertion of section 66 E in the IT Act 2000 is mainly because of advancement in the field of video, mobile technology aiding covert clicking of photos without the person's knowledge.. The insertion of the said section is a specific attempt to confine ghoulish conduct and thereby, to protect individual privacy. In today's world cyber Voyeurism is one of the most important crimes that confronts the world. Data Security and individual privacy of one's own body in the digital era is one of the most complex issues which the world is facing. Due to advancement of internet and mobile telephony, computers, websites applications, television the internet reaches the house of the common man, but at the same time, it becomes a mode of threat not only to individual privacy but also to the society at large. While many countries of the world have enacted their laws to check the menace of cyber, video voyeurism menace and India is also one of those countries which have enacted law in this regard as Section 66 E of the I.T Act was inserted in

[188] The Criminal Law Amendment Act, DL (N) 2003-13, Ministry of Law & Justice Legislative Department, 2013

that system loosens. With the technological development took place, privacy issues pertaining to women or offences pertaining to cyber voyeurism increases manifold. Therefore, to check the menace of cyber voyeurism the suggestion as given above must be implemented. Apart from it, the Offence of Cyber Voyeurism needs to be defined Thus it can be concluded that the sending of an MMS capturing the private area of any person without his/her thereby violating his/her privacy must come under the parameters detailed under Section 66E of the IT Amended Act, 2008, would also be now brought within the ambit of penalty and punished with imprisonment for a term three years or with fine which may extent to two lakh rupees or with both. Furthermore, international treaty be signed between the nations of the world pertaining to dealing with jurisdictional issues with regard to the offence of cyber voyeurism thereby foreign website which infringes the right of privacy of person by uploading the video or images of his/her private parts without his/ her consent must also be punished under domestic law where the victim lives.

Vol. 3 Issue 1, Jan-Jun 2019 ISSN :2581-6837

OVERLOOKED VICTIMS' RIGHTS & LEGAL ISSUES RELATED TO REHABILITATION

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ABSTRACT

Victims' rights vary by type of crime, in some countries, victims' rights are only afforded to victims of violent crimes, while rights in other countries, it is applied irrespective of the gravity of crime. Some countries require victims to approach by requesting their rights, while victims' rights in other countries are granted automatically. Despite the widespread adoption of legal protection, the implementation of such protection and its impact on victims have not been widely studied, nor has much research been directed at how the legislation with respect to victims has influenced victims' views on the criminal justice system. One reason is that the victims who view the criminal justice system unfavorably are likely to share that opinion with others, thereby undermining confidence in the system. The current debate in India is over the victims' rights which needs extensive research in this area. This research project unleashes the strength of legal protection for crime victims' rights has a measurable impact on how victims are treated by the criminal justice system and on their perceptions of the system. In other words, enactment of State laws and Constitutional amendments alone appears to be insufficient to guarantee the full provision of victims' rights in practice. The likely reason is that a host of other factors influences the victims' psychology. The experiences of crime victims were recorded by National Center for Victims of Crime[1] where legal protection of victims' rights were reviewed. In each group, the victims were asked whether they were afforded their rights in several areas. Were they kept informed of case proceedings and their rights as victims? Did they exercise those rights? Did they receive adequate notification of available victim services? Did they receive restitution for the crime committed against them? They also were asked what losses they suffered as a result of the crime, and they rated their satisfaction with the criminal justice process and its various representatives. Representatives of the criminal justice system are the implementors of laws that provide victims access to information and facilitate victims' participation in the criminal justice process. Human rights law has analysed why and how States fail to ensure that individuals enjoy their human rights in practice, and to describe how human rights obligations should function in practice.

Keywords: Criminal Justice, Legal Protection, Rehabilitation, Victim.

[1] Research agency on victims' rights & legal assistance

Introduction:

Our criminal justice system is more or less centred around the accused and as a result victim is often ignored by the courts. 'victim of crime' is neither defined by legislature nor by judiciary. For this we have to rely upon Article 1 & 2 of United Nation General Assembly Declaration of Basic Principle of Justice for Victims and Abuse of Power (adopted in November 1985).[2] As India has Adversarial System of Justice in which accused is presumed to be innocent and burden of proof (beyond reasonable doubt) is on the prosecution. Moreover, the accused has the right to remain silent and he cannot be compelled to reply.[3] In this system right of accused is more protected than the right of victims. Giving punishment to the offender may be a good lesson for him and also for the society not to commit any further crime, but it does not provide sufficient remedy to the victim.

There is an urgent need for maintaining balance between the rights of the accused and the victim. To achieve the objective, rehabilitation of victim along with the accused is necessary. Rehabilitation means to restore him back to normal flow of life through aid, education and mental support. Criminals can also be rehabilitated to normal life because a criminal is not a criminal by birth, situation makes him so. Rehabilitation can prevent criminals from committing any further crime.

Victims' rights to rehabilitation can be secured by four ways.

1. Access to Justice and Fair Treatment: Victims should have the right to access to justice and they should get fair treatment. There should be fair, independent, expeditious, inexpensive accessible and strong judicial and administrative mechanism which will help them to obtain redress through formal and informal procedures. Victims should be informed every necessary and minute detail about the court

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[2] Article1: "Victims" means those who individually or collectively, have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights , through acts or omissions that are in violation of criminal laws operative within the member states including those prescribing criminal abuse of power.

Article2: A person may be considered a victim under this Declaration, regardless whether the perpetrator is identified apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or the dependents of the victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

[3] Article 20(3) of The Constitution of India says "No person accused of any offence shall be compelled to be a witness against himself".

proceeding of his case if he request. Victim should be allowed to be presented at appropriate stages of the proceedings where there personal interests are affected. Victims' privacy and safety should be secured. Every measure should be taken to minimize the delay and inconvenience. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized to facilitate redress for victims.[4]

2. Restitution: Restitution means restoration of lost or damaged property. It is the most comprehensive means of rehabilitation. Accused holds responsiblity to the victim(s), his family and dependents for his behavior. He should make fair restitution for loss or harm suffered, and reimbursement for expense occurred for victimization.[5] Usually restitution is based upon monetary compensation but there are non-monetary forms of restitution. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985.[6]
3. Victim's Assistance: They should be given all the necessary assistance like emergency medical help, emergency shelter, mental support, transportation, advocacy etc. Proper assistance and service is required to the victims who have special needs(it depends upon the nature of crime committed with him). Proper guidelines should be there to train the criminal justice system, health, social service and other personnel to sensitize them for the victims requirements and rights.[7] Malimath committee had recommended that legal aid, trauma counseling psychiatric and rehabilitative service is required to the rape and domestic violence victims. But Indian Legislature does not provide any such things for the above said victims.[8]

Right to protection: Victims should have the right to security and privacy to be considered at all stages of the criminal justice process, to have reasonable and necessary measures taken to protect victims from intimidation and retaliation, to request that his identity be protected from public disclosure and to request testimonial aids when appearing as a witness.

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[4] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985, Article 4-7.

[5] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985, Article 8.

[6] Basic Principles on Guidelines on the Right to Remedy and Reperation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law, G.A. Res. 60/147, annex, U.N. Doc. A/RES/60/147 (Mar.21, 2006)

[7]Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985, Article 14-17.

[8] See https://en.wikiversity.org/wiki/Indian_Law/Victims_rights

4. Compensation: It is since the ancient times, the criminal has to reimburse the victim, his family and dependents. In case of Maru Ram v. Union of India[9], Hon'ble Supreme Court has given stress on the importance of victims' right to compensation stating that:

> "...A victim of crime cannot be a 'forgotten man' in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in the case of death and other bodily injury. This is apart from factors like loss of reputation, humiliation, etc. An honour which is lost or life which is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace."

It is the best way to help the victim and his family to recover their loss and restore their dignity. It will also encourage the victim to report the crime to the police and approach the criminal justice system. Indian legislature provides compensatory relief to the victim mainly in four areas. These are as follows:-

(a) The Code of Criminal Procedure.

(b) The Probation of Offenders Act, 1958

(c) Fatal Accidents Act, (13 of 1855)

(d) The Constitution of India

According to Indian Law, under Section 357 of the Criminal Procedure Code, 1973 (Cr.PC) court can award compensation to the victim from the fine recovered as a sentence. It is the main provision which deals with the right to compensation of the victims of crime.[10] In 2009, 357A[11] was inserted to the CrPC which direct the State Government to formulate a scheme for compensation to the victims or his dependents. After that in Criminal Law Amendment Act, 2013, two sections(357-B & 357-C) are added which deals with the victims' compensation. 357B states that compensation payable by the state shall be in addition to the fine under Section 326A or Section 376D of Indian Penal Code. Section 357C states that free first aid and medical treatment shall be provided free of cost to the victims by all hospitals, public or private one.[12]

To release the offender on probation or with admonition under the Probation of Offenders Act 1958[13], court may order offender to pay compensation or cost to the victim. Similarly court may order the convict to pay compensation to the victim under the Fatal Accident Act 1855. There are Constitutional remedies[14] also for the victims of crime. Under Directive Principles of State Policy, Article 39 directs the state to frame policies to secure economic justice and Article 40 provides for equal justice which includes victims' right to compensation. Apart from these, in part IV of the Constitution, Article 51A provides that it is the duty of every citizen of India,"... to have compassion for living creatures"[15] and "to develop humanism"[16]. These provisions can also be interpreted as rights of the victims.

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9 Maru Ram v. Union of India, AIR 1980 SC 2147.

10 Other provisions dealing with this subject matter are Ss. 237, 250 and 358 Crpc.

11 See S.357 (A) CrPC, Ins. By Act 5 of 2009 (w.e.f. 31-12-2009).

Recently, the court is emphasized on the victims' right to restitution. Specially after the recognition of victims' right by the UN General Assembly, court has started giving importance on victims rehabilitation. In the case of Ankush Shivaji Gaikwad v. State of Maharashtra[17], the Hon'ble Supreme Court has observed that every criminal court has its mandatory duty to apply his mind while awarding in every criminal case.

> "62. To sum up: While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 Cr.P.C. would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family."

Some other rights to rehabilitation:

- Victim has the right to engage an advocate of his choice. Court can permit the victim for that to assist the prosecution under section 24(8).
- Victim and his family has right to attend the trial, sentencing, parole hearing and other procedings. It is necessary because otherwise there will be a bad impact on society that victim has no role in criminal justice system as the procecutor behalf of him is also appointed by the state.
- Victim has the right to be heard. It is one of the most important right of a victim. Because the procecutor requires to obtain the opinion of the victim before the disposal of the case and has to certify the court an affidavit that the victim has been duly consulted, before the prosecutor.
- Victim can prefer an appeal against any order passed by the court.
- Though in Criminal Procedure there are provisions for witness protection but there is no mention of victim protection anywhere in Indian law. But in many countries like The United States of America, South Africa, and France there is provisions for victim protection. So, they should have the right to protection.
- There should not be any unreasonable delay in the disposal of cases. The court should also consider the effect of delay on victim before giving the final decision.

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[12] See Ss. 357B & 357C CrPC, Ins. By Criminal Law Amendment Act, 2013 (w.e.f. 03-02-2013).

[13] See Section 5 of the Act.

[14] Art. 32 & Art 226 of the Constitution of India.

[15] See Art. 51A (g) of The Constitution of India.

[16] See Art. 51A (h) of The Constitution of India.

[17] Ankush Shivaji Gaikwad v. State of Maharashtra, 2013 6 SCC 770

Some legislation of other contries about victims' right to rehabiliation:-

From the early 1960s' some firm progress on victims' right was started in Europe, the United States and some other countries. Victims were paid out of public funds that time. For the first time victims' right to compensation was introduced in California in US. At present 90% of states in US have compensatory laws. In US, there is Victim-Witness Protection Act, 1982 also. In Germany, Victim is paid with compensation even if the offender is discharged. In England, under the Criminal Justice Act, 1982 the court may order both fine and compensation, but if the offender is found unable to pay both, then court may issue a compensation order only. Since 1988, the court has to justify if it does not order any compensation. In US also, the court is empowered to order compensation but if it does not order so, reasons must be recorded.

Defficiency in Indian System:

Indian legislature has recognized the victim compensation in Section 357 CrPC but the scope of this section is very limited.

Firstly; this section comes into scene only when there is conviction.

Secondly; it is limited to recovery of fine from the accused because it is a substantive sentence of fine.

Thirdly, before ordering compensation Magistrate has to consider whether the accused is able to pay the compensation or not.

Fourthly, there is a lack of clarity on compensation relief for the crime like rape. However, Malimath Committee[18] has proposed some rehabilitation schemes. There should be rehabilitation process for the offenders and his family to control the future crimes. While doing so focus should not be diverted from the justice to the victim because he is the main sufferer.

Fifthly, section 357(2) is an important provision but court use it very seldomly.[19]

There are rehabilitation theories but some defficiencies present in the process :-

1. First, there is no sound scientific research to determine how different individuals react to the same rehabilitating methods.
2. Rehabilitation may depend more decisively on the individual psychological background, hence on his particular motives to commit crimes, than on the rehabilitating methods or phylosophy.
3. A rehabilitation programme may prove to be too costly and complex to be successfully implemented in most countries.
4. Finally, rehabilitation must prefer to the psychological findings on the sociolisation and re-sociolisation processes, as change in life-long socially aquired patterns of behavior and values entails a much more complex and sometimes change in the traumatic change on the individual's structure of character.[20]

Conclusion:

The brief review of the right to rehabilitation of victim in India and other Countries reveals that-

The problems in India are three-fold:

(i) To create awareness among potential victims to recognize victimization, with a view of preventing it and seeking proper assistance and remedy when it occurs.
(i) To sensitize the courts, the police, the medical and welfare services, including nonofficial agencies, about the needs of victims and an approach towards satisfying them and,
(i) To organize victim assistance services on a wider front and more comprehensively than currently exists.[21]

Although debate will not end what should be done or not done, it is the crucial t ime for legislation and judiciary to come out with a genuine rehabilitation scheme, which would work efficiently. The present scheme needs to be revised. The present provisions under CrPC become insufficient to deal with the rights of the victims. Victims' rights should be treated as main component of the Criminal Justice System. A new legislation is need of the hour, which should be done by taking the concepts of foreign country's legislation about this subject matter (keeping in view which laws should be suitable in our country), such as

1) Fair, considerate and sympathetic treatment by police, hospitals, welfare organisations, prosecution and courts;
2) Prompt restitution/compensation to the Victim for the injury or loss suffered by using the existing provisions; and
3) Security to Victims and potential Victims against victimisation in future.[22]

18 Report of the Committee on Reforms of Criminal Justice System, Governmant of India Ministry of Home Affairs (Malimath Committee Report).

19 Hari Singh v. Sukhbir Singh (1988) 4 SCC 551.

20 Panda Barcelona; Victim's Right to Rehabilitation: India, UK and US Experience.

21 Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/37605/10/10_chapter%204.pdf

22 Panda Barcelona; Victim's Right to Rehabilitation: India, UK and US Experience.

Vol. 3 Issue 1, Jan-Jun 2019 ISSN :2581-6837

ANALYSING PATENT POOLS IN THE INDIAN CONTEXT: WHETHER ANTI-COMPETITIVE OR PRO-COMPETITIVE?

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INTRODUCTION

A technology can encompass within itself either a single patent or be an accumulation of various patented inventions. In the latter case, there are different owners for different patented inventions incorporated in that technology. In such a case, one can easily foul while adopting such technology. To avoid infringing one another's patent, these owners cross license their patented inventions and pool in their patents. This is known as patent pooling.

Patent pools can be defined as an agreement between two or more patent owners to license one or more of their patents to one another or to any third parties.[190] The objective to form pools can have either positive or negative connotations. When the pooling is done in order to facilitate the access to patented technology and to share the technology in furtherance of technological advancement, then it is allowed and such pooling is deemed to be pro-competitive. However, patent pooling is criticized when, the owners of the patent fix price or decide among themselves for non-interference in each other's area of operation. Thus, a negative connotation is assigned to patent pools as the patent owners cut down the competition among themselves.

Henceforth, it can be comprehended that patent pools are not per se anti-competitive. But, they can become anti-competitive in certain circumstances. They are criticized and become problematic when they tend to assume the character of cartels and pose a risk to the idea of monopoly.

This research project would address all these issues. Also, this concept of patent pooling is relatively recent in terms of gaining popularity in the developing countries So, there's a dearth of case laws involving the interface of patent pooling and competition. Therefore, the jurisprudence followed in the developed countries will also be analyzed apart from the relevant provisions dealing with this subject in India.

CONCEPTUALIZATION

II.1. MEANING OF PATENT POOL

Patent pool is a contractual arrangement between two or more holders of a certain stock of patents, for the joint exploitation of their exclusive rights vis-à-vis the third parties. In such

[190] WIPO, Patent Pools and Antitrust – A Comparative Analysis, at 3 (March 2014), http://www.wipo.int/export/sites/www/ip-competition/en/studies/patent_pools_report.pdf.

an arrangement, there is centralization of exploitation on one hand and on the other, the technology and its control is transferred to a joint venture or an independent individual.[191]

The origination of patent pools is dependent mainly on two reasons- (i) A technology encompasses within itself lot of patented invention, and so it becomes impossible to adopt the technology without infringing the patent of some patentee. Therefore, pooling of patents helps solve this problem. (ii) The competitors keep suing one another so that the other person is avoided from using the technology. But by way patent pools, competitors avoid suing one another. This ultimately reduces that litigation between parties and the burden of the courts.[192]

In today's time, hundreds and thousands of patents are encompassed in a technology, whose existence is indispensable to the economy. This is majorly witnessed in the fields of pharmaceuticals, biotechnology, software, communication etc. In order to avail the use of the technology, the "downstream technology users" have to seek license from holders of "upstream patent rights". In this case, the latter has the knowledge of essentiality of its patents and so it strategically designs the price. Thus, the licensees have to incur high costs in identifying, assessing and negotiating the licenses with the holders of patented technology.[193]

One of the solution available to this problem is the grant of compulsory license. This option is not generally liked by the patent holders as they have less control over the fees and so, they are discouraged from innovating further. However, there is yet another solution which is of interest to the patent holder, i.e. patent pooling. As per this concept, a collective action is taken by various patent holders by signing amongst themselves private agreements. Unlike compulsory license, patent pooling interests the patent holders as they are in a superior position, and so, they have the power to influence the terms and conditions of grant and decide upon the royalty rates.[194]

II.2 HISTORICAL BACKGROUND OF PATENT POOLING

The traces of creation of first patent pools goes back to USA when in 1856, the famously known sewing manufacturing companies, like Grover, Wilson, Wheeler, Singer, Baker etc. had sued each other for infringement of one another's patent. As against this, the lawyer and president of Grover and Baker Co. proposed to these companies to pool in their patents and be benefitted from use of each other's technology, rather than suing each other.[195]

In yet another story, a patent pool was formed in the USA by the leading aircraft manufacturers.

It was during the time of first world war, there were no airplanes that were built by USA. USA at that time was in a desperate need of airplanes, but the two companies viz. "Wright" and "Curtiss" had blocked the building of new airplanes by anyone, as the two of them had majorly held in all the patents. Thus, later in 1917, a committee was formed by Franklin D.

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[191] JOSEF DREXL, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW 139-140 (Edward Elgar Publishing Limited 2008).
[192] Priyanka Rastogi, "India: Patent Pool", Mondaq, (July 2014), http://www.mondaq.com/india/x/325602/Patent/Patent+Pool.
[193] Michael Mattioli, "Power and Governance in Patent Pools", 27 HARVARD JOURNAL OF LAW & TECHNOLOGY, Number 2 at 422-423 (2014). Available at http://jolt.law.harvard.edu/articles/pdf/v27/27HarvJLTech421.pdf.
[194] Ibid., at 423-424.
[195] iRunway, Patent Pools, at 2, available at http://www.i-runway.com/images/pdf/Patents%20Pools.pdf.

Roosevelt which recommended formation of patent pool of aircrafts covering all the aircraft manufacturers in USA.[196]

Then, in 1924, a pool by the name- Associated Radio Manufacturers was formed to standardize radio parts, airway's frequency locations and television transmission standards. Again in 1997, a pool was formed of Phillips, Sony, Mitsubishi etc. to share royalty of a SEP of MPEG-2 compression technology standards.[197]

Later, in 1998, Sony, Philips and Pioneer formed a patent pool for inventions that are essential to comply with certain DVD-Video and DVD-ROM standard specifications yet in another patent pool was formed in 1999, this time by Toshiba Corporation, Hitachi Ltd., Matsushita Electric Industrial Co., Ltd., Mitsubishi Electric Corporation, Time Warner Inc., and Victor Company of Japan, Ltd. For products manufactured in compliance with the DVDROM and DVD-Video formats.[198]

ADVANTAGES OF PATENT POOLING

The below-mentioned are the advantages of pooling patents-

- It helps in reducing transaction costs.
- It integrates complementary IP.
- It serves a 'one-stop destination' for companies/individuals seeking patents for manufacturing of their own product.[199]
- It helps in building good relationship as the competitors come together for facilitating use of technology.
- The mutual understanding as between the licensors, and between licensor and licensee improves.
- It reduces the infringement litigation which is a costly and time consuming affair.

DISADVANTAGES OF PATENT POOLING

The below-mentioned are the disadvantages of patent pools-

- It is difficult to organize or form the pools.
- It is really challenging to look after the administration of such pools formed.[200]
- The patent pools sometimes acts as a barrier to the third parties.[201]
- It controls the patents at the internationally adopted standard.
- The members of the pool consider themselves at an upper position than the license seekers, and charge huge royalties for grant of license.
- The technology and production is locked in the hand of a few companies/individuals.
- It doesn't allow the licensees to bargain or negotiate for the high royalties sought by holders of patent.

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[196] Ibid.
[197] Supra note 3.
[198] Supra note 3.
[199] Aditya A. Kutty and Sindhura Chakravarty, "The Competition- IP Dichotomy: emerging Challenges in Technology Transfer Licenses", 16 JOURAL OF INTELLECTUAL PROPERTY RIGHTS (JIPR) at 260 (2011).
[200] Kevin Closson, "Patent Pools: Are they right for your business?", SPIE Professional (Oct 2009), available at https://spie.org/membership/spie-professional-magazine/spie-professional-archives-and-special-content/oct2009-spie-professional/patent-pools
[201] Supra note 3.

- It forces the third party to seek license for all the patented technologies which he might not willing to purchase.
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INTERFACE BETWEEN IPR & COMPETITION LAW

DICHOTOMY BETWEEN IPR & COMPETITION LAW

There exist two schools of thoughts regarding the relationship between IPR and Competition Law. While one believes that the two are complementary to one another, the other one considers them to be diametrically opposite to one another. This is believed because IPR creates monopoly and Competition Law tries to eliminate it. But, as both of them aim at achieving innovation and economic welfare, they are not considered to be contradictory to each other. IP laws encourage innovation by granting exclusive rights to the originator of a creative work or inventor of an invention. In return of the same, the originator or inventor has to disseminate his intellectual creation; by doing so, he can reap economic benefits.[202]

As against this, the competition law comes into play when the dissemination of intellectual creation takes place in the market. As per this law, the products or technology should be traded or licensed in the competitive market. It tries to increase competition in the market, while eliminating the monopolistic activities. Thus, it aims for a free market, where restrictive agreements and licenses are not allowed to operate, prices are determined by the market forces, etc.[203]

In this era of globalization, coping up with the growing technological advancement and development is really a challenging task. Since everybody cannot possess every technology, it becomes necessary to share the technology or enter into licenses to use the technology. This is where technology transfer agreements come into picture. These agreements are signed between the companies and individuals, who are present not only within the boundaries of a country but, who are present outside the territory of country as well. Some of the examples of such agreements are- agreements which assign IP rights, joint venture agreements, franchise, licensing agreements to form patent pools etc. However, these technology transfer licenses are hit by Competition Law when they start to cast territorial restrictions over the licensees or levy excessive royalty rates from the licensees.

PATENT POOLS- WHETHER IN HARMONY OR IN CONFLICT WITH COMPETITION LAW?

There is no strait-jacket or definite answer to the question- Whether the patent pools are in harmony with or in conflict with the competition law. The answer to this is dependent on the very purpose with which the pool is formed, the nature of the agreement entered into between the parties who pooled in their patents etc.

As for example, if the pooling is done with a view to form cartel, then this is regard as anti-competitive. That is to say, the patent pool is in conflict with the competition law.

[202] Supra note 9.
[203] Supra note 9.

But, if the pooling is done so that the patentees are able to share their inventions in an easy manner, which would lead to further technological development or innovation, then such pool would be considered to be in harmony with the competition law.

A. INSTANCES WHERE PATENT POOLS ARE PRO-COMPETITIVE

In the following instances patent pooling is considered to be pro-competitive:

- When the pools facilitate cooperative research and standardization in information industry.
- When it helps in setting standards in telecommunications and system technologies.
- When such standardization helps in ensuring compatibility amongst the manufacturer of products.
- When it aids in dissemination of technology.
- When it leads to an increase in efficiency and promotes innovation.

B. INSTANCES WHERE PATENT POOLS ARE ANTI-COMPETITIVE

The agreement entered into between patentees who in their patents are basically the competitors who are there at the same level. Thus, patent pooling arrangements are similar to horizontal agreements, which are essentially entered between people who are there on the same level of the market. So in the following instances, it is considered to be anti-competitive:

- When buyer is forced to buy all the patented technologies when he is intending to buy just one of the patented technology.
- When the licensors allocate the markets as per their own convenience.
- When they being in a dominant position, abuse their position by overlooking at the interests of the licensee.
- When the licensee is forced to act against his free will, with respect to any matter.
- When there is a restriction put on the research and development activity.
- When they decide on the specific geographic region to operate and limit the marketing activity.
- When they decide among themselves prices or charge high royalties.[204]
- When the technology and production is locked in the hands of a few people.

Thus, whenever the patent pools restrict or impede competition and lead to private monopolization, then, they are considered to be anti-competitive.

PROVISIONS TO DEAL WITH IPR & COMPETITION LAW

PROBLEMS/ CHALLENGES POSED BY THE PATENTPOOLS

Before analyzing the provisions that deal with anti-competitive effects of patent pool, it is necessary to analyze the problem posed by such pools.

The patent pools so formed amongst the patentees pose problem either when there is a contravention of 'contractual license as entered into between the parties' or when it affects

[204] Guidelines on Standardization and Patent Pool Arrangements, at 3, 10. Available at http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/Patent_Pool.pdf

competition as prevalent in the market, i.e. it acts against the provisions of 'Competition Law'.

Contravention of contractual license happens when the licensors do an act that is beyond the terms and conditions mentioned in the contract, or join themselves to attain an unlawful object, or the licensors being at a higher level force the licensee to do something against his free will, or when the consideration demanded is too high.

As against this, the Competition Law provisions are considered to be contravened when the licensors abuse their dominant position, or enter into agreements for production/supply/distribution of patented technology which can adversely affect the competition, or determine the price, or limit or control technical development/production, or allocate the geographical area of a market.

Yet another problem with the Competition Law is that, although it helps well in addressing the problems related to general trade agreements, but it fails to solve the intricate problems related to IPR as it generally lacks the tools which would help in solving such problems.[205]

Even though a blanket approach is provided under section 3(5) of the Competition Act, 2002 yet, no mechanism is present to deal with the unfair trade practices related to IPR. Thus section 3(5) doesn't provide for much help and is therefore regarded as ineffective.[206]

Let us now analyze the provisions given under the Patent Act and Competition Act which

addresses all these problems.

PROVISIONS IN THE INDIAN STATUTES

A. SECTION 140 OF THE PATENT ACT, 1970

It deals with "Avoidance of certain restrictive conditions." It clearly provides for certain conditions, and if any of those conditions are laid in the contract, then those conditions will be void to that extent. These conditions include the condition in relation to-

- Restriction on freedom to purchase non-patented articles from the sources indicated in the contract itself and not from anywhere else.
- Restriction on the freedom to use any article which is patented and has been obtained from any source which has not been mentioned in the contract.
- Restriction on use of any process other than the patented process.
- Restriction to challenge the validity of patent, or any condition in relation to grant back obligation, or regarding imposing of coercive package licensing.[207]

If any of the condition mentioned above is present in any contract in relation to patent, then the condition is void to that extent.[208]

Patent pooling when restricting competition, will be hit by Section 140 under the ambit of the condition imposing 'coercive package licensing'. This is also in consonance with Article 40.2 of TRIPS. It is a licensing activity or agreement in which the condition is imposed upon the licensee, wherein the license is granted to him only if he agrees for the complete package. He

[205] Supra note 9, at 258.
[206] Supra note 9, at 258.
[207] P. NARAYANAN, PATENT LAW 317 (Eastern Law House 4th ed.).
[208] Ibid.

is not as such allowed seek license for the patents that are essential to him, but, for all the patented technologies present in the package. This condition is regarded to be anti-competitive in a sense that it prevents competition and is therefore, void to that extent.[209]

However, it is to be noted that, package licensing is not per se coercive. As in certain cases, it is reasonably necessary to combine the patents or know-how because they are intricately linked to one another or an effective use is guaranteed only when they are combined together in a package.

B. SECTION 3 & 4 OF COMPETITION ACT, 2002

Section 3 prohibits anti-competitive agreements. Under its sub-section (1) & (2), the agreements regarding production, supply, distribution, storage etc. entered between are considered void, if they have "appreciable adverse effect on competition". Thus, if the agreement for forming patent pools are formed contrary to what has been stated in the sub-section (1) & (2), then they are declared void, and the pools so formed are not allowed to operate.[210]

Subsection (3) of Sec. 3 provides that when an agreement is entered between enterprises engaged in trade of similar/identical goods (including cartels), which lead to price determination, market allocation, bid rigging etc. and causes an "appreciable adverse effect on competition", then it is considered to be anti-competitive.[211] So, if the patent pools are formed to carry out any of the above-mentioned activities [as stated under s. 3(3)], then they are anti-competitive.

Also, Section 3(4) lists out five kinds of agreement, which again are considered to be against the spirit of competition laws, if they cause an "appreciable adverse effect on competition". These five kinds of agreement are- (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance.[212]

Patent pool can fit properly either within the ambit of "Tie-in agreements" (as the licensee has to take the whole package of patents even though he wishes to take a single patented technology) or "Refusal to deal" (as the patent holders restricts the dealing of patented technology with the licensee if he doesn't agree to their conditions)

Lastly under section 3(5), exception is carved out for the rights conferred under the six laws viz.[213], "(i) the Copyright Act, 1957, (ii) the Patents act, 1970, (iii) the Trade Marks Act, 1999, (iv) the Geographical Indication of Goods Act, 1999, (v) the Designs Act, 2000, (vii) the Semi-Conductor Integrated Circuits Layout-Designs Act, 2000."[214]

The incentives provided in IPR which lead to creation/ innovation and ultimately to economic growth are recognized under this sub-section. Thus, the restrictions imposed by the holders of IPR's are regarded as reasonable till the time they are imposed to 'restrain any infringement'

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[209] MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 673 (Oxford University Press), available at https://books.google.co.in/books?id=sPUyCwAAQBAJ&pg=PA673&lpg=PA673&dq=coercive+package+licensing&source=bl&ots=BqplWhR7Bu&sig=U54sdhLLamrxOxKzFXWJxlbYVVk&hl=en&sa=X&ved=0ahUKEwi5y57gwbPPAhWHLI8KHby1DHcQ6AEIRjAJ#v=onepage&q=coercive%20package%20licensing&f=false

[210] Section 3(1) & (2) of Competition Act, 2002.

[211] Ibid., Section3(3).

[212] Ibid., Section3(4).

[213] R IAN MC EWIN, "IP, COMPETITIOIN LAW & ECONOMICS IN ASIA" 168 (Hart Publishing, 2011).

[214] Section 3(5), Competition Act, 2000.

or when it is 'necessary to protect the IPR'. However, those technology transfer licensing agreements that impose 'unreasonable conditions', are not protected under this section. [215]

Lastly, the exception u/s-3(5) doesn't extend to Section 4. Section 4 provides for "abuse of dominant position". The 'dominant position' of an enterprise is determined from the factors that are present under Section 19 (4). So, if an enterprise imposes any unfair condition/price[216], or denies access to market[217], or uses it dominance to enter into other market[218] etc. then it shall be considered to have 'abused' its dominant position. This will amount to an anti-competitive act.

Exercising of dominance is not prohibited. It is the abuse of 'dominant position' that is prohibited under the Act. So if patent pools "abuse their dominant position" then, their act will be covered under Section 4.

ANALYSES OF THE PROVISION IN LIGHT OF THE CASE LAW

There are no cases as such filed in India challenging the formation of patent pools on grounds of violating provisions of Competition Act. However, the CCI (Competition Commission of India) was recently faced with such a case.

In the case of Manoj Hirasingh Pardeshi v. Gilead Sciences Inc., USA[219], Manoj Pardeshi was an "Informant" in this case who had filed an information against Gilead Sciences (also referred to as "Opposite Party- OP"), a pharmaceutical company, before the CCI. He is a HIV treatment activist, who alleged that the OP had entered into anti-competitive agreement and had abused its dominant position under section 3 & 4 respectively of the Competition Act, 2002.

This was asserted by the informant because the OP had entered into the following three licenses, viz.:

(i). A voluntary non-exclusive license for production and distribution of the products of ARV (Antiretroviral drugs).
(ii). An agreement with Medicines Patent Pool (MPP) for allowing MPP to grant sublicenses to the pharma companies of India.
(iii). A tripartite sublicense agreement amongst itself, MPP and pharma companies of India.[220]

The issues before the CCI were:

1. Whether the licenses entered by OP had any adverse effect on competition under Section-3?
2. Whether OP had abused its dominant position under Section 4?

It was held by the CCI that neither there was violation of Section 3 nor there was violation of Section 4. This is because OP had no legal existence in India and in the relevant market for ARV drugs, a lot of generic producers/manufacturers were involved. So, OP cannot be said to have abused its dominant position. As regards the agreement entered by the OP, CCI

[215] Supra note 9, at 264.
[216] Section 4(2)(a) of Competition Act, 2000.
[217] Ibid., Section4(2)(c).
[218] Ibid., Section4(2)(e).
[219] 2013 Comp. L. R. 391 (CCI)
[220] Ibid., at 3, ¶ 8.

observed that presence of patented drugs as a result of signing of agreements by OP was negligible in comparison to the generic drugs that were manufactured in India. There were almost 21 pharma companies manufacturing the generic versions of the OP's ARV drug. Furthermore, most of the medicines were given by the government free of cost to the HIV infected patients who were seeking treatment under the National AIDS Control Organisation (NACO) Programme.

In fact, as regards the pool created, the CCI concluded that it was pro-competitive because it led to the improvement in the production of ARV drugs, as there was sharing of technical know-how of OP drugs with the other pharma companies of India. Furthermore, it was observed that the market for ARV drugs had grown manifold since the formation of patent pool and entering of tripartite agreement. And lastly, due to MPP the prices of drugs were reduced.

CONCLUSION & SUGGESTION

Good knowledge and technical know-how are really vital to the economic development of a country. So, the technology transfers cannot be avoided and are necessary for companies and individuals to maintain a competitive edge. For such transfers to take place, licenses are granted. Now because of the transfer of technology taking place for exploitation purpose and determination of control thereby, the competition law comes into picture. Thus, the licenses are allowed unless it doesn't affect the competition. It poses a problem when it incorporates restriction clauses, and control the licensees, such that the competition is affected.[221]

Henceforth, a balance has to be struck between the Competition Law and transfer of technology taking place under the IP Laws. Although the two laws are closely related (as both of them have a common objective to be attained), yet the interface between them is rocky. But even then, the competition legislations of a country help to minimize unfair competitive practices in the IP field to some extent.

To deal with the friction between IPR and Competition laws, laws have been enacted both at the international and national level.

At the international forum, the Paris Convention very clearly lays down the meaning of as to what constitutes 'unfair competition' under Article 10bis and Article 40 of TRIPS, the Member States are empowered to take appropriate measures to prevent any anti-competitive practices. Thus, whenever any licensing condition affects or impedes competition, then the domestic legislations are looked at and proper steps are taken to deal with such conditions. In context of India, Section 140 of the Patents Act, 1970 and Section 3 & 4 of the Competition Act provide for provisions to deal with anti-competitive practices in relation to IP.

In view of these provisions, it can be manifested that, patent pools are not per se anti-competitive. The following factors are to be considered to determine whether the pools are supportive or unsupportive of the competition prevalent in the market-

(i). <u>The nature of the licensing agreement entered between the patent holders and licensees:</u>

[221] Supra note 9, at 258.

The agreement if it prevents the competition, enumerates payment of exorbitant royalties, leads to private monopolization or is such that the licensors are at a dominant position, etc. then it is regarded as anti-competitive, otherwise not.

(ii). The purpose of forming the pool:
If the purpose of the pool is to promote R&D or technology then it is pro-competitive, but if the purpose is to form cartels and control the market, then it is anti-competitive.

(iii). The field of technology:
In certain fields like communication or software, standardization is necessary, so is the formation of the pools. In fact, in certain fields where the technology changes rapidly, continuous R&D is required, so it is necessary for various patentees to act jointly to come with better technology. The pools so formed with these perspectives are not anti-competitive.

(iv). The scope of research and development that is available:
It is believed that the scope of R&D improves when the pools are formed, as various patentees come together to share their technical know-how and resources for betterment of existing technology.

(v). The position of licensors and licensee:
When both the parties to the contract, i.e. the patentees (licensors) and licensees are treated at par and licensors do not tend to abuse their dominant position (since they've an upper hand over the licensees), then the licensing contract entered is not regarded as anti-competitive.

(vi). The conditions of the country:
The conditions of the country, especially the economic ones are such that formation of pools is required, then the pools are not anti-competitive.

(vii). Compliance with requirements of competition:

If the conditions as mentioned under the competition law are complied with and nothing is done beyond the scope of the provisions mentioned therein, then the agreement to form pools is considered to be pro-competitive.

Hence, it can be safely concluded that not all patent pools are anti-competitive. Their competitiveness is dependent on a lot of factors as above-mentioned.

Vol. 3 Issue 1, Jan-Jun 2019 ISSN :2581-6837

Privacy Revisited: A Global Perspective on the Right to Be Left Alone

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ABSTRACT

The right to privacy can be both negatively and positively defined. The negative right to privacy entails that individuals are protected from unwanted intrusion by both the state and private actors into their private life. The positive right to privacy entails an obligation of states to remove obstacles for an autonomous shaping of individual identities. Right to privacy is not expressly provided under the Indian Constitution though it is said to exist as a necessary corollary to the expressed provisions therein. So it was left to the judiciary to recognize it as a fundamental right by putting an activist interpretation of Article 21.The object behind Article 21 of the Indian constitution is to prevent encroachments upon the personal liberty by the executive except in accordance with law and in conformity with the provision thereof. Right of privacy is also recognized in The Universal Declaration of Human Rights, American Declaration of Rights and Duties of Man, International Covenant on Civil and Political Rights and American Convention on Human Rights. Privacy of individual is a right to be protected even from the gaze of the press. Invasion of privacy by press may arise when information about private affairs of a person is published by Newspaper .If the right to privacy is in clash with another fundamental rights say right to health or life, the latter right will prevail if this advances the public morality/interest and the same would alone be enforced by the court. Supreme Court of India held unanimously that the right to privacy is a constitutionally protected right in India, as well as being incidental to other freedoms guaranteed by the Indian Constitution.

KEY WORDS-Unwanted, Encroachments, Covenant, public morality, Invasion

The right to be left alone is a crucial aspect of the right to privacy. Right to Privacy in India is a peculiar blend of constitutional, customary and common law right scattered over various legal fields., before it came to be recognised in its present form in India had been accepted in the United States of America and recognised by American Declaration of Rights and Duties of Man, 1948[222]; The Universal Declaration of Human Rights 1948[223]; International Covenant on Civil and Political Rights, 1966[224]; Council of European Convention for Protection of Human Rights and Fundamental Freedom, 1950[225]; and American Convention on Human Rights, 1969[226]. Two important essays published in 1890 in the United States are said to be responsible for development of this right in the said country.In December of the

[222]Article V,IX and X
[223]Art.12
[224]Article 17
[225]Article 8
[226]Article 11 and 14

same year the Harvard Law Review published an article by Samuel D. warren and Louis D. Brandies,that launched a new legal concept which eventually broadened into the principle of information privacy.[227]There is a substantial difference between how privacy is regulated and protected in common law and civil law countries. In US constitutional law, protection is only granted in relation to the state and state actions. Actions of private parties are regulated primarily by tort law. The US stands out for its far-reaching protection of freedom of speech to the detriment of privacy rights. In European law, privacy rights are protected both in relation to state and private actors. Moreover, the question of ownership of personal data is more regulated in European law and European law stretches the right to privacy to include also public spaces quite opposite to US law where a reasonable expectation of privacy is more or less gone when a person enters a public space.

Right to privacy is not expressly provided under the Indian Constitution though it is said to exist as a necessary corollary to the expressed provisions therein. The scope of personal liberty has been and is being expanded to a great extent, with the advancement of civilization in the free society. The right to privacy of an individual has been recognized as an essential component of personal liberty. Initially, a strict interpretation was given to Part III of the constitution[228] but later on a liberal interpretation afforded it to blossom[229]. Maneka Gandhi's caseled the expansion of right to life and personal liberty wherein it was pointed out that the procedure must be just, fair and reasonable. One cannot imagine a dignified life unless he is secure in person, house and everything which is personal and dear to him. Therefore, without the right of privacy, the right to life and personal liberty cannot be imagined to be dignified. The stress on reasonable procedure implies that all those things should not be disturbed unreasonably which go on to make the life as dignified and privacy is one of such states. Privacy seeks to erect an unbreakable wall of dignity and reserve against the entire world. The free man is the private man, who keeps some of his thoughts and judgments entirely to himself, who feels no overriding compulsion to share everything of value with others, not even with those he loves and trusts. Pursuit of happiness requires certain amount of liberty to do as one likes. As per constitutional recognition of the right to privacy which protects personal privacy against unlawful government invasion there is no express mention of it in part III of the Indian Constitution. So it was left to the judiciary to recognize it as a fundamental right by putting an activist interpretation of Article 21.

The object behind Article 21 of the Indian constitution is to prevent encroachments upon the personal liberty by the executive except in accordance with law and in conformity with the provision thereof. The words "personal liberty" are of wide amplitude and hence are to be constructed in reasonable manner so that it could promote and achieve those objectiveness and to stretch the meaning of the phrase to square with any pre-conceived notions and doctrinaire constitutional theories. Privacy has become an issue in modern democratic societies which are characterized by large-scale, sophisticated bureaucratic structures and advanced technology in communications and information systems. Technological

[227]Harv. L.R. 4 (1890) 193
[228] A.K. Gopalan v. State of Madras, AIR 1950 SC 27
[229]Maneka Gandhi v. Union of India, AIR 1978 SC 597

development has been permitted to evolve without regard for its impact on our modern democratic political system. A major factor of the privacy problem is the absence of legislation and organized rules ensuring privacy, confidentiality and due process to the subjects of computerized information. Individual's claim to solitude and secrecy are major interests protected by privacy rights. It is these interests that are violated during search and seizure. Administration of an organization whether it be government, quasi-government or private, often treads into the privacy of an individual. The earliest case Kharak Singh v. State of U.P.[230], the petitioner, Kharak Singh, was challenged in a case of dacoity in 1941 but was released as there was no evidence against him. On the basis of the accusation made against him, he stated that the police had opened-up a "history sheet" for him under Regulation 228 of Chapter XX of the police regulation which defines "history sheet" as "the personal records of criminals under surveillance".[231] That Regulation further pointed out that "history sheet" should be opened only for persons who are or are likely to become habitual criminals or the aiders or abettors of such criminals'. The petitioner described that due to such surveillance, frequently the chaukidar of the village and sometimes police constable used to enter his house, knock and shout at his door, wakes him up during the night and thereby disturbed his sleep on a number of occasions. They had compelled him to get up from his sleep and to accompany them to the police station to report his presence there. When the petitioner left his village for another village or town, he had to report to the Chaukidar of the village or at the police station about his departure. He had to give them information regarding his destination and the period within which he would return. Immediately the police station of his destination was contacted by the police station of his departure and the Latter put him under surveillance in the same way as the former.

Delivering the minority Judgment, which is worth mentioning, Subba Rao J,[232] held we agree that regulation is unconstitutional as it infringes both the Article 19 (1) (d) and Art 21 of the constitution. In the view of his Lordship the whole country is a jail for a person subjected to surveillance. The freedom of movement in clause (d) of Article 19(1) of Constitution, therefore , must be a movement in a free country, i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course in the Law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom.

In the case of Govind v. State of M.P.[233]the petitioner who was a citizen of India challenged the validity of regulation 855 and 856 of the Madhya Pradesh police regulations purporting to be made by the Government of Madhya Pradesh under Section 46(2)(c) of the Police Act. Supreme Court unanimously speaking through Mathew, J. endorsed the minority opinion of Subba Rao, J in Kharak Singh's case[234] asserting the right of privacy of individual citizens. His Lordship also cited authority from Judicial opinion from U.S.A. in Griswold v.

[230]AIR 1963 SC 1295
[231]Ibid.at.p.1295
[232]Id. at1303
[233]AIR 1975 SC 1378
[234]Supra note 62at.p.1295

Connecticut[235] wherein the executive director of the planned parenthood League of Connecticut and a physician teaching at the Yale Medical School were convicted in a state court for giving information about birth control to a married couple. Connecticut Law made the use of contraceptives, as well as counselling, aiding or abetting such use; a criminal offence. Justice Douglas while invalidating Connecticut statute held that the right of freedom of speech, press includes not only the right to utter or to print, but also the right to distribute, the right to receive, the right to read and that without those peripheral rights the specific rights would be less secure and that likewise, the other specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance, that the various guarantees create zones of privacy, and that protection against all governmental invasion of the " sanctity of a man's home and the privacy of life" was fundamental.

Mathew, J. also referred to the U.S. Supreme Court's ruling Jane Roe v. Henry Wade[236] wherein the Supreme Court said that although the Constitution of the U.S.A. does not explicitly mention any right of privacy, the United States Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas of zones of privacy does exist under the Constitution, and "that the roots of that right may be found in the first, fourth and fifth Amendments, in the penumbras of Bill of Rights, in the Ninth Amendment and in the concept of liberty guaranteed by the first section of the fourteenth Amendment" and that the right to privacy is not absolute.

In case of District Registrar & Collector, Hyderabad v. Canera Bank[237].wherein The A.P. State Legislature amended Section 73 of the Stamp Act, 1899 which gave inspecting officers not only the power to search premises but also the power to seize deficiently stamped documents. The purpose behind the amendment was to combat stamp duty evasion and also to supplement the stamp revenue of the state. The amendment was challenged before the Andhra Pradesh High Court as the amendment had given unbridled power to the officers with respect to exercising discretion and, consequently the amendment was held to be arbitrary and violative of Article 14 of the Constitution of India. The decision of the High Court was challenged by the Appellant before the Supreme Court, and the Respondent contended that the impugned provision amounted to a violation of the fundamental Right to Privacy. A two Judge Bench of the Supreme Court upheld the A.P. High Court decision and reiterated recentSupreme Court decisions and held that the Right to Privacy was implicit in the Constitution of India. Furthermore, Court held that the impugned amendment was arbitrary and violative of Article 14 of the Constitution, thus it cannot be construed as procedureestablished by law under Article 21 of the Constitution. Therefore the amendment was held unconstitutional as the Right to Privacy had been violated in the absence of procedure established by law.

[235] 381 U.S.(1965) at.p. 479
[236] 410 US1973) at.p.113
[237] A.I.R. 2005 S.C. 186

In the case of State of Maharashtra v. Madhukar Narayan Mardikar[238] appellant was serving as a police inspector, Bhiwandi Town Police station in district Thana of Maharashtra State, on 13th Nov. 1965, between 8.15 and 8.45 p.m. he allegedly visited the hutment of one Banubi W/o Babu Sheikh in uniform and demanded to have sexual intercourse with her. On her refusing he tried to have her by force. She resisted his attempt and raised a hue and cry. The Supreme Court held that, even a Woman of easy virtue was entitled to privacy and no one can invade her privacy as and when he liked. She is entitled to protect her person if there is an attempt to violate it against her wish. She was equally entitled to the protection of the law. Therefore, merely because she was a woman of easy virtue, her evidence can not be thrown overboard.

In the case of NeeraMathur v. Life Insurance Corporation of India,[239] the petitioner applied for the post of assistant in the Life Insurance Corporation of India. She was called for written test and also for interview. She was successful in both the tests. She was asked to fill a declaration form which she did and submitted to the Corporation on 25th May, 1989. On the same day, she was also examined by a lady doctor and found medically fit for the job. The doctor who examined the petitioner was in the approved panel of corporation.

On 13th February 1990, the petitioner was discharged from the service without assigning any grounds in it and it seemed to be a discharge simpliciter. It was contended that the declaration given by the petitioner was false to the knowledge of petitioner who had deliberately withheld to mention the fact of being in the family way at the time of filling up the declaration form before medical examination for fitness. The court held that the particulars which a female candidate was required to furnish in the declaration were very personal and filling of the same was too embarrassing if not humiliating. Hence ordered for the removal of such particulars from the declarations these particulars impugned upon the right to privacy.[240]

Privacy of individual is a right to be protected even from the gaze of the press. Invasion of privacy by press may arise when information about private affairs of a person is published by Newspaper. The press and the right to privacy came for the first time under notice in the case of R. Rajo Gopal v. State of Tamil Nadu,[241] the petitioner was editor, printer and publisher of a Tamil weekly magazine "Nakkeeran" published from Madras. The second petitioner was the associate editor of the magazine. They were seeking issuance of an appropriate writ, order or direction under Article 32 of the constitution restraining the respondents from taking any action as contemplated in the second respondent's communication and further restraining them from interfering with the publication of the autobiography of the condemned prisoner, Auto Shankar, in their magazine. Analyzing the right to privacy the court stated that since the right to privacy has two aspects which are nothing but two faces of the same coin (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protect personal privacy against unlawful Governmental invasion. The first aspect of this

[238] AIR 1991 S.C 207
[239] AIR 1992 SC 392
[240] Ibid at p. 395
[241] AIR, 1995 SC 264

right must be said to have been violated where for example, a person's name or likeness was used, without his consent, for advertising or non- advertising proposes or for that matter, his life story was written whether laudatory or otherwise and published without his consent. His Lordship further held that, the right to privacy was implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It has "right to be let alone".

A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning above matters without his consent – whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages.[242]

The Court pointed out that publication of public records; reports about sexual assault, kidnapping, abduction etc if it affects female's dignity etc cannot be published.

Applying the above principles, the court held that, the petitioners had a right to publish, the life story / autobiography of Auto Shankar in so far as it appeared from the public records, even without his consent or authorization. But if they go beyond that and publish his life story, they may be invading his right to privacy, and would be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication.

The evil incident to the invasion of privacy of telephone is as great as the occasioned by unwarranted publicity in newspaper and by other means. Whenever a telephone line is tapped the privacy of those talking over the line is invaded and conversations, wholly proper and confidential may be overheard.

In the case of People's Union for Civil Liberties v. Union of India,[243]a public interest litigation under Article 32 of the constitution of India was filed by the people's Union for Civil Liberties, a voluntary organisation, highlighting the incident of telephone tapping in the recent past. Delivering the Judgment Justice Kuldip Singh opined that the right to privacy by itself – has not been identified under the constitution… but the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy".

In the case of Mr. ' X' v. Hospital 'Z',[244] the court held that the right to privacy is not absolute and may be lawfully restricted for the prevention of crime, disorder or for the protection of health or morals or protection of rights and freedoms of others. As such, when a patient was found to have HIV positive, its disclosure by a doctor would not be violative of either on the ground of confidentiality or the patient's right to privacy as the lady with whom the patient is likely to be married is saved in time by such disclosure. She would have been infected with the dreadful disease had her marriage taken place and consummated. Therefore, the right which would advance the public morality or public interest would alone be enforced

[242] Id.at.p.264
[243] AIR 1997 SC 568
[244] AIR 1999 SC 495

through the process of law. If the right to privacy is in clash with another fundamental rights say right to health or life, the latter right will prevail if this advances the public morality/interest and the same would alone be enforced by the court. In the case of Justice k s Puttaswami (Retd.) &anr. ..Petitioners Vs Union of India[245].Respondents, Nine judges of this Court assembled to determine whether privacy is a constitutionally protected value. The issue reaches out to the foundation of a constitutional culture based on the protection of human rights and enables this Court to revisit the basic principles on which our Constitution has been founded and their consequences for a way of life it seeks to protect. Supreme Court of India held unanimously that the right to privacy is a constitutionally protected right in India, as well as being incidental to other freedoms guaranteed by the Indian Constitution. In general privacy is not an absolute right and hence can be limited by the law[246]. To conclude the right to privacy has become a fundamental human right, solidly embedded in International Human Rights law as well as in national Constitutions, legislations and jurisprudence of different countries. So the need of the hour is a constitutional amendment whereby right to privacy is explicitly included in part III of Indian Constitution.

[245](2017) 10 SCC 1
[246](2003) 4 SCC 493

Vol. 3 Issue 1, Jan-Jun 2019 ISSN :2581-6837

THE CONCEPT OF MERGER CONTROL IN TAKEOVER REGIME IN INDIA

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INTRODUCTION

The terms mergers, amalgamation, acquisitions and takeovers, over a period of time have occupied a very significant position in sphere of dynamically evolving corporate/commercial laws. These terms are used wherever there is a restructuring or reorganization of a corporate entity and in cases of various business combinations.

Mergers can be explained in terms of an arrangement, wherein, the assets belonging to two or more companies are transferred to or comes under the control of a company and it is not necessary that this company is either of the two or more companies[247].

In practical sense Mergers and Amalgamation carries a similar meaning. Still, a minute difference can be drawn between the two above mentioned terms on a closer observation. As far as mergers are concerned, it mostly denotes that there is a fusion of two companies. The term amalgamation on the other hand denotes an arrangement or compromise between two or more companies. Further, the term mergers are used in a restricted or so called narrow sense whereas amalgamations have a broader implication.

The term amalgamation has been further defined in the case of Re. PrakashanPvt Ltd[248]. In this case amalgamations have been defined as the organic unification of various legal entities. Amalgamation can be between any numbers of companies.

Takeover in general parlance is acquisition of control over a target company either by acquiring the shares or by way of control on the management of the company. Both the terms i.e. Takeover and Acquisition are used interchangeably by numerous writers. The only difference which can be drawn out of these two terms is that takeover denotes a sudden and sometime hostile in nature whereas acquisition is an act similar to takeover in a more planned way generally on friendly note. So takeovers denotes sudden raiding in order to take over the management of the target company so that there can be change in 'control' over the company whereas acquisition refers to a stage next to takeover acquiring the target company[249]

There are various reasons which can be attributed to the growth in the mergers, acquisition and takeovers in India. But the liberalization policy[250] during the reign of Dr. Manmohan Singh as the Finance Minister was the prime cause of growth of business activities. Due to government de regularization, business activities started growing in the country and foreign

[247] Robert Heller, "Mergers, Acquisition and takeovers; Buying another business is easy but making it a successful merger is full of pitfall", 2006 (thinkingmanagers.com)
[248] In Re Patrakar Prakashan Pvt Ltd (1997) 33 (MP) 13 SCL
[249] Source: purposedrivennews.com (http://www.purposedrivennews.com/purpose-driven-news/takeover-code)
[250] Included steps like ending many public monopolies, allowing automatic approval of FDI in many sectors, etc.

players started trying their hand at the Indian market. Resultantly, there was growth in the instances of mergers, acquisition and takeovers.

These business activities which involved restructuring where bought in the purview of law primarily to check any abuse of any kind to the society (by virtue of court's interference)[251] as well as to regulate any anti competitive act[252].

But with the increased dynamics as well as the complexity of modern business restructuring over a prolonged period of time, apart from the above mentioned reasons, such forms of restructuring have emerged as a modern tool to change the control[253] over entity/entities involved in such transaction/s. As a result, the legislature through its delegated powers[254] have enacted laws and regulation to check such abuse of sudden management change with the view to safeguard the public shareholding from any form of fraud to such share holders and other stakeholder.

Takeover implies the process wherein the controlling interest of an entity is transferred to another entity/person. Generally, a friendly takeover is one where the promoter group or that group of shareholders who are holding the controlling power sells its shareholding to the acquirer. On the other hand, hostile bidding is a situation where the management or the controlling shareholders as the case may be, be unwilling to strike a deal with the prospective acquirer and the said prospective acquirer then makes an open offer for public shareholding[255].

A takeover can be defined as a transaction of series where any person (inclusive of legal person) or a group of person attains control over the company's asset. This can either be done directly by becoming the owner of the said asset or indirectly by attaining control over company's management. It can therefore be inferred that when the shares of a company are held by a small number of people (shares being held closely), takeover will generally be affected by virtue of an agreement with the majority holders. Wherein, in cases where the shares are publically held, takeover can be effectuated by: an arrangement between the controller of management of the target company and the acquirer, purchasing shares listed on the stock exchange or by virtue of a takeover bid.

In context of type of business acquired, takeovers can be divided into

Horizontal Takeover: When two companies operate in the same industry and have similar functional area/s and one company is acquired by the other company, then such type of takeover has been categorized as Horizontal Takeover. This prime motive behind such takeovers is to increase the economies of scale. The takeover of Hutch by Vodafone is an example of Horizontal Takeover.

Vertical Takeover: When a company takeover either its supplier company (also known as

[251] as provided in Companies Act

[252] As governed by the MRTP Act previously and presently by Competition Act

[253] To be discussed in detail in the chapter related to control

[254] SEBI enacted by the SEBI Act regulate such restructuring activities.

[255] Dr. J.C Verma, Bharat's Corporate Mergers, Amalgamations and Takeovers: (Concept, Practice and Procedure), Fifth edition 2008, page. 74

forward integration) of customer company (also known as backward integration), then such a form of takeover is called a vertical takeover. Maruti Udyog Ltd taking over Sona Steering Ltd is an example of backward integration. Cost reduction is generally the main motive behind such takeovers.

Conglomerate Takeover: The takeover of one company by another company operating in a totally unrelated industry with diversification as the prime objective is called a Conglomerate Takeover.

CONTROL AND ITS RELEVANCE IN THE TAKEOVER CODE

The general day to day function of a company is carried out through the board decisions. Whereas shareholders derive their right to control the company by virtue of the ownership rights they possess. It is noteworthy that having 'control' need not necessarily imply having 'ownership' simultaneously. Control can still be there when there is partial or no ownership.

Umakanth Varottil in one of his articles has given a vivid description on control with the help of an illustrative spectrum of different types of control along with changing shareholding. The table in his article provides for these different kinds of shades of control:

-When the controller's shareholding is 100 percent, then there is absolute or total control, with the controller having the flexibility to manage the company in any desired manner

-When the controller's shareholding is two third of the total voting rights, can take all significant decisions

-When the controller's shareholding is more than 50%, there is a legal or de jure control over the appointment of directors and control over matters requiring simple majority

-When the controller's shareholding is more than one third of the total shareholding, it exercises negative control. This is possible because decisions requiring special majority can be blocked by such percentage of shareholding

-The last to fit in this spectrum would be control of management without having any shareholding.

The first four types of 'control' come under the category of de jure control. Whereas the last one is an example of de facto control. There can be several other example of such de facto control. For instance shareholders with less than majority shareholdings may by virtue of shareholders agreement be granted the right to nominate majority of the directors. Similarly, such agreement may give the shareholders the right to appoint key managerial persons.

The concept of 'control' plays a significant role in the takeover transaction. Similarly, on a further understanding, it becomes clear that the more important concept is of 'effective control'. This is because the mandatory bid rule is triggered when the acquirers exercise effective control and not just any sort of control.

India has adopted a policy which is inclined towards minority protection and therefore often criticized on the ground that it overlooks the interest of the investors. The regulator in India i.e. SEBI generally, while framing regulations, calls for the opinion of various stakeholders

and legal practitioners[256] in order to update itself with the kind of problems and the range of views which different stakeholders have. The SEBI Takeover Code has been modified thrice since its inception. These regulations have been a subject to changes dynamically as per the requirements due to the growing complexity of takeover norms. Globally, majority of the jurisdictions have adopted a numeric threshold of shareholding so as to detect 'control' over a company. India has adopted a dual policy in this regard wherein it prescribes for a subjective definition of control which is in addition to the numeric threshold as fixed b y the legislature.

The subjective definition of control (in addition to the objective criteria of a numerical threshold) can be bifurcated into two parts which triggers the requirement for Minimum Bid Rule. [257]First relates to a

Situation where the acquirer (along with Persons Acting in Concert) holds substantial shares but below the threshold (as required for triggering MBR) and still is the single largest shareholder of the company. In this case, generally the acquirer will have strong hold on the target company as it plays the major role in appointment of the board due to the fact that the shareholding of the company is scattered in nature. Second relates to a situation where the acquirer holds substantial shares (below the threshold for invoking MBR) in the target company and there is another group or person (like promoters) who also posses substantial shareholding of the company. Over here total control is generally not possible. Controlling power is generally shared in such scenarios. The problem which is akin to this scenario is of financial institutions that hold certain protective rights in the company's management although they have no interest in having the control over the company.

SEBI Takeover Code prescribes that an acquirer is liable to make an open offer whenever such an acquirer acquires more than 25% of the voting rights of the target company. Apart from this requirement, SEBI also mandates for making an open offer whenever there is a change of 'control' of the target company.

The word 'control' has been defined by the SEBI Takeover Code. As per the 2011 code control over a company includes[258]:

1. Having such rights enabling the prospective acquirer to appoint majority of the Board of Directors
2. Such rights which enable to control policy decision
3. Such rights enabling the control of management of the target company

The first SEBI regulation governing takeovers came in the year 1994. The Bhagwati Committee was thereafter constituted in order to review the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994. Similarly, Takeover Regulations Advisory Committee (TRAC) was formed to review of the then existing Takeover Code of 1997. Both of these committees were of the view that the definition of control as is present in the Takeover Code has been deliberately kept inclusive and open in nature. The reason for such

[256] SEBI issues several discussion papers in order to take public opinion on numerous points of regulations and other related issues.

[257] SEBI Takeover Code provides that an acquirer includes all such persons with some common intent of acquiring the company. All such person clubbed together is known as person acting in concert (PAC).

[258] Regulation 2 (1) (e) of SEBI Takeover Code, 2011

inclusive definition was the fact that it was intended to leave it up to the decision of the regulator i.e. SEBI to look into each case and decide the element of transfer of 'control' on the basis of the facts of the given case at hand[259].

The Takeover Regulations Advisory Committee (TRAC) wanted to widen the ambit of the term 'control' and therefore in a meeting held with SEBI in 2011, it recommended that provision defining control as "right to appoint majority directors" should be substituted with " Right and Ability to appoint majority directors". This recommendation of TRAC was not accepted and the older provision continued.

CONCLUSION

One of the most important rationales of bringing in the concept of mandatory bid rule is to provide a structure so as to protect the overall equitable concept of equality of opportunity. Prima facie this rule for making a mandatory bid provides a mechanism wherein the minority shareholders of the company can make an exit from the company in a scenario where the management of the company is changing and is unfavorable for the existing minority of the company. The importance of this minority rule lies in the fact that there is always a probability that the acquiring entity may have a de facto control over the target company without having a majority control. This can be further understood that it is possible for the acquirer that even without taking the financial burden of making the acquisition of all the shares, it would be having a de facto control over the company. Even after the acquisition, the existing shareholders would not be assured of getting the exit opportunity on terms which are favorable to such shareholders as the policy of the new policy might not suit the tendency of the existing shareholder's perspective of profitability. On a second level, it can be understood with the following terms: All the existing shareholders of the company are equal in terms of their rights. Therefore, the shareholders who

transfer their shares to the entity that is acquiring the shares helping such entity to cross the provided threshold for invoking mandatory bid rule, should also share the control among every shareholders[260].

Although, this is one side of the actual picture, apart from these rationales for the rule of mandatory bidding, the negative includes the fact that, these takeover regulations administering acquisition after a certain threshold often acts as an obstacle to a series of transaction which is have favorable effect on both i.e. market and shareholders. At a further level, this rule of mandatory bidding would add to the financial cost and time taken for the transaction which otherwise would have been financial efficient and completed in the fixed time frame.

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[259] SEBI's discussion paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations" Published on March 14th, 2016.

[260] One of the most important rationales of regulations relating to takeovers in majority of the jurisdictions all across the worlds provides/advocates that shareholders belonging to the same class of the target company should be equally treated. For reference kindly go through, City Code of the United kingdom, the new edition of this code which came into force on May 20, 2013; General Principle 3. In this regard also go through Lan Luh Luh, Ho Yew Kee & Ng See Leng, "Mandatory Bid Rule: Impact of Control Threshold on Take-over Premiums" [2001] Sing JLS 433 at 435.

This discussion helps us in drawing a normative analysis that this rule of mandatory public office serves the greater purpose of providing an exit opportunity to the existing minority shareholder of the target company. The rule of mandatory public offer would thereby be applicable in case the minority wants to exit but not in such scenario where there is a change in control of the company which is favorable both to the company and all the shareholders and where it would be prima facie evident that such change is bring in profitability.

Coming to the qualitative and quantitative aspect of the minimum bid rule, we notice a majority of jurisdictions all across the globe are now opting for the quantitative rule. Countries like England, Belgium, Austria and Italy have initially opted for quantitative check on the minimum bid rule but went on to a shift to the qualitative approach. The ambiguities surrounding the qualitative approach make it tough for the countries to enact it. The problem is quantitative approach to check control lies in the fact that clever structure of the transaction can create a scenario of having a de facto control without making mandatory public offer. Although, in this regard we may appreciate the effect of jurisdictions like UK wherein the government have enacted legislations in order to bring the acquisition of certain complex financial instruments like equity derivatives within the parameters of applicability of minimum bid rule. Similarly, Singapore has taken up this issue on a more practical term wherein it lays down that disclosure of such complex instruments (derivate instruments) is mandatory while disclosing the shareholding for takeover regulations. Related to the rule of Mandatory bidding, lies the rule making the disclosure requirement regarding the securities of the target with the acquirer. Disclosure requirements are often made mandatory by the takeover regulation itself. This rule often severs a warning to the shareholders of the target. This rule generally acts as a signal that the company might is acquired by those who are made to disclose the holdings of the target company[261]. Most of the jurisdictions across the globe have incorporated these disclosure requirements elaborately in the takeover regulation/s[262].

It then, remains in the hand of the regulator to decide, depending on the facts and circumstances of each individual case whether to include such instruments within the scope of control.

For countries which follow a quantitative approach so have to ascertain effective control, the shareholding pattern of the general shareholding should be taken in account so as to set the limit at an higher end if the shareholding in concentrated among few whereas the threshold for the ascertain control should kept at a lower end if case the general shareholding is scattered.

A normative claim can hereby derived from the above discussion that it becomes important to there have a periodic review of the shareholding pattern of a country so that the set benchmark can be thereby

such negative rights is to protect their own interest. Further, the introduction of whitewash mechanism in jurisdiction with qualitative approach can be bought in to play so as to mitigate the severity of this approach. As per the whitewash mechanism, if acquirer need not make an open offer

[261] Umakant Varottil; The Nature of Market for Corporate Control in India

[262] In Singapore, Securities Industry Council is the regulator

in a scenario is such a takeover have been done with a prior permission of the shareholders. But, this provision can be included only if the shareholders are making an informed decision. India too had had whitewash provision previously but it was done away as the farmers were skeptical about the misuse of this provision by way of influencing the shareholders[263].

This part of the dissertation is not meant to suggest the supremacy of one rule over the other, the points are to be individually taken and a process of integration would be beneficial if proper consideration is given to various domestic factors with the sense of market dynamics in a particular jurisdiction. A suitable mix of these measures might sever a useful purpose of tacking mandatory bid related issue.

The Indian Regulator i.e. SEBI has taken a proactive role in determining the change of control and still continues to take up a case to case analysis. The above mentioned points taken together can act as a guiding factor regulating takeover transaction and these can simultaneously provide certain sense of certainty in the present business atmosphere of control regime of takeovers.

Vol. 3 Issue 1, Jan-Jun 2019 ISSN :2581-6837

INTERNATIONAL CONFERENCE ON RECENT ADVANCEMENT IN MANAGEMENT, SCIENCE, TECHNOLOGY, EDUCATION AND LEGAL ISSUES

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ABSTRACT

Around the globe approximately each and every country have their own investigating agencies, each agency is form to looking down different matters. The history and the reason for their establishment is different from each other as per their struggles are different, their achievements are different, but their main goal is same i.e. to protect the people from the mischief elements in our society. The one of the well-known agency in the world and certainly one of the most important agencies in India is CBI (Central Bureau of Investigation).

CBI since its formation has always played an important role in Indian society and politics. It is always in limelight for all good and bad reasons. CBI is not a statutory body, however, its power has been derived from the Delhi Special Police Establishment Act, 1946 and the CBI was regarded as the main investigating agency of the central government.

This paper is going to focus on the birth, development and role of CBI in India. There would be a focus on the very aspect of beginning of the CBI starting from the year 1941 to 1953, the further with the aspect of the very existence of CBI from the 1960's. It would be discussed that how the CBI's significance increased after 1980's when the crime rate in India also increased in various areas such as assassination, kidnappings, crime by extremists, large scale bank and insurance frauds, murder, rape, dowry deaths, cases like Bhopal Gas Tragedy etc. At the end, there would be focus on the role of CBI in determining the judgments by the Indian judicial system.

CBI: BIRTH, DEVELOPMENT & ROLE IN INDIA

INTRODUCTION

Around the globe approximately each and every country have their own investigating agencies, each agency is form to looking down different matters. The history and the reason for their establishment are different from each other, their struggles are different, their achievements are different, but their main goal is same i.e. to protect the people from the mischief elements in our society. The one of the well-known agency in the world and

certainly one of the most important agencies in India is CBI (Central Bureau of Investigation).

CBI since its formation has always played an important role in Indian society and politics. It is always in limelight for all good and bad reasons. Recently CBI was again in limelight because of the famous Saradha chit fund scam. Entire nation shocked when the West Bengal police detained the CBI officers and the allegation by the West Bengal government on the central government to use CBI for their political gains. Whose know who is right, but it is very clear that CBI is one of the most important parts of Indian society, so it is necessary to know more about CBI.

THE STARTING POINT (1941-1953)[1]

During the British rule, in**1941** the government of India passed an executive order, for setting up the **SPECIAL POLICE ESTABLISHMENT (SPE)**. The SPE was established because at the early stage of World War-II, the government of India realised that vast amount of money which was released by the government for war efforts had provided opportunity to many mischief and anti-social elements, both at official level and non-official level, to indulged in the crimes like bribery and corruption, which was harmful for the government at that time because that was just not only effecting the war efforts and harming the interest of government but also equally harmful for the public (but not more harmful, then British government).

At that time the British-India government felt that the police and other law enforcement agencies were not in the position to control and investigate the situation, so the government establish the SPE to investigate cases of bribery and corruption in transactions with the War & Supply Departmentof India during World War II.

In the year **1942**, the role of SPE was increased and the corruption cases of Indian Railways were also given to the SPE. The railways during the British time in India played an important role because the major transportation of goods was executed through the railways and during the war, the railways played an important role because it helped in the movement of supply of war materials.

A **SPF (Special Police Force)** was established in year **1943**, by the government of India through an ordinance, which gave the power to SPF to investigate the certain offences committed anywhere in British India in relation to the central government departments. After the world war-II, in the year **1946** the ordinance of 1943 had lapsed and replaced by (DSPE) **Delhi Special Police Establishment Ordinance, 1946**. It happen because after the

[1]The starting point of CBI, (March 15, 2019) http://cbi.gov.in

war the government still felt need of central government agency to investigate the cases related to the bribery and corruption. In the same year the **DSPE Act, 1946** was came into existence.

After promulgation of the Act, superintendence of SPE was transferred to the Home Department and its functions were enlarged to cover all departments of the Government of India. The jurisdiction of SPE was extended to all the Union territories and the Act provided for its extension to States with the consent of the State Government. The Headquarters of SPE was shifted to Delhi and the organisation was put under the charge of Director, Intelligence Bureau. However, in 1948, the position of the Inspector General of Police, SPE was formed and this CBI organisation was placed under his charge. In 1953, an Enforcement Wing was supplemented to the SPE to deal with matters relating to the Import and Export Control Act.

THE BIRTH OF CBI IN 1960'S

Since, 1941 to 1963 various changes came in Indian Society. With the passage of time the role of SPE was increased in society. In 1941 the work of SPE just only to investigate the bribery and corruption cases but with the passage of time, more and more cases came under SPE. In fact, in the year 1963 SPE was duly authorised to investigate the offences under approx 91 different provisions of the Indian Penal Code 1860 and 16 other Centralised acts for the offences that are covered under the Prevention of Corruption Act 1947.[2]

In 1963 the government felt that there was need for a Central Police Agency, which can be helpful to reduce the other new emerging crime and just not only for the cases of bribery and corruption. There were need to control the crimes like violation of central fiscal laws, major frauds relating to the government of India departments, passport frauds, crime on the high seas, organised crimes etc. so, on 1st April, 1963 the government of India by a resolution, set up CBI (Central Bureau Of Investigation), with the following divisions. All these divisions are mentioned below along with their respective purposes.

a) Investigation &Anti-Corruption Division (Delhi Special Police Establishment)

The Anti-Corruption Division is primarily responsible for collecting the relevant information with regard to corruption, maintaining licenses with various Departments through their Vigilance Officers. Enquiry, investigation and prosecution of offences are also undertaken by this division which primarily includes offences such as bribery and corruption along with the tasks relating to prevention of corruption. The Anti-Corruption Division deals with the cases against public servants under the control of the Central Government. It also

[2] the birth of CBI, (March 15, 2019) http://cbi.gov.in

deals with the cases related to public servants in Public Sector Undertakings under the control of Central Government and cases against the public servants working under State Govt. entrusted to the CBI by the State Governments and serious departmental irregularities committed by the above mentioned public servants.

b) Technical Division

The Technical Advisory[3] Units ensures the expert guidance as well as the assistance in sectors that primarily includes the services of banking, the government taxation policies, the engineering sector and foreign exchange department during enquiries and investigations taken up by the CBI. The technical advisory units are:

- Banking Company Law/Insurance Advisory Unit.
- Engineering Advisory Unit (Civil/Electrical matters).
- Taxation Advisory Unit (Direct/Indirect Tax matters).
- Foreign trading/Foreign Exchange Advisory Unit.

c) Crime Records and Statistics Division

The Special Crimes Division deals with various cases that have a direct impact on the economy and various situations that is conventional in nature, which specifically deals with offences such as internal security, espionage, sabotage, narcotics and psychotropic substances. Further it also deals with case such as antiquities, murders, dacoit/robberies, cheating, and criminal breach of trust. The offences such as forgeries, dowry deaths, suspicious deaths and other IPC offences as well as offences under other laws notified under the DSPE can also not be ignored. It is also responsible for investigation of interstate and international rackets, large-scale frauds affecting the property or revenue of the Government and crimes of national importance.

d) Research Division

Research division of the CBI only ensures and focuses on the in-depth research of the facts and circumstances dealing to the happening of the crime. Their purpose of existence is research the crime scene and the place of crime while focusing on all the major as well as the minor details

e) Policy Division

The Policy Division focuses only to the cases relating to policy, procedure, organisation, vigilance & security in the CBI. It further deals with the correspondence of the ministry and

[3]The technical advisory unit of CBI, (March 17, 2019) http://cbi.gov.in/aboutus/div.php

the liaison with Ministries and is also responsible for implementation of Special Programmes for vigilance and anti-corruption, etc.

f) Administration Division.

The Administration Division of the CBI focus primarily to the matters of recruiting personnel in the branch, establishments as well as the accounts of all the Divisions of the CBI and is supervised by the officer of the rank of Joint Director/IG.

Further in the year 1964 the government of India passed another resolution by which the wing for Economic offences added, which provide more strength to CBI. Now up to this point CBI had two investigation wings which includes the General Offences Wing and another the Economic Offences Wing.

Later in the same year another Wing was formed i.e. Food Offence Wing. The main purpose of this wing to investigate and collect intelligence regarding black marketing, smuggling etc. during that time the cases of black marketing, hoarding etc, just increased drastically, so it became necessary to control the crime. Later in year 1968, this wing was merged in the Economic Offences Wing.

THE TIME OF CRIMINALS IN 1980'S

In the 1980's the crime rate in India increased. Crimes like assassination, kidnappings, crimes by extremists, large scale bank and insurance frauds, murder, rape, dowry deaths, cases like Bhopal Gas Tragedy etc. start taking place, even the court started referring cases to CBI for investigation and collection of evidence, because of the serious nature of crimes. In 1980's it was became necessary for the government to find out the solution for these conventional crimes. So, after looking all these negative developments in country, the government of India in 1987 decided to have two investigation divisions in CBI namely:-

- Anti-corruption Division.
- Special Crimes Division (Deals with the cases of conventional crimes as well as economic offences).

SPECIAL WINGS FOR SPECIAL CASES IN 1990'S

1990's even became more challenging for the India. In this decade lots of big events happen in India. Suddenly the important and sensational cases of conventional nature took place. So, even after the establishment of special crimes division, the special cells were created to deal with these situations or cases. For ex-

- SIT (Special Investigation Team)- Assassination Of Rajiv Gandhi.
- Special Investigation Cell-IV – Demolition of Babri Majid.

- STF (Special Task Force)- U.P. Increasing Crime Rate and Bomb Blast in Mumbai.
- Bank Frauds and Securities Cell- 1992 bank frauds and securities scams.

During this time the securities scams cases and rise in economic offences increase with big numbers because in the year 1994 India adopted the new economic policy of LPG- (Liberalisation, privatisation and Globalisation) and that time CBI already having work load, so a separate economic offences wing was established in 1994. So now, at this point CBI have three investigation divisions:-

- Anti-Corruption Division(it exists to primarily deal with the cases relating to corruption and fraud committed by public servants of all Central Government Departments, Central Public Sector Undertakings and Central Financial Institutions).
- Economic Crimes Division (To deal with bank frauds, financial frauds, Import Export & Foreign Exchange Violations, large-scale smuggling of narcotics, antiques, cultural property and smuggling of other contraband items etc.
- Special Crimes Division (To deal with cases of terrorism, bomb blasts, sensational homicides, kidnapping for ransom and crimes committed by the mafia/underworld).

Present Divisions :- [4]

As on date, CBI has the following Divisions:

1. Anti-Corruption Division
2. Special Crimes Division
3. Economic Offences Division
4. Technical Advisory Units
5. Directorate of Prosecution
6. Policy Division
7. Administration Division
8. Systems Division
9. Co-ordination Division
10. Central Forensic Laboratory
11. Training Division.

The CBI starts its journey from 1941 as anagency which was established only for the purpose to deal with cases of bribery and corruption and at present CBI is multi-disciplinary and highly professional institute, which plays an important role in maintaining peace and order in our nation. The CBI was not established only in one day, one month or in one year,

[4]The latest division of CBI at present time (March 17, 2019) http://cbi.gov.in

infect it took decades to establish this kind of agency, but still after adding and subtracting the lots of wings the government never try to make CBI an Independent agency and we all know why.

COMPOSITION OF CBI[5]

The CBI is headed by a Director who is assisted by a Special Director or an Additional Director. Additionally, it primarily involves various individuals including the joint directors, the deputy inspector general, the superintendent of police and other important ranks of police personnel.

The Director of CBI mainly focusing the Inspector-General of Police and the Delhi Special Police Establishment are responsible for the administration of the CBI. The power of superintendence of Delhi Special Police Establishment vests as per the enactment of CVC Act, 2003 with the Central Government and save investigations of offences under the statute of Prevention of Corruption Act, 1988, in which, the supreme power vests with the Central Vigilance Commission. The tenure of the Director of CBI is two-years in office as per the CVC Act, 2003 (Vineet Narain Case). The CVC Act also highlights the mechanism for the selection of the Director of CBI and other officers of the rank of SP and above in the CBI.

The CBI Director is appointed by the Central Government on the recommendation of a committee comprising of the Central Vigilance Commissioner as Chairperson, the Vigilance Commissioners, the Secretary to the Government of India is the in-charge of the Home Affairs Ministry and also the Secretary (Coordination and Public Grievances) in the Cabinet Secretariat.

ROLE OF CBI IN THE INDIAN JUDICIARY

The Indian Judiciary plays a phenomenon role while interpreting the law of India and granting justice to the victims or the aggrieved party. But when the judiciary is in the need of an in-depth investigation of any case, the role of CBI comes into existence. However, it cannot be ignored that if the CBI has gained respect and success while investigating in various matter then on the other hand it has been highly criticised due to not investigating the case in the correct order. Further, there would be a focus on the role of CBI towards the Indian Judiciary in a positive as well as negative manner.

SUCCESS OF CBI IN INDIAN JUDICIARY

Whether the role of CBI in the Indian judiciary is positive or not it can be only determined on the basis of reports and judgments that are provided by the CBI to the Hon'ble court.

[5]The composition of CBI, (March 20, 2019) https://www.civilsdaily.com/central-bureau-of-investigation-composition-functions/

Further certain cases are highlighted where the CBI positively impacted the result the judgment.

THE HARSHAD MEHTA SCAM

In this case[6], Harshad Mehta borrowed money from various banks in lieu of which he was provided with the Bank Receipts which were later on regarded as fake. The special CBI court in Mumbai convicted four bank officials in one of the multi crore securities scam and sentenced them to three years imprisonment and fine not more than Rs. 5,000 after 25 years of the scam that involved "big bull" Harshad Mehta. Those four bank officials included M S Srinivasan (former funds manager of State Bank of Saurashtra), Vinayak Deosthali (Former Assistant Manager of UCO bank), R Sitaraman (official from SBI's security wing) and P AKarkhanis (former senior manager, UCO Bank). They were charged for an offence of corruption, criminal breach of trust and falsification of books of account ultimately benefiting the deceased.

As per the prosecution in the year 1991, the banks were obligated to keep a particular percentage of their deposits with the RBI on the fortnightly basis which is technically known as Cash Reserve Ratio. The CBI said that all the four banks i.e. the State Bank of Saurashtra, the DN Road branch and the UCO bank, Hamam Street branch, were authorised for such transactions. The probe agency also alleged that the Srinivasan and other banks were in conspiracy with Mehta parted with a sum of aggregating Rs 198 Crore of State Bank of Saurashtra (to Mehta) by falsely recording the call money lending transactions.

The court acquitted Mr. P S Gokhale, while the case against Mehta and M V Shidhaye was abated as they expired during the trial. Sindhu Bhatt of State Bank of Saurashtra turned as the approver in the respective case. Various cases came into the limelight in the year 1992 following a probe into irregularities in securities transactions and fund management by banks and other financial institutions.

SISTER ABHAYA MURDER CASE

In the Sister Abhaya Case[7], the deceased was a member of St. Joseph's Congregation for religious sister under the Syro-Malabar Catholic Archeparchy of Kottayam, Kerala. She was found dead in the well of St. Pius X Covent in kottayam on 27th March 1992. The local police as well as the crime branch investigated the case and declared the case as the suicide case and then they simply closed the case. In the year, 1993 the High Court of Kerela

[6] The details of Harshad Mehta Case (March 22, 2019) https://www.business-standard.com/article/current-affairs/harshad-mehta-scam-4-former-bank-officials-sentenced-to-3-years-in-jail-117041200514_1.html

[7] The sister Abhaya Case (March 22, 2019) https://www.news18.com/news/india/sister-abhaya-murder-case-cbi-courts-acquits-third-accused-priest-1683041.html

transferred the case to CBI, which tried to strengthen the suicide theory.

The first investigation made the first team of CBI failed to find the reason of Sister's death. Upon the instruction of court, the second team was ordered to conduct the investigation. The second team conducted the investigation, they brought forward that it was not suicide but was murder, but they failed to gather the relevant evidences associated towards the murder. The court being not satisfies again ordered CBI to construct the third team of CBI. The third team of CBI finally found that two priests and one sister were responsible for the death of the deceased (or the murder) and they were also responsible for destruction of the evidences. The CBI concluded the case after the third investigation and arrested Thomas Kottar, Father JosePoothrikkayil and Sister Sephy, the charges were framed against all the three accused for murder and destruction of evidences. The accused were arrested in 2008 and were provided Bail in the year 2009.The Judge acquitted Poothrikaayil and rejected the discharge plea of the first accused i.e. Father Thomas M Kottoor and the third accused Sister Sephy.

RAJIV GANDHI ASSASSINATION CASE

On 21st May 1991[8] the former Prime minister of India Mr Rajiv Gandhi was killed in suicide bombing, in Sriperumbudur, Chennai, in the state of Tamil Nadu. 14 other people were also killed in that bombing. At that time, the government of Chandra Sekhar decided to handover this case immediately to the CBI because Rajiv Gandhi just not a normal politician but also the ex-prime minister of India and in that bombing only Rajiv Gandhi didn't lose his life, in fact 14 other innocent people also died and several people in the crowd got injured too.

The CBI created a special team for the investigation of this case i.e. Special Investigation Team (SIT). After taking the charge of the case the SIT finds out extremely surprising facts and evidence and also gets successful in finding out the main culprits behind the assassination. The SIT confirmed the role of LTTE (Liberation Tigers of Tamil Eelam) in the assassination. The SIT booked 26 people under TADA.

The SIT provided sufficient evidence to the court and finally the SC of India gave death sentence to the 4 accused and the others got the various jail terms.

FAILURE OF CBI IN INDIAN JUDICIARY

As discussed above, the CBI has successfully contributed to the Judiciary for positively concluding the disputed case. But on the other hand, CBI had a typical departmental failure which failed to contribute towards the positive conclusion of the case by Judiciary. As the investigation reports of the CBI were not well enough for supporting the Judiciary to

[8] The Rajiv Gandhi Case (March 23, 2019) https://www.indiatoday.in/magazine/investigation/story/19910715-rajiv-gandhi-assassination-ltte-supremo-pirabhakaran-ordered-the-killing-in-jaffna-in-october-1990-814580-1991-07-15

conclude the case. Following are various circumstances showcasing the failure of CBI.

NOIDA DOUBLE MURDER CASE[9]

The Allahabad High Court confirmed the biasness of judiciary upon the unsolved double murder of Aarushi Talwar and Hemraj bears testimony to the incompetence of the investigative agencies.

The Allahabad High Court observed that the trial court had grounded the genesis of the offence "on the fact that the deceased Hemraj and Aarushi were seen by Dr Rajesh Talwar in flagrant and thereafter, the trial judge tried to thrust coherence amongst the facts that were inalienably scattered from one position to another but ignored any coherence to the idea as to what in fact happened."

Justice Balakrishnan Narayanan and Justice Arvind Kumar Mishra reversed the trial court judgment and acquitted Rajesh and Nupur Talwar. But it cannot be ignored that the High Court never re-tried or re-opened the case. Its order is based on the same evidence presented before the trial court. And yet, the two judgments cannot be regarded as contradictory. The Quint examines how the two courts chose to read the CBI's closure report and came to two completely different verdicts.

In this case, the UP Police first arrested Dr. Rajesh Talwar on the grounds that he killed his daughter accidently when he was drunk as he saw Aarushi and Hemraj in a compromising position. As per the police theory, after seeing his daughter and Hemraj together, he aimed a golf club at Hemraj and hit his daughter's head and killed her instead. Further he went for the domestic help.

When the case was transferred to the CBI, the first CBI team investigated the case and turned their focus on Hemraj's three friends, namely, Krishna, Raj Kumar, and Vijay Mandal. However, during the Narco test, all the three friends of Hemraj confessed that they murdered the deceased but it was accused that the doctors at the Bangalore's Central Forensic Science Laboratory asked leading questions. The tape recordings of the Narco test were not admissible in the court as they were leaked in the media.

After the failure of the first CBI team, the second CBI team was established which remained silent on the motive behind the occurrence of the crime. In its closure report; it mentioned "There is an absence of a clear motive and incomplete understanding of the sequence of events and non recovery of one weapon of offence and their link to either the servants or the parents." The second CBI team dismissed the team on the basis that both the deceased were

[9] The Noida Double Murder Case (March 23, 2019) https://www.hindustantimes.com/india-news/twists-turns-and-suspense-things-to-know-about-aarushi-talwar-hemraj-murders/story MGDzngqSFC6rhb4CWWqA7H.html

found in the compromising position that provoked the father of deceased no.1 i.e., Aarushi Talwar. The Closure Report made by the second CBI team further noticed that no blood of Hemraj was found on the bed sheet or pillow of Aarushi. The evidence of Hemraj's death was missing from the room of Aarushi.

The CBI's Closure Report was criticised by the CBI court in Ghaziabad and the Court dismissed the same ordering the trial against Aarushi's parents. This re-trial against Aarushi's parents was also supported by the Special Judicial Magistrate Preeti Singh. During the 2013 judgement, the court took cognizance of a report prepared by Dr BK Mahapatra regarding the bloodstains that were found on Aarushi's pillow.

The Allahabad High Court appreciated the fact that there was no sexual activity between the two deceased; instead Hemraj was assaulted in Aarushi's bedroom. The High Court took into consideration, the report prepared by Dr Bhibha Rani who was the director of Central Forensic Science Laboratory in New Delhi.

Due to vague reports of CBI in this respective case, the judgment delivered by the Trial Court as well as the High Court of Allahabad was adversely affected and hence the CBI was criticised for not investing the case in the proper direction. Hence, due to this landmark case, the role of CBI can be stated as the failure as it failed to contribute in the proper conclusion of the case that was supposed to be given by the Hon'ble court.

CONCLUSION

Since, 1941 the role of CBI increased in Indian society. This organization was established to look down the corruption case after the world war- II, now this organization became so important that some people says that without CBI the security of India can be came in danger. The CBI resolves many important and complex cases in India and in some cases the CBI didn't get the success but with the time CBI always proves itself. During this long period the CBI was highly criticized and the biggest criticism of CBI was always that the central government uses the CBI as a puppet and the latest example was the hustle between the state of West Bengal and the central government over role of CBI. It is true that CBI many times got criticized for its role but people also can't denieit's contribution. The long standing demand of many people to make CBI an independent organization is still a dream and it is hard to say that when CBI will became an independent investigating organization.

NOTES


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Printed, Published and owned by Amit Gupta. Printed at Shubham Enterprises, 129, DSIDC Sheds, Okhla Indl. Area, Phase-I, New Delhi - 110020. Published at JIMS Engineering Management Technical Campus 48/4, Knowledge Park-III, Greater Noida. Editor: Amit Gupta