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“When we talk of sound and stable system of administration of justice, all the stakeholders in the said legal system need to be taken care of. Legal community and advocates are inseparable and important part of robust legal system and they not only aid in seeking access to justice but also promote justice. Judges cannot perform their task of dispensing justice effectively without the able support of advocates. In that sense, advocates play an important role in the administration of justice. It is wisely said that for any society governed by Rule of Law, effective judicial system is a necessary concomitant. The Rule of Law reflects man’s sense of order and justice. There can be no Government without order; there can be no order without law; and there can be no administration of law without lawyers.”

Dr A. K. Sikri, J.

*Cardamom Mktg. Corp. v. State of Kerala
(2017) 5 SCC 255, para 13*

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Lex Revolution

UGC Approved Periodical Indexed Journal of Social & Legal Studies

Quarterly Published International Research Journal

Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals. The Journal invites the submission of papers that meet the general criteria of significance and academic brilliance. Authors are requested to emphasize on novel theoretical standard and downtrodden concerns of the mentioned areas against the backdrop of proper objectification of suitable primary materials and documents. The papers must not be published in parts or whole or accepted for publication anywhere else.

OBJECTIVES:

- To develop and promote academic research activities on various contemporary socio-legal issues and trends in law,
- To provide a platform to discuss the problems related to socio-legal and research issues.

The most valuable and suggestive comments of all the readers are always awaited and welcomed in order to achieve the ultimate goal. We are looking forward for your contributions. All communications shall be made only in electronic form e-mailed to: **EDITOR(DOT)LEXREVOLUTION(AT)GMAIL(DOT)COM**. The submission guidelines are available at website.

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MESSAGE

It is with great pleasure we announce the release of Volume III Issue-2 (2017) of ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

We owe our sincere gratitude to legal luminaries Prof. Gopal Krishna Chandani, Prof. S. K. Gaur & Sr. Advocate Mr. K. N. Chaubey for their valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of AdvocateKhoj who have been the continuous platform for us encouraging various forms of legal dialogue with our readers and contributors.

Finally, we would like to thank all prominent members of our Editorial Board for joining us in this new fascinating and promising academic voyage.

We are indebted to the various Contributors, teachers and Research scholars whose views and opinions have been incorporated in the text.

- **Editorial Board**

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SOCIO-LEGAL ASPECTS OF STATELESS LINGUISTIC MINORITIES: AN OVERVIEW

Prof. S. K. Gaur*

*"None shall be turned away
From the shore of this vast humanity
That is India."*

These lines have a ring of feeling that from time immemorial men of diverse but fascinating culture and languages have been warmly welcomed in our great nation due to its liberal and tolerant traditions which in turn led to cultural and linguistic plurality in India.

LANGUAGE

The notion of language cannot be imprisoned within the four walls of a definition as it takes too many things in its fold. The concept of language may defy definition but it can at least be described simply as a process or channel through which people understand and communicate effectively and air their thoughts, feelings of all sorts. Language is much more than that. It is storehouse of culture and pride of the people speaking it. Hence it is difficult to measure its depth so is its spread.

LINGUISTIC MINORITY

Minority based on language is a group of persons who do not share common language with the majority and speak a language distinct from that of majority. Technically speaking they form numerically less than fifty percent of the entire population of a State. It may be emphasized that the State is taken as the unit not the whole country for the purpose.

The thick fog cover surrounding the question of determination of linguistic minority for a pretty long time has been broken by the Apex Court through its eleven judges Constitution Bench in a powerful decision of *TMA Pai Foundation v. State of Karnataka*¹. Now it appears to be settled once for all that minority based on language has to be ascertained State wise. The linguistic minority need not have any script of its own or distinct script in relation to the script of the majority in the State. Mere separate language of minority is enough. The

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¹ AIR 2003 SC 350

language need not be one of the twenty two languages which have found space in the schedule VIII of our Constitution. Even foreigners forming well defined linguistic minority residing in India are eligible to claim protection of linguistic rights enshrined in Article 30(1) even though they get foreign aid to establish an educational institution to meet their linguistic interests.

It is interesting to note that the problem of linguistic minorities which confronts us is not only national but global as well. It is a national problem of ‘linguistic minorities’ which includes ‘stateless linguistic minorities’ this paper focusses on. For brevity and convenience sake hereinafter the expression ‘Stateless Linguistic Minorities’ will be referred to as the ‘SLMs’. The architects of the Constitution had plenty of challenging problems to face with. The problem of linguistic minority including SLMs was one of them which became all the more serious to deal with after the reorganization of States on the linguistic lines.

STATELESS LINGUISTIC MINORITY

India possesses multi-faceted linguistic landscape. There is very wide spectrum of linguistic diversity and pluralism in our country. Language in our country varies from ‘pole to pole’. No wonder there would be unfortunate existence of difference of languages in every State. The stateless languages are those which have no home State that is the State in which their language gets official patronage that is a language of administration. These unfortunate languages are not official languages in any State as they are not mother tongue of the majority of people residing in any State in our country. The minorities based on such unlucky languages are called minorities based on stateless languages or Stateless Linguistic Minorities (SLMs). The SLMs may take following three forms:

1. Those living outside their home State and whose language is not official language in any State like Sanskrit and Sindhi.
2. Those living in any region of their home State but their language are not the official language in their own State e.g. Kashmiri and Dogri in the State of Jammu & Kashmir where official language is Urdu.
3. Those settlers coming from outside particularly from neighboring countries e.g. Chakmas coming from Bangladesh speaking Bengali and settled in Arunachal Pradesh where official language is English and Nepalis speaking Nepali language concentrated in Uttarakhand where official language is Hindi.

RETROSPECTIVE PERSPECTIVE

Indian political map was redrawn on the basis of language in the year 1960. The problem of SLMs ensued from the reorganization of the States which took place in the past mainly on the linguistic lines and which contributed to the formation of nearly unilingual states in India. These were unilingual in the sense that large majority of the population living therein spoke one language. In such States it was not possible to avoid some tracts where a number of small group of people belonging to different languages having no official status in other States. Soon after a State was allotted to a majority linguistic group, that started to regard the area of that State as its own and gave the feeling of outsiders to other group speaking different language(s). Thus a vicious circle of mutual distrust and bitterness was created and new problem of SLMs came to the forefront. Further, in the reorganization of states it was not possible to allot to every language a State where persons speaking it might be in large majority. Obviously some language were left out which could not get the official patronage in any State. The problem of SLMs was further aggravated as they found themselves stranded in and exposed to an unfriendly and uneasy atmosphere and their mother tongue became vulnerable to falling in disuse. Every state has islands of suffering SLMs.

CONSTITUTIONAL PROTECTION

The Constitutional protection of SLMs may take two forms. First is the cultural and educational right in the form of specific Fundamental Rights mentioned in the constitution. Second is the administrative machinery which is included in the Constitution but not in the form of Fundamental Rights.

Safeguards in the form of Fundamental Rights

The framers set out a Constitutional cover on linguistic minorities through two Fundamental Rights enshrined in Articles 29 and 30. They are ‘two gems’ studded in the Constitution. The fabric of their special protection mentioned in these articles has been woven with great care and compassion by giving voice to the feeling and sentiments of SLMs. These twin articles had been fine tuned in line with the liberal values of Indian culture and crafted in liberal terms which have been further decoded and liberalized by judicial interpretation and which further brought many victories to the SLMs. The enterprising judiciary has added blood and flesh to the dry bones of the aforesaid articles to give effect to noble vision of the framers to establish cohesive society and bring about unity in plurality.

Article 29(1) confers right to conserve the language on any section of citizens residing in India having a distinct language, script or culture of its own. Though the expression ‘any section of citizens’ covers both minorities and majority, but essentially Article 29(1) is meant to give protection to minorities as majority does not need the same protection. This inference is further buttressed by the fact that the expression ‘protection of interest of minorities’ finds mention in the marginal note of Article 29(1). It deliberately states right of minorities to conserve ‘language, script or culture’ which widens the scope of Article 29(1). There are sections of citizens with separate language and script but not separate culture e.g. Andhrithes settled in Odisha and Maharashtrians settled in Bengal. Similarly there are sections of citizens which have separate culture but no separate language or script e.g. Muslims in Bengal. Both the aforesaid categories of citizens get protection under the umbrella of Article 29(1).

Articles 29 and 30 confer three fold special rights on SLMs covering 1) Right to conserve their language, etc.; 2) Right to freedom of education in respect of their language; and 3) Right to State aid to their educational institutions for protecting their linguistic interest

It may be pointed out that the word used in Article 29(1) is ‘conserve’ and not ‘preserve’. The right to ‘preserve’ is merely a negative and passive right in the sense that it implies the right to maintain and keep its existence alive. On the other hand right to ‘conserve’ is positive and active right not only to keep its language intact but also to develop and “agitate for the protection of its language” to siphon off the words from a landmark judgment of *Jagat Singh v. Pratap Singh*² handed down by highest Constitutional Court of last resort. Our Apex Court has increased the span of the word ‘conserve’ by interpreting it very liberally. Since the right to conserve takes in its fold not only the right to preserve but also right to develop the minority language, it can best be done through the right to establish and administer educational institutions of their choice under Article 30(1). This right has been described by the Apex Court as charter of educational rights of SLMs. Clause 2 of Article 30 unfolds the obligation imposed on the State to grant aid to education institutions under the management of SLMs without discriminating between minority and majority. It may be parroted that both the negative and positive dimensions have been well taken care of by clauses 1 and 2 of Article 30. Financial resources for establishing an educational institution is indispensable. Obviously SLMs do not get cooperation from the majority community and the State which

² AIR 1965 SC 183

represents them and home State as they have none. The protection available to them under Article 30(1) is in reality robbed of.

Safeguards in the form of administrative machinery

The administrative machinery has been put in place to give effect to the safeguards so that they may be put into action and may not remain mere paper safeguards and the SLMs may not risk losing out on advantages which find mention in the Constitution.

- *Right to official recognition of the language (Articles 347 and 350):*

Article 347 provides for official recognition of a language spoken by a substantial proportion of the population of a State but the safeguard loses its entire efficacy as the number of members of SLMs form microscopic proportion and not substantial proportion of the population. Article 350 enables a person to submit a representation for redressal of his grievances to any officer or authority in any language used in the Union or the State. This language need not be any of the twenty two languages which are part of Eighth Schedule of the Constitution or officially patronized.

- *Right to teach and be taught under Articles 350 A and 350 B:*

Article 350 A provides for facilities for instruction in mother tongue at the primary stage to children belonging to linguistic minorities including SLMs and imposes a duty in this regard both on the State as well as every local authority within the State. Article 350 B contains a provision for appointment of a Special Officer for linguistic minorities including SLMs to safeguard their rights in this regard provided under the Constitution.

- *Right to be understood (Articles 120 and 210):*

With regard to the right to be understood Art.120 permits the Chairman of the Council of States or the Speaker of the House of People to permit any member who cannot adequately express himself in Hindi or in English to address the House in his mother tongue. Art.210 makes a parallel provision in respect of State Legislatures.

CONCLUDING REMARKS

The point has come to arrive at certain conclusions regarding the shortcomings and loopholes of the safeguards in their operation on SLMs. The jurisprudential and social analysis of the safeguards available to SLMs discussed above make them appear impressive but in reality they are not so in their application to SLMs. Due to lack of State backing ,poor numerical

strength the content of their protection is sucked out. They have not been able to derive full benefit of preserving and enriching their language, script or culture. The interests of SLMs living in the midst of huge majority community are always side stepped. Merely because of their speaking a language having no State patronage they are overwhelmed and treated unfairly due to lack of linguistic tolerance of majority. There are many ills that plague them as they do not have any home State and hence do not have the advantages of keeping intimate contact and maintaining emotional bond with the co-linguist having State backing. They have to struggle hard to keep their language intact. Some of their languages are overlooked so much that they run the risk of being forgotten. There are many stateless languages of SLMs which have died slow death.

These disconnected stateless languages are subject to high handedness by the majority speaking different language in the State they reside in. The SLMs unlike other linguistic minorities do not have privilege of having their own State anywhere in the vast sub-continent of India. The State giving step-motherly treatment to them has no apprehension that similar treatment may be meted out to the group of people speaking its official language in the home State of underprivileged SLMs.

Moving on to the solution of their problems. There is an intimate connection between the form of administration with the form of Constitutional protection and the former must at least match if not exceed the expectation of the latter. Elimination of Tibetan language and culture despite its recognition by the Chinese Constitution is an instance in point. When a language is destroyed the identity of the community speaking the language is also lost.

Only leaning upon the Constitutional and other legal provisions will not do as they do not provide answer to every problem the SLMs confront. They should turn to their own efforts to protect and advance their mother tongue and make it a literary force and repository of their culture to enable it to command respect in the linguistic milieu of the State.

India's picturesque and wonderful linguistic panorama is shaped by all the languages which are spoken by the people in our country and are our own whether they are scheduled (part of Eighth Schedule) or they belong to majority or minority or they get full (official) or partial (co-official/additional) or no patronage. No language should be treated unequally.

The Constitution has conferred chain of rights on SLMs. More the rights, greater the responsibilities & duties. It can be said in unvarnished words that they are under a duty to

reset their ties with the majority so that in spite of being on the wrong side of the border may not feel alienated and think of packing up and crossing over the border. The majority should also stretch out its hands in the spirit of cooperation with the linguistically marginalized group of SLMs. The linguistic conflicts and barriers should find no quarter in our soil as SLMs cannot look across the border of the State for ventilating their grievances.

However untrue the saying: ‘minorities must always suffer’ may have become in modern democracies, but in the Constitutional and social scenario of India it is certainly true at the ground level for one species of minorities namely minorities based on stateless languages which form weakest but important section of Indian population in the context of language. Just as the strength of a chain depends upon the strength of its weakest link so also the strength of India depends upon the strength of its linguistically weakest section. Our country can best be said to be truly strong and democratic when it infuses complete confidence in the minority community in general and SLMs in particular.

TRADE SECRET LICENSING UNDER INTELLECTUAL PROPERTY LAW

Divya Singh Rathor* & Sarvesh Kumar Shahi**

INTRODUCTION

Nowadays, in globalized economy, Intellectual Property is being protected by organisations through adoption of available measures in form of patents, copyright, trademark etc. but in addition to these popular IP rights there are other IP rights not so popular but which are recently depicting attentions all over the world- Confidential Information and Trade Secret.

A trade secret denotes to information relating to the business which is not known to the public and which the owner rationally attempts to keep secret and confidential. Through trade secret, businesses get a competitive edge over their rivals. As long as any economic interest of the owner is involved and it is intended to be kept as secret, almost any type of data, processes or information can be referred to as trade secrets.

One of the key challenges for businesses today is to remain profitable in a slowing but increasingly global economy. They are under pressure to create new opportunities and new revenue streams from existing assets. Often businesses need new or original innovations and/or creative expressions to create new products, enhance existing products, and explore new markets. What is most importantly needed to be protected by the trade secret law or intellectual property system is these crucial innovations and expressions, which are increasingly valuable economic assets in today's economy, before revealing or sharing them. Only then can a business leverage these economic assets as intellectual property (IP) assets for gaining and retaining competitive advantage¹.

The primary route to commercialization of intellectual property (IP) is by licence. This will usually be in the form of a partnership where originators and IP owners will exchange commercialization rights with the partner successively in exchange for finance and development and then the marketing of the product. This exchange may be largely one sided

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¹ Licensing of intellectual property assets; advantages and disadvantages <http://www.wipo.int/export/sites/www/sme/en/documents/pdf/licensing.pdf> (last visited on 08/04/2016).

with the originator taking no further part in the development of the product or, alternatively, the originator may become part of the development team accepting financial support and a share of the income from the completed product when it is sold².

CONCEPT OF INTELLECTUAL PROPERTY LICENSE

An Intellectual Property license is a contract between two parties which permits the licensee to use at least a portion of the licensor's intellectual property in exchange for some consideration³.

A license is, simply stated; permission to do something the granting party (the licensor) has the right to otherwise prohibit. In the context of intellectual property (IP) licensing, it is a grant, by the owner of the property, to another (the licensee) of this right to use the licensed rights free of suit by the property owner, pursuant to certain terms and conditions and subject to certain limitations⁴. The extent of the rights granted in a license may run the gamut from a mere permission to use the licensed property in some limited manner (a nonexclusive license) to all but ownership of the property (an exclusive license)⁵.

The word license simply means permission – one person grants permission to another to do something. A license agreement is a formal, preferably written document, recording the circumstances under which a promise shall be legally binding on the person making it. There are at least two essential parties: the licensor, the party who owns the IP and is agreeing to let it be used, and the licensee, the party who receives rights to use the IP in exchange for payment. Therefore, a license agreement is a partnership between an IP owner (licensor) and another who is authorized to use such rights (licensee) under certain conditions, usually for a monetary compensation in the form of a flat fee or running royalty that is often a percentage or share of the revenues gained from use of the invention. Simply put, a license grants the licensee rights in property without transferring ownership of the property⁶.

² Austin Martin, *Licensing, Selling and Finance in the Pharmaceutical and Healthcare Industries-The commercialization of Intellectual Property* (2012), Gower Publishing Limited, England, at page 141

³ Halt, Jr., G.B., Donch, J.C., Stiles, A.R., Robert, F., (2014) *Intellectual Property in Consumer Electronics, Software and Technology Start-ups*, Springer New York page 161.

⁴ Alexander I. Poltorak and. Paul J. Lerner, *Essentials of Licensing Intellectual Property*, (2004), John Wiley & Sons, Inc, Hoboken, New Jersey at page 22

⁵ *Ibid* at page 22

⁶ Licensing of intellectual property assets; advantages and disadvantages <http://www.wipo.int/export/sites/www/sme/en/documents/pdf/licensing.pdf> last visited on 08/04/2016.

Webster's Dictionary defines License as 'Authority or liberty given to do or forbear any act; especially, a formal permission from the proper authorities to perform certain acts or to carry on a certain business, which without such permission would be illegal; a grant of permission; as a license to preach, to practice medicine, to sell gunpowder or intoxicating liquors, The document granting such permission⁷.' Licensing IP can be used to learn about and use others' technology. IP holders may exclude others from using their protected IP.

Licensing agreements are effectively grants made by the IP-holder to others that grant access to the protected technology and trade secret information, while creating a revenue stream for the IP-holder. For example, a high-technology consumer electronics company may need to license proprietary manufacturing equipment from others. Conversely, a company may consider licensing its product along with a trade name and marketing campaign to a third party to create a larger distribution network and generate revenue from a larger market⁸. For a license of IP to be effective, four basic conditions must be met:

- The ownership of relevant IP must be with the licensor or he must have authority from the owner to grant a license;
- The IP must be protected by law or at least qualified for protection;
- The license must specify what rights with respect to IP it grants to the licensee;
- IP assets to be given in exchange for the license must be clearly stated.

WHAT IS TRADE SECRET LICENSING?

In general, a trade secret license is a private agreement whereby the owner (licensor) grants the recipient (licensee) with permission to use some or all of the secret information. However, the licensor retains full title and all ownership rights associated with the trade secret. A license is typically issued by the licensor with the intent to benefit by maximizing their profit (in the form of royalties) on the trade secret. This benefit comes with the risk of disclosure from sharing their secret information with another party. A license may be exclusive,

⁷ Goldscheider Robert (2002), *Licensing Best Practices- the LESI Guide To Strategic Issues And Contemporary Realities*, John Wiley & Sons, Inc., New York.

⁸ Halt, Jr., G.B., Donch, J.C., Stiles, A.R., Robert, F.,(2014) *Intellectual Property in Consumer Electronics, Software and Technology Start-ups*, Springer New York.

granting the licensee sole use of the trade secret, or nonexclusive, granting the licensee only shared use.

Under a non-exclusive license, the licensor retains the right to use the trade secret and/or to grant additional licenses to others. The licensee's right to use the trade secret can be granted either for an indefinite period or for a defined period of time. The revocation of license is allowed, if the licensee fails to comply with the terms of the licensing agreement⁹. The owner of a trade secret has the exclusive right to use it in his business as long as the information remains secret and no one else discovers it independently by legitimate means. The owner's disclosure of his trade secret is a de facto license to use the information, since apart from secrecy; the owner has no exclusive rights. Therefore when the trade secret owner licenses his trade secret, the consideration paid by the trade secret licensee is really in exchange for disclosure, not for use, as in the case of a patent license.¹⁰

Information that has been disclosed to licensees, vendors, or third parties for limited purposes subject to nondisclosure or confidentiality agreements may remain protectable as trade secrets.¹¹

ELEMENTS/FACTORS TO CONSIDER IN TRADE SECRET LICENSE

Trade secrets are a cherished part of most licensing agreements. The best licensing practices require that steps be taken by the licensing executives involved in negotiating and drafting the license to identify the scope and value of the trade secrets, determine the controlling law, and clearly specify in the license the rights and liabilities of the parties, both before and after the agreement. A license that is conjointly beneficial to the licensor and the licensee is the ultimate goal¹².

There are numerous factors that need to be considered in an IP license which are unique depending on the facts and circumstances presented and rarely, if ever, are two licensing deals the same. Such factors may include what rights to license, term, territory

⁹ Andrew R. Basile, Jr., *Trade Secret Licensing*, 2007. Also available at: http://www.youngbasile.com/pdf/trade_secret_licensing.pdf

¹⁰ Elizabeth Miller, *Antitrust Restrictions on Trade Secret Licensing: A Legal Review and Economic Analysis*, 52 Law and Contemporary Problems 183-210 (Winter 1989) Available at: <http://scholarship.law.duke.edu/lcp/vol52/iss1/10>

¹¹ See *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 177 (7th Cir. 1991).

¹² Goldscheider Robert (2002) *Licensing Best Practices- the LESI Guide To Strategic Issues And Contemporary Realities*, John Wiley & Sons, Inc., New York at page 137.

considerations, exclusivity, the amount and structure of the royalty, indemnification from damage caused by the other party, etc.¹³ Following factors need to consider in trade secret license.

1. Identification of Rights to be licensed
2. Maintenance of IP Rights/ secrecy
3. Consideration
4. Improvements under Trade secret licensing
5. Prohibitions /Restrictions

IDENTIFICATION OF RIGHTS TO BE LICENSED

Trade secrets and know-how can take a wide variety of forms, and a license on such property must define very clearly what is being licensed. The licensee may seek sufficient assistance from the licensor to enable it to utilize the licensed property effectively; the licensor, however, should take care not to include anything in the license that could be construed as a warranty of the suitability or effectiveness of the licensed property¹⁴. Know-how and trade secret licenses are global in scope, and they may have a limited term or may continue for as long as the licensee continues to utilize the licensed property. If the secret becomes publicly known and the license provides for the termination of the license in such an event, the licensee may invoke this provision to terminate the license and continue to use the information without paying any royalties; if the license does not include such a provision, the licensee may be compelled to pay royalties for using information that is now public knowledge¹⁵. In a patent license, the licensed property is fully defined in the patent document itself. The licensee receives rights in respect of the invention disclosed and claimed in the licensed patent. Trade secrets and knowhow are often not so readily defined. Rather, they may take the form of a vast collection of related materials, including plans, drawings, specifications, formulas, procedures, process descriptions, lists of materials, and lists of vendors, all of which should enable the licensee to accomplish some desired objective, and all

¹³ Halt, Jr., G.B., Donch, J.C., Stiles, A.R., Robert, F.,(2014) *Intellectual Property in Consumer Electronics, Software and Technology Start-ups*, Springer New York page 161

¹⁴ Alexander I. Poltorak and. Paul J. Lerner, *Essentials of Licensing Intellectual Property* ,(2004), John Wiley & Sons, Inc, Hoboken, New Jersey at page 76.

¹⁵ *Ibid* at 77.

of which are to be delivered to the licensee upon execution of the license¹⁶. Patent rights include the right to exclude others from making, using, selling or offering for sale a patented article or process. By licensing a patent, the patent holder is giving permission to the licensee to no longer be excluded from practicing the patented invention. Patent rights are territorial, and are limited to the country in which the patent is granted. Trademark rights are the right to use a trademark in connection with goods or services, and are also territorial by country. Other rights can provide access to a proprietary or trade secret technology or know-how¹⁷.

MAINTENANCE OF IP RIGHTS/SECURITY

Licensors put their trade secrets at great risk of being lost or misappropriated by either a licensee or a third party. Nevertheless, protecting this type of intellectual property in licensing transactions is often neglected and left for the boilerplate language of licensing agreements¹⁸. The complexities of licensing know-how and trade secrets arise, in large part, from the fragility of their existence. It is not the underlying information but the secrecy that creates the value of such properties. If the secrecy is lost, so too is the value. This is not to say that licensees (and others) would not continue to use such information after it became publicly known. They most certainly would; however, they would not continue to pay for that use¹⁹.

Maintenance of secrecy is critical to the value of trade secrets and knowhow. Therefore, any license of such property should include suitable provisions directed toward the preservation of confidentiality. At a minimum, a licensee should accord the licensed property the same degree of care and caution afforded its own confidential or proprietary information.

Ideally, access to the licensed property should be limited to those with a “need to know,” and all such individuals should execute agreements acknowledging the confidential nature of the information and their duty to maintain it in confidence²⁰. There are a number of terms that should be included in a license agreement that relate to the maintenance of the licensed

¹⁶ *Ibid* at 70

¹⁷ Halt, Jr., G.B., Donch, J.C., Stiles, A.R., Robert, F., (2014) *Intellectual Property in Consumer Electronics, Software and Technology Startups*, Springer New York page 161

¹⁸ Maxim Tsotsorin (2012) *Practical Considerations in Trade Secret Licensing*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2334060

¹⁹ Alexander I. Poltorak and. Paul J. Lerner, *Essentials of Licensing Intellectual Property* ,(2004), John Wiley & Sons, Inc, Hoboken, New Jersey at page 69

²⁰ *Ibid* at 73

intellectual property rights. For patent rights, this should include the requirement that the licensee include the appropriate patent marking on any goods sold that are covered by the patent. Lack of patent marking can limit claims for damages against infringers. Depending on whether the license granted is an exclusive license, the licensor may also require the licensee to pay patent maintenance fees.

In some situations, a licensee may even take over prosecution of pending patent applications, which may benefit the licensor especially in the situation where the licensor is an individual or has limited resources to prosecute the patent application. Licenses of trade secrets and know-how should include provisions for the maintenance of secrecy. In both the licensee's and licensor's companies, only those employees with a "need to know" should be allowed access to confidential or proprietary information. For this reason, the obligation to maintain confidentiality should survive the termination of a license²¹. If the license includes a provision for termination in the event that the licensed information becomes publicly known, the licensor must be sure to qualify the term "publicly known." Otherwise, an unscrupulous licensee may attempt to reconstruct the information from publicly available sources in order to terminate the license and enjoy the intellectual property royalty-free²².

Given the confidential nature of trade secrets, the safeguards to ensure continuous secrecy must be spelled out in the agreement. The security measures will depend largely on the value and sensitivity of the information provided, and may include²³:

- Strict limitation of internal and external distribution;
- Assigning an employee or a committee to oversee compliance with applicable procedures;
- Marking all confidential information as "Confidential";
- Maintaining document logs and tracking of confidential documents;
- Compartmentalizing (disclosure and access by employees on the "need-to-know" basis);

²¹ Alexander I. Poltorak and. Paul J. Lerner, *Essentials of Licensing Intellectual Property* ,(2004), John Wiley & Sons, Inc, Hoboken, New Jersey at page 77.

²² Ibid

²³ Maxim Tsotsorin (2012) *Practical Considerations in Trade Secret Licensing*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2334060 (Last visited 24/04/2015)

- Mandatory signing of a confidentiality agreement by every person getting access to the information;
- Putting all related personnel on notice that confidentiality must be maintained;
- Educating personnel on proper procedures and applicable policies;
- Developing a system to prevent inadvertent disclosure to public (through advertisement, speeches, publications);
- Off-site or off-network storage;
- Limited access and reproduction by the licensee's personnel and thirdparty vendors and contractors;
- Restricting public accessibility and escorting visitors;
- Use for the purpose of the agreement only;
- Use only at a specific site or in specific jurisdiction;
- Conducting exit interviews with departing personnel;
- Prompt return of all confidential information upon termination of the agreement.

CONSIDERATION ON CONTRACT FOR IP RIGHTS

Consideration between parties to a contract regarding intellectual property rights can take many forms, but usually involves some form of payment. The most common are a lump sum payment, a stream of royalty payments (most commonly based on the number of products sold), as well as a combination of both. A lump sum payment can be used in a number of circumstances, such as settlement of past infringement, or when the technology is being transferred and the licensor is going to be working in the field. This type of royalty shifts the entire risk of success onto the licensee since the licensor receives payment no matter what happens.

As a result, an up-front lump sum payment is often discounted from the amount that could be obtained by taking a stream of royalty payments over time based on the sales volume of the product. A stream of royalty payments over time based on the sales volume mitigates the risk

that the licensee must take, because no payments would be made by licensee unless the product is selling. The licensor stands to receive a greater stream of royalty revenue if the product does well in commerce²⁴.

While the loss of secrecy may (actually, should) result in termination of a trade secret license, it should not be assumed that a licensee must pay royalties until such an event occurs. In those instances where the subject secret is susceptible to reverse engineering, a potential licensee has two choices:

- (1) take a license and pay a royalty; or
- (2) Reverse engineer the secret and pay no royalties. The existence of these choices serves to put a ceiling on the royalties a prospective licensee would be willing to pay.

Indeed, some trade secret licenses provide that royalties will be paid only in respect of use made during a period corresponding to the time that would have been required to reverse engineer the licensed trade secret²⁵.

IMPROVEMENTS UNDER TRADE SECRET LICENSING

Intellectual property protects the expression of ideas. Ideas are not always formed in a vacuum. Inventions are often inspired by existing technology; a person may create and design a new improvement to that technology, or a feature that enhances the use or functionality of the technology. The new invention may come about as a result of an idea that relates to the use of the licensed technology, or it may actually be the result of modification of that technology in order to produce a derivative work or other enhancement²⁶.

There is no widely accepted definition for “improvement” in the context of intellectual property licenses, but it is usually used to mean a development within the field of the licensed technology that enhances the usability, functionality, efficiency, performance or other characteristic of the original technology. If used in the Agreement, the parties should be certain to provide a clear definition as to what is contemplated as an improvement, to avoid

²⁴ Halt, Jr., G.B., Donch, J.C., Stiles, A.R., Robert, F.,(2014) *Intellectual Property in Consumer Electronics, Software and Technology Start-ups*, Springer New York page 161

²⁵ Alexander I. Poltorak and. Paul J. Lerner, *Essentials of Licensing Intellectual Property* , (2004), John Wiley & Sons, Inc, Hoboken, New Jersey at page 75.

²⁶ Donald M. Cameron (2003), *Key Aspects of IP License Agreements*, available at <http://www.jurisdiction.com/lic101.pdf> at page 21.

disputes later on²⁷. The decision to include a provision for improvements in a licensing agreement depends upon the overall objectives of the contracting partners. Generally improvement clauses can be an essential element of a license agreement. A well-crafted clause can provide clarity so as to avoid future disputes and can provide the benefit of the bargain in a licensing agreement. Unfortunately, such clauses are often overlooked or receive gloss treatment²⁸.

Another problematic area is the ownership of improvements. A licensee will often improve upon a trade secret, raising the question of which party owns the resulting improvement. From a licensor's perspective, the answer is clear: the licensor should own any improvement that utilizes the underlying trade secret²⁹. From a licensee's perspective, however, this arrangement potentially entangles the licensee in on-going obligations to the licensor even when the original underlying trade secret is no longer a trade secret. Ultimately, the issue is resolved by the parties' relative bargaining power³⁰.

PROHIBITIONS/RESTRICTIONS

A license allows the licensor to restrict a licensee's activities to something less than an unlimited right to use the licensed intellectual property. For example, a patent licensor may choose to grant a licensee to make, use, sell or offer for sale a patented product. Another restriction is whether the licensor is granting an exclusive, sole or nonexclusive license. An exclusive license is similar to an assignment of the IP rights to the licensee, and the licensor foregoes the ability to use its own IP rights in favour of the licensee. An exclusive license presents the most value to the licensee because it prevents all competition from using the licensed IP rights, and is often granted by research institutions that have no intention of commercially exploiting an invention. A sole license, in contrast to an exclusive license, allows the licensor to continue to use the IP rights, but limits the licensor from granting any further licenses to third parties.

²⁷ *Ibid.*

²⁸ Kenneth J. Dow and Traci Dreher Quigley, (2004) *Improvements for Handling Improvement Clauses In IP Licenses: An Analytical Framework*, Santa Clara Computer and High Technology Law Journal, Volume 20, Number 3 available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1352&context=chtlj>

²⁹ Andrew R. Basile, Jr., *Trade Secret Licensing* available at http://www.youngbasile.com/pdf/trade_secret_licensing.pdf at page 16.

³⁰ *ibid*

Thus, in a sole license agreement, both the licensor and the licensee may use the technology under license. What allows the licensor to grant multiple licenses to third parties is a non-exclusive license. It allows for multiple companies to use the licensed technology, which increases competition³¹. Various types of restrictions can also be included in a licensing agreement. For example, territorial restrictions are a common restriction in license agreements. A license should explicitly define the licensed territory or geographic area where the licensee may use the licensed technology. It is very common in licensing agreements for a company to only be permitted to service a limited geographic territory. In exchange for the territorial limitation, the licensor will not make a similar grant to any third party allowing the third party to compete in this same restricted area.

This is a very common practice in the operation of franchises. Field of use restrictions are also frequently included in licenses, and may limit the use of the equipment or components contained within the product to a specific type. Field of use restrictions could limit the use of the licensed technology to certain applications such as therapeutic applications, veterinary applications, industrial materials applications, etc. This allows a licensor to grant multiple licenses in various fields of use, enabling the licensor to exploit its IP more effectively. Product restrictions can also be included in a licensing agreement. This kind of limitation restricts the licensee's use of the IP to a particular class of artefact.³²

TYPICAL TRADE SECRET LICENSING RESTRICTIONS

It is difficult to generalize with respect to the types of restrictions permitted and prohibited in patent and trade secret licenses. Again, the laws and regulations vary substantially from jurisdiction to jurisdiction. However, five general guidelines have been developed that apply to trade secret licensing in most jurisdictions³³:

1. A license can stipulate payment for the use of trade secret information for as long as it remains secret.
2. The license can be limited to a particular field of use, or a particular limited area.

³¹ Halt, Jr., G.B., Donch, J.C., Stiles, A.R., Robert, F.,(2014) *Intellectual Property in Consumer Electronics, Software and Technology Start-ups*, Springer New York page 161

³² Halt, Jr., G.B., Donch, J.C., Stiles, A.R., Robert, F.,(2014) *Intellectual Property in Consumer Electronics, Software and Technology Start-ups*, Springer New York page 161

³³ Goldscheider Robert (2002) *Licensing Best Practices- the LESI Guide To Strategic Issues And Contemporary Realities*, John Wiley & Sons, Inc., New York at page 134

3. The license can also stipulate minimum production, sale, or use requirements and prohibit the handling of competing goods or using competing technology during the term of the license.
4. The mutual grant-back of non-exclusive licenses for improvements is usually permissible.
5. It is also permissible to continue the obligation of the licensee not to disclose the technology after the license expires, as long as it remains secret.

Restrictions can be used in trade secret licenses that are greater than permitted in patent licensing because a trade secret does not inherently create any monopoly rights in the owner. As already noted, all trade secret rights, whether licensed or not, are subject to independent development and reverse engineering by others that are not a party to the license³⁴.

General observations can also be made with respect to restrictions that are prohibited in trade secret licenses. As with patents, a licensor should not attempt to regulate the sale or resale prices of the licensed products. Also, it is pertinent to take note of that the limitations cannot be placed on the use of competing goods by the licensee, or the use of competing technology, after the license is terminated. Exclusive grant-backs of improvements are also subject to question. In the United States, since trade secrets inherently do not convey monopoly power to the owner, such restrictions are reviewed and analysed under the Rule of Reason of the antitrust laws.³⁵

VALIDITY OF A TRADE SECRET LICENSING AGREEMENT

In general, a license may cover anything that is negotiated between the contracting parties. A license to use trade secret information, such as a formula, may address the use of all or part of the secret and may cover the following topics:

- Subject matter of the trade secret
- Installation procedures to effectuate use of the information
- Methods of production
- Machine operations
- Compensation for use of the information
- Security codes to access information

The licensing agreement may not violate the federal Antitrust Guidelines for the Licensing of Intellectual Property. These Guidelines recognize and promote the protection of all

³⁴ Ibid

³⁵ Ibid

intellectual property but prohibit any licensing arrangements which “unreasonably” restrain competition in the marketplace (e.g., facilitating price fixing or market division). Generally, the license may not be “facially anticompetitive” and the parties involved may not account for more than 20% of the relevant market³⁶. Trade secret licensing is more flexible because in effect what the licensee is paying for is the disclosure of the secret and parties has more freedom to construct the metrics that will be used to calculate that payment.

This flexibility is reflected in several ways. First, the royalty base can be more liberally defined to include revenues that are related to exploitation of the secret but that transcend the commodities that embody the secret. Second, payment obligations can also survive public disclosure (and thus destruction) of the trade secret³⁷. Third, the obligation to pay royalty can be based on global sales or manufacturing activities. In contrast, patents are limited to specific jurisdictions and an astute patent licensee will object to payment of royalties on activities that fall completely outside those jurisdictions where licensed patents have been obtained.

CONCLUSION AND SUGGESTIONS FOR ENFORCEMENT

Because a licensee can destroy trade secret rights through mishandling of the licensed information, a licensor should insist on contractual provisions that will permit expeditious, cost-effective judicial relief if such mishandling is threatened³⁸.

These provisions include typical dispute management clauses such as choice of law, jurisdiction and venue, and service of process. Licensors should also consider a provision awarding attorney’s fees to the prevailing party. From the licensor’s perspective, the agreement should specify that equitable relief is available. Rather than rely on a boilerplate clause, however, a licensor may want to enumerate specific types of relief such as destruction of inventory and return of documents that are tailored to the specific transaction³⁹. When dealing with foreign licensees, arbitration can be an effective dispute resolution vehicle; however the arbitration clause should contemplate that the licensor may seek equitable relief

³⁶ Carlos M. Correa, *Intellectual Property And Competition Law: Exploring Some Issues Of Relevance To Developing Countries*. Also available at: http://ictsd.net/downloads/2008/06/corea_oct07.pdf visited on 15.02.2012.

³⁷ Gustavo Ghidini, *Intellectual Property and Competition Law: The Innovation Nexus* 6 (2006).

³⁸ Andrew R. Basile, Jr., *Trade Secret Licensing*, Young Basile Hanlon MacFarlane (2007).

³⁹ Ibid.

in any forum having jurisdiction over the licensee. To deter breach, licensors can insist on immediate or automatic termination of license rights in the event of material breach.

If the licensee is permitted to disclose licensed information to third-party discloses, those discloses should be in private with the licensor, such as by signing a form of nondisclosure agreement that is attached to the license as an exhibit. A licensor might also insist on indemnification by the licensee for any misappropriation committed by third-party discloses to whom the licensee provides the licensed information. Finally, because it may be difficult to measure damages for misappropriation of a trade secret or other breaches (such as the failure to provide agreed-upon security measures), the parties can consider liquidated damages clauses.

MUSLIM WOMEN, RELIGIOUS PERSONAL LAW AND DISCRIMINATION WITHIN

Tanaya Agrawal* & Dr. P. K. Gautam**

Issues of Muslim women, especially with respect to their position in personal law, have, in India, acquired a great deal of importance due to several reasons. This can partly be attributed to coming in power of political outfit generally considered antithetical to rights of Muslims in general and Muslim identity in specific. Secondly, due to rising literacy rates among Muslim Women, they have become more aware of their rights and consequently they have called for revision of Muslim personal laws, considered obsolete in post-modern period and medievalist in approach. However, Muslim women, despite the political support for change, often find themselves caught between loyalties to their religious or ethnic communities and a desire for greater freedom and equality as women within those communities¹. Thus, Muslim women in India are triply disadvantaged, firstly as members of such minority, secondly as women, and thirdly, most of all as poor women.²

Though the recent debate has centred around discriminatory provisions regarding divorce, there are several other provisions of Muslim personal law are unequal towards women and the same can be mentioned hereinafter. *Firstly*, equal inheritance rights are denied to women. As per general rule, if there are male and female heirs of same degree, the share of male heir is always double to that of female heir. Widows are entitled to one-fourth of the property of deceased husband in case there are no children. Rule is applicable regardless of the number of wives a deceased had. Therefore, if a man had more than one wife then, one-fourth of share will be divided among them³. The reasons advanced for denying equal right to inheritance are often naive, for example, *as for the right to inherit, she inherits as daughter, as wife and as mother. Thus she inherits in three capacities. Of course she gets half that of her brother but then neither she has to pay dower (on the contrary she receives) nor has she to maintain herself. She is maintained by her father while unmarried and by her husband after marriage.*

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¹ Cyra Akula Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, And Muslim Personal Law Reform In India*, 17 Columbia Journal of Gender and Law 45, 45-110 (2008)

² Ibid.

³ Vrinda Narain, *Women's Rights and the Accommodation of "Difference": Muslim Women in India*, 8 Review of law and Women Studies 51, 43-73 (1998)

*She is not obliged to give anything of her wealth, whatever she possesses, to her husband who is obliged to maintain her even if she is rich and he is poor.*⁴ Such arguments presume that women are dependent on father, husband and children and thus, have the effect of denying the woman of her independent identity.

Secondly, under Muslim Law, a mother cannot be the legal guardian of her children. She can only claim physical custody, the period of which is prescribed by personal laws and is non-extendable. The father is considered a legal guardian and upon his death guardianship passes to father's executor, paternal grandfather or the paternal grandfather's executors.⁵ Further, a mother's right to custody of her minor children is not absolute, and she may be deprived of it if she is deemed unsuitable and unable to contribute to the physical, moral and intellectual development of the child. Sometimes guardianship rights are used by husband as a threat to induce compliance and wife yield to his demands.⁶

Thirdly, Muslim women's right of monogamous marriage has not been protected. The instances of polygamy among both Hindus and Muslims are nearly equal but it the formal acknowledgement of right of Muslim men to enter into Polygamous marriage, which is degenerating.⁷ Polygamy, though, is a criminal offence in India but Muslim men are exempt from provision of this act, even in view of the fact that many Islamic countries have either controlled or prohibited polygamy.⁸ Further, Muslim personal laws are also not equal with regards to whom women can marry. While men are permitted to marry women from other religion who are *kitabia* but marriage between Muslim women and Non-Muslim man is void.

Fourthly, divorce laws are discriminatory against Muslim women. While men have a unilateral right to divorce, women's rights to divorce are limited and subject to several constraints. Islamic law allows several kinds of action by which divorce can be obtained. First, *talaq* is divorce that is initiated by the husband at will, without any cause. It can be revocable or irrevocable, done through written or oral pronouncement, and does not require the wife's presence or consent. A revocable *talaq* becomes irrevocable upon the passing of the *iddat*. Second, a wife can initiate or obtain divorce through *khula*, or mutual consent, in

⁴ Asghar Ali Engineer, *Status of Muslim Women*, 29 Economic and Political Weekly 298, 297-300 (Feb 5, 1994)

⁵ Supra note 5

⁶ Nayar Honorwar, *Behind the veil*, 6 Journal of Law and Religion 385, 355-387 (1988)

⁷ Faizan Mustafa, *Three is Crowd*, (March 17, 2015 12:00 am),

<http://indianexpress.com/article/opinion/columns/three-is-a-crowd/>

⁸ Around 20 countries including Turkey, Turkmenistan, Israel have illegalised polygamous marriage for Muslim men.

which she agrees to give the husband consideration for dissolution of the marriage. Finally, where both parties seek dissolution, the *mubara'at* form of divorce can be used.⁹ In addition, Dissolution of Muslim marriage Act 1939, lists various ground on which Muslim women can obtain divorce.¹⁰ Out of the above, it is the *talaq al biddat*, or *triple talaq* as it is called, in which the word *talaq* is pronounced thrice in single sitting, is under controversy. It is this form of *talaq*, far greater than polygamy, which causes severe prejudice to the status of Muslim women¹¹.

ARABIA AND ADVENT OF ISLAM

In order to correctly understand orthodox position of women in Islam, it is necessary to analyze the societal position of women in Pre-Islamic Society in Arabia becomes necessary and impact of development of Islam. In Pre-Islamic Arabia, primitive society having nomad culture threatened by poverty and starvation, women were considered more a burden. With women being considered weak and most of the necessary functions of nomadic society being accomplished by males, female subjugation was a way of life. Status of women in early Arabic society can also be understood from the types of marriage contracted. There were two main forms, first *sadiqa* based on female kinship and second *ba'l* based on male kinship. Initially both in practice it was the domination of *ba'l* form of marriage over *sadiqa*, which significantly contributed to female deprivation.¹² Further, there was no limit, except financial, on number of marriages which could be contracted by males. The dower, though was given in marriage but it was generally paid to the father of the bride, thus, rendering a marriage to be a

⁹ Supra note 5, 73

¹⁰ Section 2 of the Dissolution of Muslim marriage Act 1939, mentions the following grounds,

- i. his whereabouts have not been known for a period of four years;
- ii. he has failed to provide maintenance for her for a period of two years (for which she may sue him even if she is able to maintain herself);
- iii. he has been imprisoned or sentenced to be imprisoned for more than seven years;
- iv. he has failed to perform his marital obligations for a period of three years;
- v. he was impotent at the time of marriage and continues to be so;
- vi. he has been insane for a period of two years, or suffers from leprosy or a virulent venereal disease;
- vii. the wife was given in marriage by her father or guardian before the age of fifteen and repudiates the marriage before the age of eighteen;
- viii. he treats her with cruelty, that is, either physical or mental, associates with women of ill-repute, attempts to force her to lead an immoral life, disposes of her property and refuses to allow her to exercise her legal rights over it, obstructs her ability to perform her religion, or has more than one wife and does not treat her equitably; and
- ix. she has any other grounds which are recognized as valid for dissolution under Muslim law.

¹¹ Vrinda Narain, *Women's Rights and the Accommodation of "Difference": Muslim Women in India*, 8 Review of law and Women Studies 53, 43-73 (1998).

¹² John.L.Esposito, *Womens's Rights in Islam*, 14 Islamic Studies 102, 99-114(1975)

sales contract between husband and bride's father. This also limited the divorced women with limited means of support after divorce. In short, Pre-Islamic Arabic society was characterised by rampant female infanticide, practice of easily obtainable divorce by husband and absence of legal rights secured to women. In such a situation her position was at best marginalised¹³.

It was in backdrop of this society that Islam introduced major reforms in the society along with recognition of female rights as well. Significant changes were introduced in personal laws which provided significant benefit to women. Firstly, Islam restricted the number of wives which could be taken by man to four with an emphasis on monogamy, particularly evident from conditions which were imposed. Husband was obligated under Islam to treat all his wives without any discrimination and was also required to provide them with separate quarters and adequate maintenance.¹⁴ Also marriage was given status of contract between husband and wife, with both male and female having equal rights to contract marriage.¹⁵ Role of father to give his daughter was thus made marginal. Secondly, Islam recognised the right of women to manage her own property and her personal income for her personal benefit to exclusion of everyone including husband and children.¹⁶ Rights of women concerning inheritance were also recognised though her share was restricted to half of males. It was however, in the area of divorce that fewer rights were given to females as compared to males. *Talaq* was held to be undesirable practice and in cases where it became necessary women was entitled to *mehr* if not paid earlier. In fact, Islam was the first religion to accept woman as a legal entity and accord her rights in matters of marriage, divorce, property, inheritance, custody of children and maintenance etc¹⁷ and considered to be equal in status and worth with respect to man.¹⁸ Thus, from material as well as spiritual point of view Islam recognised position of women to be same as that of men¹⁹. In short, Islam rather than being a religion was a social movement which strived for the change in underlying malpractices prevalent in the society. It was in the course of time that these practices were cast in stone and given status and hence held to be immutable.

¹³ Nayer Honarvar, *Behind the veil: Women's Rights in Islamic Societies*, 6 Journal of Law and Religion 366, 355-387(1988)

¹⁴ Rashda Sharif, *Women in Islam*, 21 European Judaism: A Journal for the new Europe 29, 28-33 (1987)

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Shashi Shukla, *Political Participation of Muslim Women*, 57 The Indian Journal of Political Science 8, 1-13(1996)

¹⁸ Supra note 16, 32.

¹⁹ Saneya Saleh, *Women In Islam: Their Status In Religious And Traditional Culture*, 2 International Journal of the Society of Family 36, 35-42 (1972)

CASE OF MUSLIM IDENTITY

The call for social change in Muslim personal laws, as mentioned earlier, has been met with considerable resistance. This situation is perplexing in view of the reformative zeal adopted by Islam in its initial formative years. Several reasons have been quoted for this position. However, among them the obsession with religious identity is most pertinent in case of India and often changes in personal law have been frowned upon on ground that it is integral part of social-religious identity.²⁰ The concept of socio-religious identity is, however, of British creation. It was the colonial politics of British India which began, in a more systematic manner, manipulation of group identities.²¹ The attempt to divide population along communal lines carried out in order to prevent united anti-imperialist struggle. Also, meaningful reforms in personal laws were avoided so as to avoid public backlash and to prevent diffusing of identities, for a unitary system of personal laws would have blurred the differences among communities. In 1772, for example, Warren Hastings and William Jones, had decided to apply “the laws of Koran with respect to Mohammedans and that of the Shastra with respect to Hindus.”²² But it was Minto-Morley reforms of 1909 which institutionalized the unsaid policy of British administration to harness the fault lines in religions to their own benefit by granting Muslims separate electorates in representative bodies at all levels of the electoral system. It was a momentous step which gave Muslims the status of an all-India political category but one effectively consigned to being a perpetual minority in any scheme of constitutional reforms.²³ From then communal discourse became too entrenched in Indian Politics. The late 1930s saw the further development of the idea of a Muslim nation which ultimately led to the unfortunate partition.²⁴

The persistence with the minority identity continued even after the Independence as Muslims who preferred to stay in India, closed their ranks in order to secure safety in what they perceived as *Hindu Rashtra*, even after adoption of Constitution which was secular in nature. This insecurity found its expression in uproar of the community against the judgement of

²⁰ Supra 13, 65

²¹ Asgar Ali Engineer, Remaking Indian Muslim Identity, 26 Economic and Political Weekly 1036, 1036-1038 (1991)

²² Ali Riaz, *Nations, Nation-State and Politics of Muslim Identity in South Asia*, 22 Comparative Studies of South Asia, Africa and the Middle East 54, 53-58 (2002)

²³ Cyra Akula Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, And Muslim Personal Law Reform In India*, 17 Columbia Journal of Gender and Law 56, 45-110 (2008)

²⁴ Id. 57

Supreme Court in case of *Shah Bano*²⁵. In this case Supreme Court ruled that Shah Bano, who divorced by her husband after 43 years of marriage, was entitled to maintenance from her husband. The court further ruled that a Muslim woman, unable to support herself, was entitled to take recourse to Section 125 of the Criminal Procedure Code which applied to all communities regardless of their separate personal laws. In case of a conflict between certain provisions of the Criminal Procedure Code and the Muslim Personal Law, the former would prevail over personal law was further emphasised in *Daniel Latif*²⁶ case. Judgement evoked considerable passion and in view of protests, Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed by the government. This act limited the duty of husband to provide for the maintenance of divorced wife. Under the act husband was only liable for maintenance during iddat period. However, what is often ignored is the fact that *Shah Bano* judgement was not the first to grant maintenance rights to divorced Muslim women. Two important judgments by Justice Krishna Iyer in the *Tahira Bai v. Ali Hussain Fiduli Chothia*²⁷ and *Fazlunbi v. Khader Ali*²⁸ cases in the 1970s granted maintenance to Muslim women under Section 125 of Criminal Procedure Code. In contrast to *Shah Bano* case none of judgement evoked sharp response. Some writers have attributed it to deteriorating Communal harmony in India during the period and to phraseology in which judgement was framed. *Shah Bano* judgement was critical of the Muslim Personal law, in comparison; judgements delivered by Krishna Iyer J, were couched in framework of Social Justice.²⁹ However, the first reason seems to be misguided in view of fact that in year 1980 when the *Fazlunbi v. Khader Ali*³⁰ judgement was delivered, there were Moradabad riots disturbing the communal harmony, even then judgement evoked no response. Therefore, second reason which puts phraseology of judgement at fault seems more plausible.

Muslim leadership and especially clergy have also used the tool of religion as an identity for the preservation of political power for such power rests on the premise that group in some important respects different from another group. In such a scenario incentive for the group to evolve is non-existent. On the other hand if the group evolves to the point where the distinction between itself and other groups is no longer significant then it would render

²⁵ Mohd. Ahmed Khan v. Shah Bano Begum 1985 SCR (3) 844

²⁶ Daniel Latifi v. Union of India AIR 2001 SC 3598

²⁷ AIR 1979 SC 362

²⁸ AIR 1980 SC 1730

²⁹ See for example Zoya Hasan, *Minority Identity, Muslim women bill campaign and the political process*, 24 Economic and Political weekly, 44-50 (1989)

³⁰ AIR 1980 SC 1730

group, claim for power meaningless³¹. Therefore, a section of the Muslim leadership has consistently tried to politicise religion as a means of safeguarding the community's separate and distinct identity, justified on the ground of Article 25, 26 and 29³² of Constitution of India. This has been achieved by demanding obedience and loyalty to personal laws over reforms which may bring members of group closer to majority. In pre-independence era the political movements among Muslims in the 1920s used religious and cultural symbols, relevant to all strata of the community, with a view to foster the unity among the followers of the religion and to enhance their bargaining position in the constitutional discussions.³³ In the post- independence period this symbolism has come to rest entirely on laws pertaining to family and women. Invariably women are the victims of cultural distinction, because community identity is defined almost entirely in terms of family laws which tend to subordinate women.³⁴

CONCLUSION: THE WAY FORWARD

After the *Shah Bano* controversy, subsequent enactment of Muslim Women's Protection on Divorce Act also highlighted the ambivalent attitude of government towards the protection of rights of all. State abdicated its duty off securing the fundamental rights mentioned in Article 14³⁵ and Article 15³⁶. The State under pretext of securing the policy of secularism bowed to the demands of Muslim elite and failed to interfere with personal laws when such laws were in explicit conflict with the constitutional guarantees. Consequently, the state, unwittingly, created a model of differentiated citizenship, wherein it had differing obligations and duties to citizens based on gender and religious identity. In a country like India where, being a woman itself creates societal hurdles, Muslim women were made to suffer both as women and as a member of Islamic community. The obvious reason being that Muslims, and not

³¹ Shalina.A. Chibber, *Charting a new path towards gender equality in India: From Religious personal law to Uniform Civil Code*, 83 Indiana Law Journal 705, 695-717 (2008)

³² Article 25, 26 and 29 of Constitution of India contain provisions regarding the minority rights.

³³ Zoya Hasan, *Minority Identity, Muslim women bill campaign and the political process*, 24 Economic and Political weekly 45, 44-50 (1989)

³⁴ The subordination of women in personal law is not limited to Muslim laws only. For example: under Christian law, a man may obtain a divorce when his wife has committed adultery, while a Christian woman seeking divorce is required to prove at least two offenses by her husband.

³⁵ Article 14 of Constitution of India guarantees to every person equality before law and equal protection law without any discrimination

³⁶ Article 15 prohibits discrimination on grounds of race, religion, gender, caste, place of birth etc.

women, are formidable voting bloc³⁷ and any changes in personal law would have resulted in electoral reverses.

As measure to ameliorate the status of women, especially those of minority community, it is often suggested to implement the Uniform Civil Code, as directed under Article 44 of Indian Constitution, which would be a common personal law code having provisions with regard to inheritance, divorce, marriage, guardianship and maintenance. Supreme Court too has from time to time called for implementation of civil code. In *Lily Thomas v. Union of India*³⁸ AIR 2000 SC 1650, Supreme Court held, “*The desirability of uniform civil code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change.*” Supreme Court, in the same vein had earlier, in the case of *Sarla Mudgal (Smt), President, Kalyani & Others v. Union of India & Others*³⁹, directed the government to implement the directive of Article 44 and to file affidavit indicating the steps taken in the matter. The demand for Uniform Civil code has also become louder due the fact that present government is favorably disposed towards its implementation.

However, few caveats have to be kept in mind regarding Uniform Civil code. Implementation of the code is along drawn process, requiring consultations with the parties concerned. Also minorities have valid reason to worry that code might not be neutral or secular instead it would be the reflection of Hindu values and ignoring their cultural system. In such a scenario it becomes important to assuage concerns of the minority groups. Any forceful attempt to implement code would inflate societal tensions and in such a scenario women may prefer to remain within the fold of religious practices and customs than becoming the part of mainstream society. Uniform Civil code would then not only fail in its purpose of women amelioration but also become politically unfeasible. Instead as a short term measure, the personal laws of the minorities could be codified and updated by incorporating values relevant in modern society and by removing the practices which are discriminatory. This would help to begin the debate within the communities over the personal laws. It would further serve dual purpose; firstly, it will loosen the stranglehold of religious elites over adjudication of the personal laws, while opening up more formal means of dispute settlement such as through courts. Secondly, it would help in creating a fertile ground for further

³⁷ Supra note 33, 705

³⁸ AIR 2000 SC 1650

³⁹ AIR 1995 SC 1531

dialogue on Uniform Civil Code for its ultimate implementation; in the meantime codified personal laws would continue to protect the women in minority communities.

Additionally any change in Muslim personal laws would require the Muslim leadership to stop viewing the religion and minority identity as a tool for consolidation of power advancing group politics. Refusal to change would itself threaten the basis of group based identity for failure to respect the identity of women would render Muslim women to feel disassociated with the very concept of Muslim identity, which used to advance discriminatory practices among them. This can be seen from the fact that in recent Uttar Pradesh election it was alleged that Muslim women voted for a particular party often considered opposed to Islamic ideology.

JOURNEY FROM SHAH BANO TO SHAYARA BANO: WOULD IT BE END OF MISOGYNY?

Aparajita Singh*

Abstract

There is striking similarity between Shah Bano case which came in 1985 and Shayara Bano case which has come in 2016. Both belong to the Muslim community and are victims of personal laws. Despite the similarity they differ from each other as Shah Bano case was regarding adequate maintenance after triple talaq while shayara bano case challenges itself the constitutionality of the instantaneous triple talaq being in contravention of the fundamental rights. The era has changed but the question remains whether shayara Bano case will bring about social changes in life of the Muslim women if the decision comes in favour of Shayara Bano. Gender justice is the heart of both the cases. This judgement would be landmark in our social and political history. Shah Bano was historic in the sense of post-divorce maintenance while this case may be a milestone as far as pre divorce is concerned. It is in this backdrop that the article tries to analyse the plight of the Muslim women in reference to arbitrary divorce (triple talaq) and also tries to establish that how this case which has come before the Supreme Court is related with Gender justice.

Keywords: Personal Law, Triple Talaq, Gender Justice, Constitutionality, Muslim Women.

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Every girl has dreams about her marriage and having a family. Shayara Bano once had such dreams and they got fulfilled when she got married. Once she was a bride with lot of aspirations in regard to his future life .Situations has changed since her marriage. There is a fear in her eyes of uncertainty regarding her future and family. She had undergone multiple abortions and is continuously taking anti-depressants. Her marriage is just 15years old and her greatest fear has been word divorce uttered thrice by his husband. The word divorce has become a nightmare for her. Soon after her marriage there were demands of more dowries failing which his husband would threaten divorce. This became everyday exercise of his husband asking for certain demands and if they were not met he would threaten her with divorce. This emotional and physical trauma turned shayara into bundle of nerves. She has undergone treatment at her parent's place. But treatment at hospital is no solution to it. Finally one day his husband sent her Talaq Nama by post.

She is a post graduate in sociology and is the most educated in the family. She is the eldest sibling in her family. She had ambition to teach which she did for very short span of time for a few months before she got married. But her life drastically changed after marriage.

In Supreme Court she has filed a petition challenging the constitutional validity not of Triple Talaq approved and allowed by Quran as long as it is three utterances spread over time period of 90 days but rather instantaneous triple talaq. This is the first case of its kind where a Muslim woman has challenged a personal practise citing fundamental rights guaranteed by the Indian Constitution.

There are various forms of divorce in Islam sometimes they are initiated by husband and at times by wife. The theory and practice of divorce in the Islamic world have varied according to time and place.¹ Historically, the rules of divorce were governed by shariat, as interpreted by traditional Islamic jurisprudence, and they differed depending on the legal school. In modern times, as personal status (family) laws were codified, they generally remained “*within the orbit of Islamic law*”, but control over the norms of divorce shifted from traditional jurists to the state.

TRIPLE TALAQ is considered as the most sinful form of divorce. It is a form of divorce where the word divorce is uttered in one single sitting as “I divorce thee” thrice. Hanafis one

¹ Maaike Voorhoeve, Abed Awad and Hany Mawla (2013), ‘Divorce’, *The Oxford Encyclopedia of Islam and Women*. Oxford: Oxford University Press

school of thought in Islam considers it as sinful but still it is very much valid. The idea of this school of thought is that if the word divorce has been uttered thrice the wife becomes alienated and she cannot remarry. She is totally prohibited and in Islam it is called Haram. He cannot go for fresh nikah with her nor can he take her back. The only condition in which he can remarry her back when she gets married to another person and that person leaves her on ground of marital conflict or if she becomes a widow.²

Four major schools of jurisprudence accept the validity of triple talaq. If one see the jurisprudence behind divorce in Quran. It provides for two situations that is either one can keep the wife with kindness or leave her with benevolence.

Shayara Bano alone is not the sufferer of discriminatory use of talaq but Muslim women in general face it every day. Shayara has claimed for equality before law and protection from discrimination on the basis of gender and religion. She is symbolic of the change that should take place. Muslim woman has received divorce in numerous ways .Sometimes over Skype other time at Facebook and even through text messages. One can see the arbitrary way in which divorce has been given and there is no protection against it. They have their hands tied while the guillotine of divorce dangles perpetually ready to drop at the whims of their husbands who enjoy undisputed power. A woman has no say when it comes to instantaneous triple talaq. She has also challenged polygamy which gives arbitrary power to husbands.

In response to the petition filed by shayara on discriminatory practise of triple talaq common among Muslims Supreme Court has decided to check the constitutionality of the Islamic tenet and has asked solicitor general to file the response against the petition.

The time period in which this case has come is almost thirty years after the famous and controversial Shah Bano Maintenance case. That case was controversial as it brought lot of political turmoil in Politics at that time. As a consequence of such political turmoil the parliament has to pass the legislation the Muslim Women (Protection of the rights on divorce Act) 1986. This legislation was passed to override the judgement given by the Supreme Court giving Muslim women fairer maintenance as compared to what she got in their personal laws. The debate at that time was successfully framed as an Islam-versus-women's rights issue, and Shah Bano became a part of the Babri Masjid-and-Kashmir idea of injured Hindu pride in India.

² Available at: http://www.irfi.org/articles/articles_151_200/triple_talaq.htm

However, the social conditions and people's perspective has changed since then and if one sees here the question involved is more important as it talks about larger issue that disregarding gender biasness in respect of Muslim women especially in reference to arbitrary divorce. This case is significant as it is the first time a Muslim woman has challenged a personal law being in violation of the provisions of the fundamental rights of the constitution. Shayara Bano has raised few questions before the court to declare *triple talaq* (pronouncement of the word divorce thrice in one single utterance), *nikah-halala* (where a woman is made to consummate a *nikah* with another man in order to go back to her former husband) and polygamy are illegal and in violation of Articles 14 (equality before law), 15 (prohibition of discrimination on the basis of religion, caste, sex, place of birth), 21 (protection of life and personal liberty) and 25 (freedom of conscience and free profession, practice and propagation of religion) of the Constitution. With triple talaq Indian men exploit women. They say it whenever they want, in a fit of anger. Life ends for a woman. In many Islamic countries like including Saudi Arabia, Pakistan and Iraq triple talaq has been restricted or banned. It's high time that it should be banned in India as well .It is one of the ways in which Muslim women can become empowered if they are able to enjoy their fundamental rights given in the constitution in the true sense. Personal practice especially of arbitrary divorce often does not allow Muslim women to enjoy their right to life and personal liberty in the true sense.

Shayara Bano case stands for the whole community of Muslim women who have been suppressed since ages in the name of arbitrary divorce. Let's hope this case will open new doors for Muslim women as far as gender justice is concerned.

GENDER NEUTRALITY: A WAY TO PAY HOMAGE TO LONG LOST HUMANITY?

Vishruti Relan * & Shiven Kaushik **

INTRODUCTION

When we come across the term ‘Gender Neutrality’, we often confuse ourselves with its many faced definitions that come flying around like messenger birds from either human right activist or pseudo intellectuals. They may vary from societal unacceptance of the non-binary genders to the sexist laws that are up surging the gender bias in the name of justice. However, the scope of this essay would limit to the sexist laws that are eviscerating the rights out of the humans. In simpler terms gender neutrality is a concept to a bridge the differences between the people on the ground of gender or sex. It disparages the mentality of people who considers the gender unequal and assigns the role based on gender. Same treatment is not entertained to the people of different genders; the work is allotted solely based on anticipation. The same goes for the crime anticipation, in the cases of rape, males are the only worthy candidates. The thinking is highly influenced by the orthodox element in Indian society based on long followed traditions. In unembellished words, gender neutrality means cessation of role distribution based on sex or gender with the ultimate aim to prohibit empowerment of one gender and desensitization of other genders and to discard the thought of superiority of one gender over other. As per the Constitution of India, no discrimination can be done on the basis of sex¹. According to Universal declaration of human rights no differentiation can be done between men and women². Gender neutrality is a way to sensitize humans towards other genders in the society.

WHY THERE IS A NEED FOR GENDER NEUTRAL LAWS?

Gender Equality apotheosized in our Indian Constitution in its preamble, Fundamental rights, Directive principles and Directive duties lacks ‘Gender Neutrality’. The gender neutral reforms will augment the scope and definitions of the rape and sexual assault laws to rope in the female perpetrators and give justice to the male victims. This type of reform would

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¹ Article 15 , Constitution of India

² Universal Declaration of Human Rights

recognize male victims of abuses in many forms and faces and also chastise the women perpetrators and affirm that women can commit a crime as serious as rape and sexual assaults. The shift of burden of proof from the prosecution to the defendant in rape law has left no scope for the men to get justice. The general principle of law states that the burden of proof is on the prosecution, but in some handpicked sections of law the burden of proof is on the accused (male). This certainly does not look like a gender neutral legal framework. The recognition of gender neutrality will abate the excruciating sufferings of the victimized male in India and other countries that lack gender sensitivity in their laws. A study was done on 97 countries around the world out of which 63 countries had gender neutral rape law while the other 27 countries had gender specific laws like India as per which a man can only rape a woman and remaining 6 countries had partly gender neutral laws as per which a man can commit rape against both male and female³.

We live in a funny world, where people are like sheep following the crowd. Earlier the trend or belief was to degrade women which people followed religiously until an intellectual group of people slapped the world with the obvious truth of life that ‘everyone is equal’. Just about when the bar of equality was stabilizing in conformity with gender neutrality, a new trend took the world by storm with now the male victims on the edge of the knife. Sexism has penetrated our legal system, with postulated mindset that men are always guilty, that crime against men is not that big a deal, that men cannot be raped. If a man dares to complain about being stalked or sexually abused by a woman, his remaining dignity is scraped off by the phrases like ‘be a man’ and ‘don’t be such a girl’. Our legal system has beautifully drafted the atrocious laws for men where by just a ‘100’ call could land a clean handed male into the prison for a considerable time. If striking a balance in the society of legions with distinct genders was the aim, then the effort was in futile. Nothing can be more erroneous than the fact that the legal system which was meant to be a shield for the women of our country against the perpetrators, is being used as a weapon against the men of our country. Former Supreme Court Judge, KT Thomas pointed out, “*Whenever you make a law very stringent on account of pressures from emotionally surcharged social reactions, there is a real danger of its misuse.*” Yes, we do understand the need to empower women because of the horrendous past that our country has encountered, but the time when women were not allowed to speak, share their thoughts or act out of their own will has surpassed us so much so that now the most

³ The source for this data is the Penal or Criminal Code of each country. The countries that were not studied usually had inaccessible criminal codes or inconsistent laws across states, like in the United States.

hon'ble positions are held by the most deserving women candidates. No barriers have been set for females, and moreover they are provided with the special status and on top of that no one seems to be questioning the validity of women's accusations. Being gender neutral is when you celebrate both heroes and she-roes with equal respect, no pun intended. But the scale has been set right; there are no more rules/laws that are acting against the welfare of women. Pro women laws are turning out to be a nightmare for the male species, the gender biased laws like section – 497, 498a of Indian Penal Code, 125 CrPc⁴, Domestic Violence act 2005 and Dowry Prohibition act are legally authorized men destruction weapons in the hands of disgruntled, revengeful female perpetrators. The laws in India are not gender neutral, but gender specific which gives an impression of gender inequality. The overlooked presence of the transgender, including hijras (Indian context), cross-dresser, a gender and many more who do not fall under the category of either male or female is obnoxious to the very core of the humanity. The absence of sufficient laws and provisions for sexual minorities (transgender community) creates gender inequality. Due to lack of social recognition of sexual minorities they are not socially accepted hence they don't play similar roles as compared to majority of gender which ultimately does not earn them the right to be protected by the laws. Albeit steps have been taken to right the wrong, like when the Supreme court gave recognition to transgender by giving them the tag of 'third gender'⁵ and the mere introduction of the bill⁶ towards the empowerment of the transgender community although the bill stinks of callousness and ignorance. The law on throwing acid has been made neutral by adding the expression 'whoever'⁷. Keeping in light of all the facts it can be said that India is taking baby steps towards attaining gender neutrality.

INDIAN LAW: CURRENT SCENARIO

Rape & Sexual assault laws

Indian rape law is the perfect candidate for showcasing the lack of gender neutrality in India. As per the provisions laid down in the Indian law, only a man can rape a woman in India. As per section 375 and 376 of Indian Penal Code a man can only be punished for committing rape against a woman in India along with this there are other gender specific laws such as

⁴ Code of Criminal Procedure, 1973

⁵ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438

⁶ The Transgender persons (protection of rights) bill, 2016

⁷ Section 326, The Criminal Law Amendment Act of 2013

laws relating to sexual harassment⁸. As per section 375 of Indian Penal Code any type of sexual offences against females is only considered as rape in India. No laws regarding the rape of a male by another male or rape of male by a female or rape of a male by transgender or vice-versa are made. None of these rapes are covered under the ambit of section 375 of Indian Penal Code neither any relief is granted for the same nor has any punishment been prescribed for the same. The ‘Right to Equality’ as inscribed in Article 14 of our Constitution is in violation if not enough steps are taken to deal with the men related crimes. The Delhi-based Centre for Civil Society found that approximately 18% of Indian adult men surveyed reported being coerced or forced to have sex. Of those, 16% claimed a female perpetrator and 2% claimed a male perpetrator⁹.

Males are always expected to be sexual offenders, immaterial of the fact that they can be victim as well. A male being a victim of rape by another male or a female has no legal provisions to complain against the offenders and get them punished. Neither any provision is made for the rehabilitation of male rape victims or counseling of the male victims. Even when the accused is acquitted, the stigma does not obliterate that easily and the media coverage destroys the self-esteem, confidence and in some cases the tortured, abused victim falls into psychotic disorders. The social ridicule haunts the falsely accused male victim for decades. The section 377 of IPC does not define male rape it only deals with unnatural sex that covers carnal intercourse that is against the order of nature with a man or a woman¹⁰. By the virtue of section 375 and section 377 of IPC homosexuals, transgender and transsexual people have no legal mechanism to deal with rape except where it can be brought under the ambit of section 377 IPC.

Rape of Men and Transgenders

In India it is unfortunate that rape of male by another male and voluntary sexual intercourse between homosexuals is jointly brought under the ambit of section 377 of IPC. A clear cut definition in Indian law must severalize between coercive sexual intercourse and consensual sexual intercourse among the homosexuals.

“He was being raped by 6 drunken males while being verbally and physically assaulted for being gay. Vinodhan was the victim here he was even filmed by the offenders he could not

⁸ Section 354, The criminal law amendment Act of 2013

⁹ Retrieved from <http://ccs.in/indias-law-should-recognise-men-can-be-raped-too>

¹⁰ Section 377 of IPC

*even go to police for help as there was no law to deal with it and he thought he will be blamed for being gay*¹¹. Due to the stigma of being criticized by the Indian society for being gay in India People like Vinodhan cannot come out as male victims of rape

The minimum punishment for rape as per the Indian rape law (Criminal Amendment Act of 2013) is 7 years which may extend up to sentence for life¹² whereas per section 377 no minimum punishment is prescribed for forced sexual intercourse between two males. If a minimum punishment for a particular crime is awarded in Indian law it means the crime is heinous in nature, but not setting minimum punishment in section 377 for an offence otherwise considered as heinous, gives an impression of non-serious crime as in Indian law male on male rape is not considered so it is not considered as rape. This fact itself shouts the status of gender neutrality in Indian rape laws. To bring the sexual assault on males, transsexuals, transgender and homosexuals under Indian Rape law, 3 members Justice Verma committee¹³ recommended to make victims gender inclusive so that it can include all above mentioned. Ms. Ratna Kapoor Professor of law at Jindal Global Law School and Advocate/Plaintiff in *Ratna Kapoor versus Suresh Kumar Kaushal* held section 377 of IPC as unconstitutional, with an ultimate aim of making stronger gender neutral law writes “*criminalizing non-consensual sex regardless of gender can only work if sexual minorities are granted the right to have consensual sex in the first place*”¹⁴. It means that making criminal of non-consensual sex will only come into force if sexual minorities like gays, lesbians, bisexuals, transsexuals and transgenders are given right to have consensual sex as changes in law as suggested by Justice Verma Committee can further lead to harassment of sexual minorities in India.

As per Flavia Agnes Senior lawyer at Bombay High Court, the importance of providing security to LGBT community against the violent acts of heterosexual men and other homophobic people holds great significance as the current law in force does not have any provision to provide security to the sexual minorities.

Siddharth Narain addressing non woman rape victims of India has put on a question to Indian Society “*who is to say that the sexual humiliation suffered by the transgender person and men, and by those intersex persons and sexual minorities not born woman, is a lesser*

¹¹ Menon P, *Lacking support male victims stay silent*, The times of India

¹² Section 376, IPC

¹³ Justice Verma Committee Report

¹⁴ Ratna Kapoor, *The new sexual security regime*, The Hindu

violation of personal and inner space, a lesser injury to mind, soul, spirit and sense of a self?¹⁵”, this is absolutely true that the rights of transgender people, intersex and sexual minorities are kept at bay by the current law.

Dowry

One of the most unbridled abused laws in India, the anti-dowry laws is turning out to be anti-men laws. With more than 10,000 false cases registered every year, the law-abiding husbands and their innocent family members land in prison. In a recent order, the Supreme Court had said Section 498A had “*dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives*”¹⁶. If a wife dies within 7 years of the marriage, the husband is beyond any reasonable doubt considered as the murderer. This social evil must be destroyed before it destroys the sacred concept of marriage.

INITIATIVES TOWARDS PROMOTION OF GENDER NEUTRALITY

Supreme Court on Transgender

In the case of *National Legal Service Authority v. Union of India*¹⁷, Justice KR Radhakrishnan declared transgender as the Third Gender in India. The verdict was revolutionary as it was the 1st step in India taken by the Judiciary to give social recognition to transgender people of India and to give them equal status so that they can be uplifted and to cease all the sufferings they encounter.

UGC Notification 2016

The University Grants Commission of India notified that laws governing sexual harassment would be considered as a gender neutral law. The law which was notified by the UGC Regulations on Sexual Harassment Prevention and Prohibition has made the offence of sexual harassment a gender neutral law as the new notification give protection to both the sexes against sexual harassment.

¹⁵ Narain S., *Crimes of Exclusion*, The Indian Express

¹⁶ Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273

¹⁷ 2014) 5 SCC 438

In another instance, gender neutrality can be seen, where the Delhi High Court Rejects a plea of a wife demanding increase in maintenance, on the mere ground that the husband was residing in Dubai and earning there in local currency at Dubai¹⁸.

On demand of a student of NALSAR Law University in Hyderabad, a gender neutral graduation certificate was issued as the student wanted to be identified as “Mx” instead of “Ms or Mr”¹⁹. The request was made by Anandita Mukherjee and the same was duly considered. Historically NALSAR became the first education institute in whole of the India to issue a gender neutral graduation certificate.

In the case of *Narendra v. K Meena*²⁰ it was held by apex court that repeated efforts of a wife to influence her husband to get separate from parents will amount to “cruelty” and can be a ground for seeking divorce, rarely these kind of verdicts come from Indian Judiciary which makes it clear that married men can also be subjected to cruelty. In this verdict it can be clearly seen that it is influenced by the wave of gender neutrality which is moving at very slow pace.

Madhu Bai Kinnar²¹ was the first transgender of India to win Civic pools and was elected as Mayor, she won by 4500 votes while beating her opposition party BJP at Raigarh in the state of Chhattisgarh. A sense of developing gender neutrality can be seen by the entry of a transgender into the Indian governance and that too with a great support.

From all the above instances and examples it is clear that the sense of gender neutrality is developing among the Indian Society as it is reflected in various verdicts of Honorable Supreme Court of India and various High Courts and other occasions, though the initiatives to promote gender neutrality are very less, but like it's said – “hope is the only thing that keeps us alive”.

CONCLUSION

¹⁸ The Indian Express, Retrieved from <http://indianexpress.com/article/india/india-news-india/delhi-high-court-rejects-wifes-plea-for-enhanced-maintenance-from-husband-3082350/>

¹⁹ The Indian Express, Retrieved from <http://indianexpress.com/article/india/india-others/1st-gender-neutral-degree-handed-out-by-nalsar-varsity/>

²⁰ *Narendra v. K. Meena*, Retrieved from <https://indiankanoon.org/doc/130314186/>

²¹ Retrieved from <https://www.theguardian.com/world/2015/jan/05/transgender-woman-elected-mayor-india-chhattisgarh>

The truth is that the men do not feel invested enough in the legal tank of justice, moreover, they feel as if they are standing in front of the gun barrel of the justice system because it has been abundantly clear in our society that a man's mental agony is kept at bay whereas a woman's emotional hoax is at play. The need of the hour is to make immediate amendments in existing laws to make it gender inclusive in such a way that it embodies victim of all genders and no gender is deprived of the rights promised by our constitution. Section 377 of IPC needs amendment to differentiate between forced Sex (rape) and consensual sex (sexual intercourse with consent) and also the definition of rape should be widened to recognize rape between the members of same sex group and transgender. Rigorous punishments should be awarded for any act of sexual assault or rape to the perpetrators irrespective of their gender.

There is no doubt that gender inequality is ubiquitous in India from ancient times due to superiority of one gender over the other. But the people of India have started realizing the problem of gender inequality. Indian people over the time have now developed a sense of sensitivity towards other genders and now are trying to overcome the problem through small steps taken in best of their ability and domain. These steps may be very small steps to overcome gender inequality but they give a light of hope in the long lasting darkness.

The fact that the 'Gender Neutrality Revolution' has begun in India and has started growing cannot be overlooked and should be appreciated as well. The torch of gender neutrality has emerged and it needs to be carried and spread around the Indian society.

SEXUAL HARASSMENT AT WORKPLACE

Sumit Agarwala* & Shilpy**

“The meaning and content of the fundamental rights Guaranteed in the Constitution of India are of sufficient Amplitudes to encompass all facets of gender equality....”

J. S. Verma J., in *Vishaka v. State of Rajasthan*

Women have a unique position in every society whether developed, developing or underdeveloped. She plays a very important role in every family, society or nation. Inspite of her contribution in the life of every individual human being, she still belongs to a class or group of society which is in disadvantaged position on account of several social barriers and impediments. She has been the victim of tyranny at the hands of men who dominate the society. The position of Indian woman is no better compared to their counterparts in other parts of the world. On one hand she is held in high esteem by one and all worshipped, considered as the embodiment of tolerance and virtue. But on the other hand she has been the victim of untold miseries, hardships and atrocities caused and perpetuated by the male dominated society. The women have been a victim irrespective of her economic background. The rich and poor alike are the victims of social barriers and disadvantages of varying kinds. A report of the United Nations organizations points out that women constitute half the world population, perform nearly two-thirds of work hours, receive one-tenth of the world's income and own less than one-hundred percent of world's property.

In India, women have always been discriminated against and have suffered and are suffering discrimination in silence in the civilized as well as the primitive society. They have been made the victims of all inequalities, indignities, inequality and discrimination, from time immemorial. This history is responsible for including certain general as well as specific provisions for upliftment of women. With regard to the constitution contains many provisions which go a long way in securing gender justice. The rights guaranteed to the women are on par with the rights of men and in some cases the women have been allowed to enjoy the benefit of certain special provisions.

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The preamble to the Indian Constitution contains various goals including the equality of status and opportunity to all the citizens. This particular goal has been incorporated to give equal rights to the women and men in terms of the status as well as opportunity.

A safe workplace is therefore a woman's legal right. Indeed, the Constitutional doctrine of equality and personal liberty is contained in Articles 14, 15 and 21 of the Indian Constitution. These articles ensure a person's right to equal protection under the law, to live a life free from discrimination on any ground and to protection of life and personal liberty. This is further reinforced by the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which was adopted by the UN General Assembly in 1979 and which is ratified by India. Often described as an international bill of rights for women, it calls for the equality of women and men in terms of human rights and fundamental freedoms in the political, economic, social, cultural and civil spheres. It underlines that discrimination and attacks on women's dignity violate the principle of equality of rights.

Sexual harassment constitutes a gross violation of women's right to equality and dignity. It has its roots in patriarchy and its attendant perception that men are superior to women and that some forms of violence against women are acceptable. One of these is workplace sexual harassment, which views various forms of such harassment, as harmless and trivial. Often, it is excused as 'natural' male behavior or 'harmless flirtation' which women enjoy. Contrary to these perceptions, it causes serious harm and is also a strong manifestation of sex discrimination at the workplace. Not only is it an infringement of the fundamental rights of a woman, under Article 19(1)(g) of the Constitution of India "*to practice any profession or to carry out any occupation, trade or business*"; it erodes equality and puts the dignity and the physical and psychological well-being of workers at risk. This leads to poor productivity and a negative impact on lives and livelihoods. To further compound the matter, deep-rooted socio-cultural behavioral patterns, which create gender hierarchy, tend to place responsibility on the victim, thereby increasing inequality in the workplace and in the society at large.

Though sexual harassment at the workplace has assumed serious proportions, women do not report the matter to the concerned authorities in most cases due to fear of reprisal from the harasser, losing one's livelihood, being stigmatized, or losing professional standing and personal Reputation. Across the globe today, workplace sexual harassment is increasingly understood as a violation of women's rights and a form of violence against women. Indeed, the social construct of male privileges in society continues to be used to justify violence

against women in the private and public sphere. In essence, sexual harassment is a mirror reflecting male power over women that sustains patriarchal relations. In a society where violence against women, both subtle and direct, is borne out of the patriarchal values, women are forced to conform to traditional gender roles. These patriarchal values and attitudes of both women and men pose the greatest challenge in resolution and prevention of sexual harassment. Workplace sexual harassment, like other forms of violence, is not harmless. It involves serious health, human, economic and social cost, which manifests themselves in the overall development indices of a nation.

The Directive Principles of State Policy contained in part IV of the constitution incorporate many directives to the state to improve the status of women and their protection.

Article 39 (a) directs the state to improve the status of men and women, equally have the right to an adequate means of livelihood.

Article 39 (d) directs the state to secure equal pay for equal work for both men and women. Article 39 (e) specifically directs the state not to abuse the health and strength of workers, men and women.

Article 42 incorporates a very important provision for the benefit. It directs the state to make provisions for securing just and humane conditions of work and for maternity relief. Apart from these specific provisions all the other provisions of the constitution are equally applicable to the men and women. This clearly establishes the intention of the framers of the constitution to improve the social, economic, educational and political status of the women so that they can be treated with men on equal terms.

In 1992, a rural level change agent, Bhanwari Devi, was engaged by the state of Rajasthan as a Satin work towards the prevention of the practice of child marriages. During the course of her work, she prevented the marriage of a one-year old girl in the community. Her work was met with resentment and attracted harassment from men of that community. Bhanwari Devi reported this to the local authority but no action was taken. That omission came at great cost Bhanwari was subsequently gang raped by those very men.

The Bhanwari Devi case revealed the ever-present sexual harm to which millions of working women are exposed across the country, everywhere and everyday irrespective of their location. It also shows the extent to which that harm can escalate if nothing is done to check

sexually offensive behavior in the workplace. Based on the facts of Bhanwari Devi's case, a Public Interest Litigation (PIL) was filed by Vishaka and other women groups against the State of Rajasthan and Union of India before the Supreme Court of India. It proposed that sexual harassment be recognized as a violation of women's fundamental right to equality and that workplaces/establishments/institutions be made accountable and responsible to uphold these rights.

In a landmark judgment, *Vishaka v. State of Rajasthan* (1997), the Supreme Court of India created legally binding guidelines basing it on the right to equality and dignity accorded under the Indian Constitution as well as by the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

It included:

- A definition of sexual harassment
- Shifting accountability from individuals to institution
- Prioritizing prevention
- Provision of an innovative redress mechanism

The Supreme Court defined sexual harassment as any unwelcome, sexually determined physical, verbal, or non-verbal conduct. Examples included sexually suggestive remarks about women, demands for sexual favours, and sexually offensive visuals in the workplace. The definition also covered situations where a woman could be disadvantaged in her workplace as a result of threats relating to employment decisions that could negatively affect her working life. It placed responsibility on employers to ensure that women did not face a hostile environment, and prohibited intimidation or victimization of those cooperating with an inquiry, including the affected complainant as well as witnesses.

It directed for the establishment of redressal mechanism in the form of Complaints Committee, which will look into the matters of sexual harassment of women at workplace. The Complaints Committees were mandated to be headed by a woman employee, with not less than half of its members being women and provided for the involvement of a third party person/NGO expert on the issue, to prevent any undue pressure on the complainant. The guidelines extended to all kinds of employment, from paid to voluntary, across the public and private sectors. Vishaka established that international standards/law could serve to expand the

scope of India's Constitutional guarantees and fill in the gaps wherever they exist. India's innovative history in tackling workplace sexual harassment beginning with the Vishaka Guidelines and subsequent legislation has given critical visibility to the issue. Workplaces must now own their responsibility within this context and ensure that women can work in safe and secure spaces.

Having raised the bar of responsibility and accountability in the Vishaka Guidelines, the Supreme Court placed an obligation on workplaces, institutions and those in positions of responsibility, to uphold working women's fundamental right to equality and dignity at the workplace. Three key obligations were imposed on institutions to meet that standard, namely:

- Prohibition
- Prevention
- Redress

Keeping in view the guidelines laid down by the Supreme Court in Vishakha's Case. In 2013, the Government of India notified the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act. Consistent with the Vishaka judgment, the Act aspires to ensure women's right to workplace equality, free from sexual harassment through compliance with the above mentioned three elements .It is important to note that the Act provides a civil remedy to women and is in addition to other laws that are currently in force. Consequently, any woman who wishes to report instances of sexual harassment at the workplace has the right to take recourse of both civil and criminal proceedings.

Sexual Harassment includes anyone or more of the following unwelcome acts or behavior (whether directly or by implication), namely:

- i. Physical contact or advances;
- ii. A demand or request for sexual favours;
- iii. Making sexually coloured remarks;
- iv. Showing pornography;
- v. Any other unwelcome physical, verbal or non-verbal conduct of a sexual nature

The impact of sexual harassment at the workplace is far-reaching and is an injury to the equal Right of women. Not only does it impact her, it has a direct bearing on the workplace

productivity as well as the development of the society. Below is a list of select examples of such negative impacts:

- Decreased work performance
- Increased absenteeism, loss of pay
- Loss of promotional opportunities
- Being objectified
- Becoming publicly sexualized
- Defamation
- Depression
- Anxiety, panic attack
- Shame, guilt, self-blame
- Fatigue, loss of motivation

Some examples of behavior that constitute sexual harassment at the workplace:

- Making sexually suggestive remarks or innuendos.
- Serious or repeated offensive remarks, such as teasing related to a person's body or appearance.
- Offensive comments or jokes.
- Inappropriate questions, suggestions or remarks about a person's sex life.
- Displaying sexist or other offensive pictures, posters, Mms, Sms, Whatsapp, or E-mails.
- Intimidation, threats, blackmail around sexual favours.
- Threats, intimidation or retaliation against an employee who speaks up about unwelcome behavior with sexual overtones.
- Unwelcome social invitations, with sexual overtones commonly understood as flirting.
- Unwelcome sexual advances which may or may not be accompanied by promises or threats, explicit or implicit.

Generally workplace sexual harassment refers to two common forms of Inappropriate behavior:

- Quid Pro Quo (literally 'this for that')
 - Implied or explicit promise of preferential/detrimental treatment in employment
 - Implied or express threat about her present or future employment status
- Hostile Work Environment
 - Creating a hostile, intimidating or an offensive work environment
 - Humiliating treatment likely to affect her health or safety.

Shalini is a lawyer who works as a researcher at an NGO in Delhi since 2013. Dr. Bhargav is the director of the organization and has always advocated for the cause of human rights. During an official field visit to Shimla for 2 days, Dr. Bhargav finds an opportunity to be alone with Shalini and makes a physical advance. Despite her protests, he forces himself on her while giving lurid and sexually explicit details of his relationships, both past and present, with women. When she chastises him and threatens to make his behavior public, he threatens to destroy her career.

Srishti is a Captain with the Indian Army. She has refused an offer made by a Senior Officer for a relationship. Srishti has kept quiet about this experience, but thanks to the rumour-mongering by the Senior Officer, she has acquired a reputation of being a woman of ‘easy virtue’. Now she is being subjected to repeated advances by three of her senior officer colleagues. When she turns around and protests, she is singled out for additional physical training.

MARITAL RAPE: AN ANALYSIS

Ashutosh Shukla* & Sakshi Mishra**

INTRODUCTION

Marital Rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. Marital rape could be by the use of force only, a battering rape or a sadistic/obsessive rape. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused.

Approximations have quoted that every 6 hours; a young married woman is burnt or beaten to death, or driven to suicide from emotional abuse by her husband. The UN Population Fund states that more than 2/3rds of married women in India, aged of 15 to 49 have been beaten, raped or forced to provide sex. In 2005, 6787 cases were recorded of women murdered by their husbands or their husbands' families. 56% of Indian women believed occasional wife-beating to be justified.

HISTORY

Historically, '*Raptus*'¹, the generic term of rape was to imply violent theft, applied to both property and person. It was synonymous with abduction and a woman's abduction or sexual molestation, was merely the theft of a woman against the consent of her guardian or those with legal power over her. The harm, ironically, was treated as a wrong against her father or husband, women being wholly owned subsidiaries.

The marital rape exemption can be traced to statements by Sir Mathew Hale, Chief Justice in England, during the 1600s. He wrote, "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband"². Not surprisingly, thus, married women were never the subject of rape laws. Laws bestowed an absolute immunity on the husband in

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¹ Oxford Law Dictionary

² Criminal Law by P. S. Pillai

respect of his wife, solely on the basis of the marital relation. The revolution started with women activists in America raising their voices in the 1970s for elimination of marital rape³ exemption clause and extension of guarantee of equal protection to women.

In the present day, studies indicate that between 10 and 14% of married women are raped by their husbands⁴: the incidents of marital rape soars to 1/3 to 1/2 among clinical samples of battered women. Sexual assault by one's spouse accounts for approximately 25% of rapes committed⁵. Women who became prime targets for marital rape are those who attempt to flee. Criminal charges of sexual assault may be triggered by other acts, which may include genital contact with the mouth or anus or the insertion of objects into the vagina or the anus, all without the consent of the victim. It is a conscious process of intimidation and assertion of the superiority of men over women.

Advancing well into the timeline, marital rape is not an offence in India⁶. Despite amendments, law commissions and new legislations, one of the most humiliating and debilitating acts is not an offence in India. A look at the options a woman has to protect herself in a marriage, tells us that the legislations have been either non-existent or obscure and everything has just depended on the interpretation by Courts.

LEGAL PROVISIONS IN INDIA

Section 375, the provision of rape in the Indian Penal Code (IPC), has echoing very archaic sentiments, mentioned as its exception clause- "*Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape.*" Section 376 of IPC provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.

³ History of Criminal Offence by O. P. Srivastava

⁴ Crime against women statistics by law Audit Report 2015

⁵ Crime against women statistic by U.N report 2015

⁶ Sudesh Jakhoor v K.C.J & Others, 1996 (3) AD Del 653

This section in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 16 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 16, there is no legal protection accorded to the wife, in direct contravention of human rights regulations.

How can the same law provide for the legal age of consent for marriage to be 18 while protecting from sexual abuse, only those up to the age of 16? Beyond the age of 16, there is no remedy the woman has.

The wife's role has traditionally been understood as submissive, docile and that of a homemaker. Sex has been treated as obligatory in a marriage and also taboo⁷. At least the discussion openly of it, hence, the awareness remains dismal. Economic independence, a dream for many Indian women still is an undeniably important factor for being heard and respected. With the women being fed the bitter medicine of being 'good wives', to quietly serve and not wash dirty linen in public, even counseling remains inaccessible.

Legislators use results of research studies as an excuse against making marital rape an offence, which indicates that many survivors of marital rape, report flash back, sexual dysfunction, emotional pain, even years out of the violence and worse, they sometimes continue living with the abuser. For these reasons, even the latest report of the Law Commission has preferred to adhere to its earlier opinion of non-recognition of 'rape within the bonds of marriage' as such a provision may amount to excessive interference with the marital relationship.

A marriage is a bond of trust and that of affection. A husband exercising sexual superiority, by getting it on demand and through any means possible, is not part of the institution. Surprisingly, this is not, as yet, in any law book in India.

The very definition of rape (section 375 of IPC) demands change. The narrow definition has been criticized by Indian and international women's and children organizations, who insist that including oral sex, sodomy and penetration by foreign objects within the meaning of rape would not have been inconsistent with nay constitutional provisions, natural justice or

⁷ Principle of Sociology by C. N. Shanker Rao

equity⁸. Even international law now says that rape may be accepted as the “sexual penetration, not just penal penetration, but also threatening, forceful, coercive use of force against the victim, or the penetration by any object, however slight.” Article 2 of the Declaration of the Elimination of Violence against Women includes marital rape explicitly in the definition of violence against women. Emphasis on these provisions is not meant to tantalize, but to give the victim and not the criminal, the benefit of doubt.

Marital rape is illegal in 18 American States, 3 Australian States, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia. Rape in any form is an act of utter humiliation, degradation and violation rather than an outdated concept of penile/vaginal penetration. Restricting an understanding of rape reaffirms the view that rapists treat rape as sex.

The importance of consent for every individual decision cannot be over emphasized. A woman can protect her right to life and liberty, but not her body, within her marriage, which is just ironical⁹. Women so far have had recourse only to section 498-A of the IPC, dealing with cruelty, to protect themselves against “perverse sexual conduct by the husband”. But, where is the standard of measure or interpretation for the courts, of ‘perversion’ or ‘unnatural’, the definitions within intimate spousal relations? Is excessive demand for sex perverse? Isn’t consent a sine qua non? Is marriage a license to rape? There is no answer, because the judiciary and the legislature have been silent.

2013 VERMA COMMITTEE REPORT

The 172nd Law Commission report¹⁰ had made the following recommendations for substantial change in the law with regard to rape.

1. ‘Rape’ should be replaced by the term ‘sexual assault’.
2. ‘Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.

⁸ Women Protection From Violence Report 2012

⁹ Criminal Audit Report By Law Audit 2012

¹⁰ Criminal Law Amendment Act, 2103

3. In the light of *Sakshi v. Union of India and Others*¹¹, ‘sexual assault on any part of the body should be construed as rape.
4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
5. A new offence, namely section 376E with the title ‘unlawful sexual conduct’ should be created.
6. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
7. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.
8. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

LEGAL PROVISION UNDER DOMESTIC VIOLENCE ACT, 2005

The much awaited Domestic Violence Act, 2005 (DVA) has also been a disappointment. It has provided civil remedies to what the provision of cruelty already gave criminal remedies, while keeping the status of the matter of marital rape in continuing disregard. Section 3 of the Domestic Violence Act, amongst other things in the definition of domestic violence, has included any act causing harm, injury, anything endangering health, life, etc., ... mental, physical, or sexual.

It condones sexual abuse in a domestic relationship of marriage or a live-in, only if it is life threatening or grievously hurtful. It is not about the freedom of decision of a woman’s wants. It is about the fundamental design of the marital institution that despite being married, she retains and individual status, where she doesn’t need to concede to every physical overture even though it is only be her husband. Honour and dignity remains with an individual, irrespective of marital status.

¹¹ 2004 (5) SCC 518

INDIAN EVIDENCE ACT, 1872

Section 122 of the Indian Evidence Act prevents communication during marriage from being disclosed in court except when one married partner is being persecuted for no offence against the other. Since, marital rape is not an offence¹², the evidence is inadmissible, although relevant, unless it is a prosecution for battery, or some related physical or mental abuse under the provision of cruelty. Setting out to prove the offence of marital rape in court, combining the provisions of the DVA and IPC will be a nearly impossible task.

The trouble is, it has been accepted that a marital relationship is practically sacrosanct. Rather than, making the wife worship the husband's every whim, especially sexual, it is supposed to thrive in mutual respect and trust. It is much more traumatic being a victim of rape by someone known, a family member, and worse to have to cohabit with him. How can the law ignore such a huge violation of a fundamental right of freedom of any married woman, the right to her body, to protect her from any abuse?

As a final piece of argument to show the pressing need for protection of woman, here are some effects a rape victim may have to live with¹³,

- Physical injuries to vaginal and anal areas, lacerations, bruising.
- Anxiety, shock, depression and suicidal thoughts.
- Gynecological effects including miscarriage, stillbirths, bladder infections, STDs and infertility.
- Long drawn symptoms like insomnia, eating disorders, sexual dysfunction, and negative self-image.

CONCLUSION

Marriage does not thrive on sex and the fear of frivolous litigation should not stop protection from being offered to those caught in abusive traps, where they are denigrated to the status of chattel¹⁴. Apart from judicial awakening; we primarily require generation of awareness. Men are the perpetrators of this crime. ‘Educating boys and men to view women as valuable

¹² Shruti Kumar v. Union Of India AIR 1967 SCC54

¹³ Criminal Law Audit Report Against Women 2014

¹⁴ Usha Badri v. K. K. Babu AIR 2002 SCC 45

partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's human rights', says the UN¹⁵. Men have the social, economic, moral, political, religious and social responsibility to combat all forms of gender discrimination.

In a country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the letter of law.

¹⁵ Women Protection Report By U.N. Audit Report 2015

RELEVANCE OF INTELLECTUAL PROPERTY FOR FASHION INDUSTRY AND WORLD CLASS ORGANISATIONS

Lipika Sharma*

In today's competitive environment, innovation is the strength for every business that leads to development of intellectual property. Identifying, developing, and leveraging innovation provides competitive edge and aids in long term success of the company. Intellectual property is not limited to technology companies, but is valuable for every business which invests huge sums in research and development for creating indigenous products and services. A company should be proactive in implementing IP solutions to identify novel innovations and increase revenues. A well-defined IP goal can result in achieving business objectives and help position the business as a leader in the marketplace¹. With growth in business revenues, the IP strategy can include protecting the unique aspects of the assets and foster innovations to explore new geographies. This can be achieved through licensing or joint ventures to create novel solutions that satisfy the unmet needs in the market. Intellectual property is vital to every possible industry. The investment of intellectual capital has propelled every sector towards IP creation and maintenance.

A company must evaluate its existing intellectual property to determine whether it is in line with business objectives. Successful companies must look for new avenues to expand their product offerings, increase their sales revenue, and foray into new markets². An organization's patent portfolio is vital for its future success along its various intellectual property assets as designs, trademarks, and copyrights.

This article discusses about Intellectual property rights in special reference to Fashion Industry. This Fashion design is a form of art dedicated to the creation of clothing and other lifestyle accessories³. To work as a designer, one must possess an artistic and creative personality. Fashion designers should be aware of the fashion market requirements such as protecting their Intellectual Property (IP). IP is the result of applying your mind or intellect to

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¹ Available at: <http://www.effectualservices.com/category/articles/page/3/>

² Available at: <http://economictimes.indiatimes.com/small-biz/legal/relevance-of-intellectual-property-for-business/articleshow/49563911.cms>

³ Available at: <https://www.quora.com/What-is-the-basic-difference-between-fashion-designing-and-apparel-designing>

create something new or original. The fashion industry is an IP intensive industry, continually generating and commercially exploiting creative ideas and innovation.

ROLE OF IPR IN FASHION INDUSTRY

IPR plays a vital role in fashion industry. In fact fashion is all about intellectual creation. When we talk of fashion industry it involves all kinds of designs i.e. clothing, footwear, jewelry, bags etc. Textile Designs are also considered as a form of art which is an inception of mind and soul of an Artist. When an artisan spends enormous amount of time and energy in putting a design into an outfit in the textile industry, it is the duty of the owner of such precious works to protect his right legally so that no one can copy and take a readymade benefit for such work. In an industry beset with creativity and high-level investments of intellectual capital, IP protection is an absolute necessity.

Versace's medusa motif, the Vera Wang wedding dress, Louis Vuitton handbag – all these are products of applied intellectual creativity and skill in the fashion industry⁴. No one doubts the tremendous value of intellectual capital to the creation and marketing of products in the fashion industry, be it high fashion or ready-to-wear. Yet many small and medium-sized enterprises pay little attention, if any, to protecting such intellectual assets. In the current business environment, the primary source of competitive advantage for all businesses, including those in the fashion industry, is innovation and original creative expressions⁵.

The Indian fashion market is growing better than ever. The number of "Fashion Weeks" in a year is growing in the country. Latest designs by Indian fashion houses have done well abroad. Since fashion is not just restricted to apparel but also extends to luxury goods, better standards of living in the country have meant a greater demand for the luxury goods. But, Intellectual Property Rights (IPR) has been a burning issue in this sector⁶. Fashion designers have frequently complained about their designs being copied without their permission. Such so-called piracy must be stopped as it is plaguing the growth of this industry.

IPR's INVOLVED IN FASHION INDUSTRY

The primary IP rights available to the fashion industry are as follows:

⁴ Available at: www.ipandbusiness.com/new-trend-this-season-role-of-ip-in-fashion-industry/

⁵ Available at: www.wipo.int/wipo_magazine/en/2005/03/article_0009.html

⁶ Available at: www.nlujodhpur.ac.in/ip_events.php

Designs

The fashion industry has design at its centre. At the heart of fashion are fresh, new designs. Among the range of IP tools, the protection of industrial designs – also simply referred to as designs – is the most clearly relevant to the fashion industry. Registration of a design helps the owner to prevent all others from exploiting its new or original ornamental or aesthetic aspects, which may relate to a three-dimensional feature, such as the shape of a hat, or a two-dimensional feature, such as a textile print⁷.

New and fresh designs need protection. Design registration helps owners to prevent others from copying their designs or lifting elements thereof. The design aspect of a product relates to aesthetic appeal or innovative ornamentation, coupled with new and original patterns and cuts relating to a shape or two-dimensional feature. Design protection may be perceived by some as difficult to achieve due to the short lifecycle of the product; however, while some fashion trends come and go, others never fade and become classic and iconic pieces⁸. If fashion houses succeed in creating such classic design pieces but do not have the appropriate IP protection, imitators will be able to take a ‘free ride’ on their creative work. For fashion items with a long lifespan, filing an application for a registered design may be the best way to prevent others from using the design.

The fashion industry invests huge sums to create new and original designs each season. Despite this significant investment, little use is made of relevant national and/or regional design law to register and protect these designs. In some countries, fashion designs may be adequately protected by copyright law as works of applied art. However, a frequently cited explanation for not registering fashion designs is that the short product life cycle – often no more than one six-to-twelve month, season – does not justify the considerable time and financial cost involved.

The arguments for registering a new design have to be considered on a case-by-case basis. Registering a design should help to deter others from copying it, and to fight unscrupulous competitors who do so. Moreover, design protection is not always a major financial burden, at least to begin with. Some countries and regions, such as the United Kingdom and the European Union (EU), offer an unregistered form of protection for industrial designs for a

⁷ Managing Intellectual Property: The Strategic Imperative, Vinod, V. Sople at 295, August 2012, 3rd Edition

⁸ Available at: www.slideshare.net/nehakeshtwal/ipr-in-fashion

relatively short period of time. Unregistered design protection, wherever available, is extremely useful for fashion designers or businesses with limited budgets and for all those that wish to test market new designs before deciding which to register. The unregistered community design right of the EU offers protection for a maximum period of three years, starting from the date on which the design is first made available to the public in any of the 25 countries of the EU⁹.

Copyright

Copyright is protection for the expression of ideas in a tangible medium. Fashion design is giving expression to the creative faculty, often resulting in an artistic product. Artistic expressions and prints on textiles may be protected as applied art under copyright law¹⁰.

Copyright protects original artistic works. A design can be protected as an artistic work; specifically as a graphic work which includes a painting or a drawing. Textile designs may benefit from copyright protection but an actual dress (when made) does not. In this situation, it will be necessary to rely on the Designs Act 2003 for protection. Copyright protection is also likely to be available for works of artistic craftsmanship, such as one-off fashion garments and jewellery¹¹. However, for producing or making multiple copies of items, design law should be relied rather than copyright law.

Copyright protects artistic expressions “that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” This is commonly referred to as the separability rule, which was developed from the 1954 case of *Mazer v. Stein*¹². In this case, the Supreme Court ruled that Balinese statuettes that formed the bases of lamps were copyrightable because the aesthetic work (the statuette) was separable from the functional article (the lamp). Even though they could be used as lamp bases, the statuettes had their own artistic merit and could be protected as such¹³.

With regard to copyright in fashion industry, in February 2008, Marc Jacobs was accused of plagiarizing an amateur Swedish artist named Gösta Olofsson. Olofsson, who passed away in 1982, ran a petrol station in a small village and made a living by selling postcards, scarves,

⁹ The Handbook of European Intellectual Property Management: Developing , managing and protecting your company’s Intellectual property, Adam jolly, at 113 3rd Edition 2012,ISBN 9780 7494 64158

¹⁰ Available at: www.internationallawoffice.com/.../How-Can-Intellectual-Property-Assist-the-Fashion...

¹¹ Available at: www.tfia.com.au/ip-fashion-rulescopyright

¹² Available at: <https://supreme.justia.com/cases/federal/us/347/201/>

¹³ Available at: <http://www.altacit.com/publication/ipr-in-fashion-industry/>

and other tourist paraphernalia. Marc Jacobs (or rather one of his accessories designers) ripped off the design. The matter was eventually settled outside court when Jacobs offered monetary compensation to Gösta Olofsson's son. In this case the artistic work—Olofsson's original painting—exists beyond and entirely separate from the utilitarian aspects of the scarf. Hence design is subject to copyright laws¹⁴.

Trademark

Trademark is a word, phrase, symbol or design, or a combination of the same associated with a product or service which is used as market differentiators from similar products or services. Any product or service will always be identified with a name and logo in order to distinguish it from other similar products on the market. Designs are not the exception, as they will always bear a label distinguishing them from other creations.

These names and logos can be trademarked based on the type of products (clothing, shoes, accessories, fabrics, etc.). The slogans of advertising campaigns for each product can also be protected through trademark registration. Recently trademarks that generally do not fall within the standard categories but include marks based on visible signs (colours, shapes, moving images, and holograms) or non-visible signs (sounds, scents) considered as Non-conventional Trademarks or Non-traditional Trademarks can also be trademarked. Therefore, perfumes, fragrances and other aromatic products that play an important role within the world of fashion can also gain IP protection¹⁵.

Trademark law not only protects a brand's right to revenue, but also helps consumers distinguish between genuine products and counterfeit products.

Big fashion houses value their brand equity. Most develop a bond with their customers through their brand names and fiercely protect these through registration of trademarks and protection of associated artwork by copyright law. Trademarks are just as important for a small or start-up company in the fashion industry.

The Italian clothes company, Pickwick, offers an interesting example of the strategic use of a trademark to build a successful business in the fashion industry. Pickwick now sells a range of casual fashion wear to adolescents across Europe. But not so long ago, all that the

¹⁴ Available at: <https://antwerpsex.wordpress.com/2013/09/03/fashion-101-intellectual-property-laws/>

¹⁵ Available at: <http://www.altacit.com/publication/ipr-in-fashion-industry/>

company had was the trademark itself, which depicted a young, faceless boy with a spiky hairstyle. The trademark owner started his business by selecting items he judged would have particular style appeal to teenagers, adding his distinctive trademark and distributing them through the local shops in Rome. Initially, the business costs were kept low by operating from a garage.

Teenagers perceive the Pickwick logo as trendy and are willing to pay extra for clothes bearing its trademark. Today, the company subcontracts the manufacturing and focuses on marketing, distribution and monitoring and controlling the use of the trademark¹⁶.

Products of lasting quality are always in demand and over time a psychological association can develop with regard to product source and quality. The key to creating and maintaining this connection is through use of a trade name and logo on the product. Fashion houses across the world fiercely protect their trade names and logos against unfair practices.¹⁷ Trademarks also depict brand value, as they often become symbols of ideas propagated in association with the product. Trademarks are just as important as designs for the fashion industry.

Patents

Patents may not immediately spring to mind when considering the fashion industry. Artistic creations cannot be patented and therefore patents are not widely adopted by designers¹⁸.

Yet technical innovation can equally put a fashion business ahead of the competition. For example, inventions by Buck Weimer and CSIRO which control odour and body temperature respectively in garments have been successfully patented. Another example, can be Novozymes, a Danish biotech company specializing in enzymes and microorganism, pioneered the use of enzymes in the treatment of fabrics. Though not previously involved in the fashion industry, in 1987 the company developed and patented a technology for the treatment of “stone washed” denim jeans. This technology is based on an enzyme called cellulase, which removes some of the indigo dye from denim so as to give the fabric a worn look .Within three years, most of the denim finishing industry was using cellulase under license from Novozymes. Today, Novozymes’ technology for improving production methods

¹⁶ A Stitch in Time - Smart Use of Intellectual Property by Textile Companies, WIPO copyright 2005

¹⁷ Managing Intellectual Property : The Strategic Imperative, Vinod.V.Sople, at 329, PHI Learning Pvt Ltd., Delhi 2016

¹⁸ Available at: www.ipandbusiness.com/new-trend-this-season-role-of-ip-in-fashion-industry/

and fabric finishing has been licensed worldwide. The company holds more than 4,200 active patents and patent applications.

The fashion industry is no longer dependent on natural fabrics. Innovations in the creation of synthetic fabrics have increased the prevalence of patents as well. A patent portfolio reflects technologies for the creation of, for example, crease and weather-resistant fabrics.

Adding devices to clothing is fast becoming a trend in this age of technology, which means patents for new devices and new methods of use for devices are an option worth considering. American designer Lauren Scott is currently adding radio frequency identification tags to her line of children's wear¹⁹. The tags have previously been used to track shipments of freight. In clothes, the tags could carry medical information in case of an accident or emergency and could also prevent abductions by triggering an alarm if a certain perimeter is breached (e.g. tags inside pyjamas could trigger readers placed at various locations in a house if the child leaves the Novozymes, a Danish biotech company specializing in enzymes and microorganisms (www.novozymes.com), pioneered the use of enzymes in the treatment of fabrics. Though not previously involved in the fashion industry, in 1987 the company developed and patented a technology for the treatment of "stone washed" denim jeans. This technology is based on an enzyme called cellulose, which removes some of the indigo dye from denim so as to give the fabric a worn look. Within three years, most of the denim finishing industry was using cellulose under license from Novozymes. Today, Novozymes' technology for improving production methods and fabric finishing has been licensed worldwide. The company holds more than 4,200 active patents and patent applications, and pursues a pro-active licensing strategy to maximize royalty revenue from these IP assets.

The Italian company Grindi Sri Invented Suberis, an innovative fabric made of cork, said to be as smooth as velvet, light as silk, washable, unscratchable, stain-resistant, waterproof and fireproof. After testing and codifying the treatment, Grindi filed an international patent application under the PCT in 1998 to protect its unique product in a large number of countries. The Suberis fabric is used in the manufacture of clothing, footwear and sportswear, as well as in many other applications²⁰.

TRADE SECRETS AND NEW BUSINESS MODELS

¹⁹ Available at: <http://www.wipo.int/edocs/lexdocs/laws/en/au/au332en.pdf> as on 21st October, 2014

²⁰ ibid

Trade secrets are pieces of information which are crucial for successful trading. If leaked, such information would put competitors in an advantageous position²¹. In the fashion industry the sourcing of raw materials, key suppliers and software tools used in designing may all constitute trade secrets.

Business models pertain to the management of logistics across the value chain, from purchase of raw materials through to the manufacture of the products and their display in stores. Fashion houses introducing new clothing lines every season integrate fashion forecasting within their organization. Customized manufacturing through virtual shops is also a business model which can give a fashion house the competitive edge in the industry.

Trade secrets may range from a list of key suppliers and/or buyers, to use of software tools for fashion design, to logistics management of the entire value chain. In some fashion businesses, core trade secrets serve to protect the computer-implemented, software-based business models, which underpin an entire business strategy, based on stealth and speed, to supply a limited quantity of fashion products. For example, the Spanish retail fashion chain, ZARA, uses a proprietary information technology (IT) system to shorten their production cycle – i.e. the time from identifying a new trend to delivering the finished product– to a mere 30 days. Most of their competitors take from 4 to 12 months. The company receives daily streams of e-mail from store managers signaling new trends, fabrics and cuts, from which its designers quickly prepare new styles. The fabric selected is immediately cut in an automated facility, and sent to work shops. A high-tech distribution system, with some 200 kilometers of underground traces and over 400 chutes, ensures that the finished items are shipped and arrive in stores within 48 hours²².

Other fashion houses use IT to make customized products in response to an individual customer's request. For example, Shirtsdotnet (www.shirtsdotnet.com) aims to reshape the traditional clothing industry by reversing the process of decision making and following the made-to-order business model. Shirtsdotnet is a Business to Business clothing software platform provider, offering made-to-measure, mass customization clothing solutions for mail order companies. Customers can design and order apparel directly from the virtual shop. The business relies on proprietary software, which is protected as a trade secret and by copyright law. The above examples show that the strategic use of new information technology,

²¹ Available at: www.ipo.org/wp.../IP_Protection_for_Trade_Secrets_and_Know-how1076598753.p...

²² Available at: http://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html as on 29th October, 2014

protected by the tools of the IP system, can play a critical role in establishing and consolidating a market position.

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This is especially true in an industry such as fashion, which is driven by creativity and by the intellectual capital invested in it²⁵. Protecting that intellectual capital in the form of IP assets serves to boost income through sale, licensing, and commercialization of differentiated new products, to improve market share, raise profit margins, and to reduce the risk of trampling over the IP rights of others. Good management of IP assets in a business or marketing plan helps to enhance the value of an enterprise in the eyes of investors and financing institutions.

GEOGRAPHICAL INDICATIONS AND TRADITIONAL KNOWLEDGE

Geographical indications are relevant to the fashion industry in terms of protecting unique handicrafts and fashion articles originating from a specific location and consisting of specific quality or reputation²⁶.

Traditional or indigenous knowledge is also relevant in terms of the need to protect unique cultural expressions in the designs, motifs and production methodologies of the artisans and

²³ Available at: www.thefashionlaw.com/.../what-is-the-defend-trade-secrets-act-and-how-does-it-aff...

²⁴ Available at: http://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html as on 29th October, 2014

²⁵ Supra Note19

²⁶ Available at: https://www.wto.org/english/tratop_e/trips_e/t_agm3b_e.htm

craftspeople of the country. India has a rich textiles and handicrafts heritage in terms of abundant weaving, dying and printing techniques, embroideries, motifs, designs and production know-how, all of which are unique to the country and in need of protection.

Improved protection of IP assets would lead to more innovations and growth in the fashion industry²⁷.

INDUSTRIAL DESIGN AND FASHION DESIGNING

A design is the visual appearance of a product that is the decorative pattern on the garments. If the design is new and unique it can be registered. This means it can't be the same or similar to designs already produced (even in a sketch). There are certain designs that can't be registered, including designs featuring scandalous graphics. This gives the designer protection for the visual appearance of the product, but not its feel, material or function.

Among the range of IP tools, the protection of designs is most relevant to the fashion industry. Registering a design helps the owner to prevent all others from exploiting its new or original ornamental or aesthetic aspects, be they three-dimensional features, such as attractive shapes, or two dimensional features, such as aesthetically pleasing textile prints. Any three-dimensional design, such as a purse, garment, or accessory, can obtain intellectual property protection by being registered as an Industrial Model²⁸. Designs printed on fabrics can also be protected, not as an Industrial Model as there is no three-dimensional shape, but as an Industrial Design because of the combination of images, lines or colors that are incorporated into an industrial product for decoration purposes.

Legal rights can help a fashion designer in two distinct ways:

Protection: They can stop someone else benefiting from your hard work by copying or using your textile or product without your permission; and

Exploitation: They can generate revenue from your designs by allowing you to enter into licensing agreements for your designs with third parties.

IP rights are not just about protection against copying. Instead they may be viewed as performing a more subtle function, identifying the creator of content. By adopting an

²⁷ Available at: <https://www.internationalpropertyrightsindex.org/Italy>

²⁸ Available at:
http://www.wipo.int/export/sites/www/sme/en/documents/guides/customization/stitch_in_time_pa.pdf

approach more akin to that taken within the media and entertainment industries, fashion brands can reach that next level of sophistication whereby they are strategically managing their IP rights distinctly from their commercial operations²⁹.

Intellectual property law offers a raft of rights to fashion designers. Some of these will arise automatically, such as copyright, while others require registration, such as trademarks.

NEED TO REGISTER

A registered IP can be a valuable commercial asset. A registered IP gives a right to enforce the design against infringement³⁰. It also provides an exclusive right to use the design and authorize other people to use the design as specified in the registration. It becomes a personal property and can grow in value and be sold.

The legal protection of IP rights provides designers, artists, business people, entrepreneurs and inventors with the exclusive right to use and control, and therefore profit from, their intellectual and creative work. IP is a very valuable asset for those in the design industry and an important differentiating factor between one designer and the next.

The rights that are most likely to be relevant to a fashion designer are: trademarks, copyright and design rights.

PROTECTION FOR IPR

Registered designs Two and three dimensional product designs (e.g. a fabric pattern or the shape of a bag). The visual appearance of a product is protected, but not the way it works. The owner has the exclusive right to use, sell or license the registered design or the appearance of the whole or part of a product resulting from the feature of, in particular, the lines, contour, colours, shape, texture and/or materials of the product itself and/or its ornamentation’.

Registration initially protects your design for five years from the date the application was filed³¹. The design registration can be renewed for a further five years up to the maximum term of 10 years. If you do not renew your registration it will cease. You can't make an

²⁹ Available at: <http://www.businessoffashion.com/2011/07/fashions-intellectual-property-conundrum.html> as viewed on 20th October, 2014

³⁰ Available at: www.altacit.com/publication/ipr-in-fashion-industry/

³¹ Available at: www.wipo.int/edocs/lexdocs/laws/en/au/au332en.pdf

application to re-register the same design. Once the design has ceased it passes into the public domain and is free for others to use.

Trade marks Letters, numbers, words, colours, a phrase, sound, scent, logo, shape, picture, aspect of packaging or any combination of these A trade mark identifies the particular goods or services of a trader as distinct from those of other traders. The owner has the exclusive right to use, sell or license the trade mark. A trade mark is initially registered for a period of ten years and continues indefinitely as long as the renewal fees are paid every ten years

CONCLUSION

The fashion industry invests huge sums every season to create new and original designs. Despite this significant investment, the fashion designers are reluctant in protecting their IP. However, a frequently cited explanation for not registering fashion designs is that the short product life cycle – often no more than one six-to-twelve month, season – does not justify the considerable time and financial cost involved. The arguments for registering a new design have to be considered on a case-by-case basis. Registering a design should help to deter others from copying it, and to fight unscrupulous competitors who do so. Moreover, design protection is not always a major financial burden, at least to begin with. For fashion items with a long life span, protecting the IP may be the best way to prevent others from using the design³².

The fashion industry is driven by creativity and by the intellectual capital invested in it. Protecting that intellectual capital in the form of IP assets serves to boost income through sale, licensing, and commercialization of differentiated new products, to improve market share, raise profit margins, and to reduce the risk of trampling over the IP rights of others. Good management of IP assets in a business or marketing plan helps to enhance the value of an enterprise in the eyes of investors and financing institutions.

³² WIPO Magazine/May-June 2005

TAKING ALTERNATIVE METHODS TO PUNISHMENT SERIOUSLY

Alvin Antony*

Abstract

Punishments are one of the prime factors of criminal justice system. It serves many purposes and act on a person in many ways. However, in many cases punishment aimed to create a change in the society is actually creating serious problems to the society. Lack of proper execution of punishments, occasions of human rights violations, overcrowding of prisons, debates on capital punishment etc points to the need for a change in methods of punishments under criminal justice. Many countries have already adopted innovative techniques in punishments forwarding the motion that it should be capable of making changes in offenders and reduce the social stigma about them. Also it helps in effectively managing the cost of carrying punishments and to create a sense of responsibility in the minds of offenders. It also reduces the level of punishments given for small offences and will help to reach the ends of justice in its true sense. This paper is an attempt of the researcher to find out the scope of alternative methods of punishments in criminal justice system in India. It will be looking upon the present condition in India with regards to alternative punishments considering various methods existing in other countries and how those can help in Indian situations.

Keywords: Community Service, Modern Punishments, Criminal Justice, Electronic Tagging, less incarceration.

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WHAT DO PUNISHMENTS SERVE?

The concept of punishment is as old as human history. It showed its existence from the time when laws were first codified. Initially it was on the principle of ‘eye for an eye’¹ and considered it as just to allow the punishments in same manner that a crime is committed. Later thoughts were changed, how a better life can be made possible for mankind, by forming a ‘social contract’ for pursuing good of every person in society. However in this level also the concept of punishment maintained its existence². Thus the concept of punishment is always associated with an element of justice.

In criminal law, punishment of criminal for the offence committed makes it awe-inspiring and deterrent³. It has the prime objective of imposing appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime⁴. Main purposes of such punishments are deterrence, incapacitation, rehabilitation, retribution, and restitution⁵. It is true that the punishment should serve justice but ultimately it must help to prevent such incidents of offences happening in society and for that the twin policy of correction and deterrence⁶ should be followed.

In modern day the concepts related to punishments are undergoing many changes. The scheme of modern social defence of punishments is more in favour of correcting the wrong doer and not taking punitive vengeance on an offender, whose acts in many cases may be a mere manifestation of a psycho-social maladjustment, for which society itself may be responsible⁷. There is still criticism of punishments in recent times as some opines that the modern penology has abandoned the rehabilitation element⁸ and punishments are now acknowledged to be an inherently retributive practice⁹. These practices are widely criticised

¹ Ushistory.org. (n.d.). *Hammurabi's Code: An Eye for an Eye* [online] Available at: <http://www.ushistory.org/civ/4c.asp> [Accessed 12 Mar. 2017].

² Friend, C. (n.d.). *Social Contract Theory / Internet Encyclopedia of Philosophy*. [online] Available at: <http://www.iep.utm.edu/soc-cont/> [Accessed 12 Mar. 2017].

³ Sagar V R K K, *Sentencing Discretion and IPC*, 3 SCC Journal 45 (1994).

⁴ Alister Anthony Pareira V State of Maharashtra (2012) 2 SCC 648

⁵ Criminal Law, University of Minnesota Libraries Publishing edition, 2015, at p.17

⁶ *Supra* note 5

⁷ Edited by Thomas, K. and Rashid, M. (2014). Ratanlal & Dhirajlal's The Indian penal code. 34th ed. Gurgaon, Haryana: LexisNexis, p.86.

⁸ Miller v. Alabama, The Oyez Project at IIT Chicago-Kent College of Law (http://www.oyez.org/cases/2010-2019/2011/2011_10_9646) (Accessed 3 Mar 2017).

⁹ Hugo Adam Bedau & Erin Kelly, *Punishment, The Stanford Encyclopedia of Philosophy* (Spring 2010), <http://plato.stanford.edu/archives/spr2010/entries/punishment/> (last visited Mar 11, 2017).

by various scholars¹⁰. Same was observed by KRISHNA IYER, J., “as the punitive strategy of our penal code does not sufficiently reflects the modern trends of correctional treatment and personalised sentencing”¹¹. Thus the concept of having only retribution is getting weaker day by day and the view that punishments should make the convict realise that he has committed an act that is not only harmful to the society but also to his own future as an individual and part of society¹².

The reformatory and incapacitation element related to punishments are getting popular throughout the world today. Punishments not only have an element of deterrence now but also play a role in reforming an offender back to a law abiding citizen. This is a part of the therapeutic approach, which tries to treat the criminal tendencies as a result of diseased psychology¹³. Even though incapacitation in its classical sense results in turning offenders to animals¹⁴, with the use of modern technological developments the incapacitation will only restricts the activities of a person, not his basic liberties. On the basis of all this discussions, in the opinion of researcher, it is high time for India to think whether some additions should be made to Section 53 of Indian Penal Code 1860.

WHAT IS ALTERNATIVE PUNISHMENT?

The new libertarian views and human rights movements resulted in reformation in methods of punishments in many parts of world. The question of death penalty is a highly debatable issue in modern day also and the researcher does not wish to enter in to the same. The discussion happening here will be mostly related to those punishments that are generally considered as an alternative to imprisonment.

In many societies prisons were actually a new concept and are counterproductive in rehabilitation of people charged with minor offences¹⁵. There are more than 10.35 million

¹⁰ See Mike C Marteni, *Criminal Punishment and Pursuit of Justice*, 2 Br. J. Am. Leg. Studies (2013)

¹¹ Shivaji V State of Maharashtra AIR 1973 SC 2622

¹² *Supra* note 8 at p.87

¹³ *Ibid*

¹⁴ Piers Hernu, *Norway's Controversial 'Cushy Prison' Experiment – Could It Catch On in the UK?*, DAILY MAIL, July 25, 2011, available at <http://www.dailymail.co.uk/home/moslive/article-1384308/Norways-controversial-cushyprison-experiment--catch-UK.html> (last visited Mar 12, 2017).

¹⁵ Dirk van Zyl Smit, Handbook of basic principles and promising practices on Alternatives to Imprisonment, 2007, United Nations Office On Drugs And Crime

prisoners in the world at present¹⁶ and the number is growing day by day. Many prisons witness overcrowding resulting in lowering standards set by United Nations and other organisations. Human rights courts and tribunals consider the loss of liberties through imprisonment as degradation of human dignity¹⁷. Criminal justice professionals in many countries are advocating the reservation of imprisonment only for the most dangerous offenders and to consider alternative punishments for first time and non-violent offenders.

Any punishment other than spending time in jail or prison can be considered as alternative methods of incarceration¹⁸. These does not make the crime a less serious one but only have the objective of reducing the number of prisoners and considering the imprisonment as last resort¹⁹. It helps in reducing the prison costs and promotes the rehabilitation of offenders who might have done the offence in a sudden boil of blood.

WHY ALTERNATIVE PUNISHMENTS?

Modern trend of using alternative methods in punishments are based on humanitarian concepts and cost management. Some of the thoughts that promote such punishments are:

- 1) Courts have more sentencing option: The traditional form of punishment does not consider what makes a person to do such offences and how to rehabilitate such persons from a condition that will lead the person to commit the same again. Each offender is unique in nature. The restriction on committing an offence should be same for everyone but the punishment for each offender should be in accordance with the circumstances²⁰. If courts are given with options other than the usual ones, it can do more cost effective sentencing that will promote rehabilitation of offender and protection to public²¹.
- 2) Saving tax payer's money: One of the main criticisms of imprisonment is that it is creating a huge economic burden. This is creating a situation where a person is paying for the maintenance of an offender who committed an offence against him. In some

¹⁶ R. Walmsley, *World Prison Population List*, Institute of Criminal Policy Research, Birkbeck University of London ,2016

¹⁷ *Supra* note 17

¹⁸ FAMM, Alternatives to Incarnation in a Nutshell Available at <http://famm.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf>

¹⁹ See Matti Joutsen and Ugljesa Zvekic, "Noncustodial sanctions: Comparative Overview" in Ugljesa Zvekic (ed.), *Alternatives to Imprisonment in Comparative Perspective*, UNICRI/Nelson-Hall, Chicago, 1994, pp. 1-44.

²⁰ *Supra* note 11

²¹ *Supra* note 21

countries prison management is costing more than education²². Alternative punishment methods are cheaper in nature and reduces economic burden.

- 3) Prevents prison overcrowding: Overcrowding in prisons is creating a huge crisis throughout the world. The imprisonment for every stage of criminal procedure is also contributing to this. This results in violence in prison and creates dangerous environment for prison staff²³. Alternative methods help in reduction of these conditions. There are also suggestions by organisations in relation to this²⁴.
- 4) Strengthening communities: An important problem faced by prisoners is the isolation by community when they return to it. Also such punishments separate offenders and families which will negatively affect both the sides. Alternative methods can help in solving problems and rehabilitating the offenders by making them do productive work in community.
- 5) Reduction of crime rates: Alternative methods of punishments helps in reduction of crime rate to an extent. Studies shows that 40% released persons are coming back to prison with in three years²⁵. Alternative methods concerned to offences related to narcotics are helping the offenders to not to do it again.
- 6) Public support: In many countries public support for providing alternative punishments to non-serious and non-violent offenders is increasing and imprisonment should be done only when these alternatives fail²⁶.

WHAT ARE CONSIDERED AS ALTERNATIVE METHODS NOW?

Around the globe there are various methods that are used as alternative to imprisonment. United Nations recognised the importance of alternative punishments and came with certain

²² Public National Security Plan, National Secretary of Public Security, Ministry of Justice, Brazil, 2002 (English version, Instituto Cidadania) Available at <http://www.mj.gov.br/senasp/biblioteca/documentos/PUBLIC%20SECURITY%20NATIONAL%20PLAN%20ingl%C3%AAs.pdf>

²³ Penal Reform International. (n.d.). Prison overcrowding - Penal Reform International. [online] Available at: <https://www.penalreform.org/priorities/prison-conditions/key-facts/overcrowding/> [Accessed 20 Mar. 2017].

²⁴ Penal Reform International. (2012). 10-Point Plan to Address Prison Overcrowding - Penal Reform International. [online] Available at: <https://www.penalreform.org/resource/10point-plan-address-prison-overcrowding/> [Accessed 20 Mar. 2017].

²⁵ Pew Centre On The States, State Of Recidivism: The Revolving Door Of America's Prisons, Exhibit 1, Available At http://www.Pewcenteronthestates.Org/Uploadedfiles/Pew_State_Of_Rcidivism.Pdf.

²⁶ Nat'l Council On Crime & Delinquency, Attitudes Of Us Voters Toward Nonserious Offenders And Alternatives To Incarceration 1 (June 2009), Available At http://www.Nccdcrc.Org/Nccd/Pubs/2009_Focus_Nonserious_Offenders.Pdf.

rules that provide alternatives in every phase of proceedings²⁷. Some of the most widely considered methods are:

1. **Community Service:** One of the oldest and most accepted forms of alternative punishment is community service. It is a way of punishment mostly recognised as a part of probation. Here offenders will be asked to do unpaid work in civic and non-profit manner. This was originated from the idea of rehabilitation of offenders and existing punishments not serving its purpose. Community service gives benefit to the offender, court, community and victim simultaneously²⁸. Former Italian Prime Minister Silvio Berlusconi, Actress Paris Hilton are the known faces who had undergone through this.
2. **Probation/Community Correction:** This method is executed by reducing the rights that a person can enjoy when living in society. Various conditions will be attached to it and a probation officer will be appointed to whom the offender have to report continuously. This programme is concentrating mainly on non-violent offenders²⁹. It also includes Intensive super vision programmes and Day reporting. This can be helpful in cases related to sex offences.
3. **Electronic Monitoring:** It is a method executed with the help of modern technology; a device will be attached to the offender's body creating a continuous watch. It can be active or passive in nature³⁰. Only offenders who are violating the conditions are imprisoned³¹.
4. **House Arrest/Home Confinement:** Offenders are required to stay in their house and certain pre-approved areas³². There will a supervising officer appointed for effective

²⁷ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), 1990 Available At <http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>

²⁸ Community Service, Federal Corrections and Supervision Division Administrative Office of the U.S. Courts. February 2001

²⁹ Marcus Neito, Community Correction Punishments: An Alternative To Incarceration for Nonviolent Offenders, California State Library (1996) Available at <http://library.ca.gov/CRB/96/08/index.html>

³⁰ *Ibid*

³¹ *Supra* note 11

³² *Ibid*

execution of this. It can be in three mode, Curfew, Home detention and Home Incarceration³³.

5. **Community Residential Centres:** It is a round the clock hour supervision for non-violent offenders which works by surrendering the paychecks and earnings directly to authorities to pay the restitution. The goal of this method is to integrate the offender back to local environment and provide skills so that further committing of offences can be avoided³⁴. Economic offences are mostly punished through this method.
6. **Residential Treatment Centres/ Drug Courts:** These methods are for the rehabilitation of offenders who are involved in offences related to alcoholic abuse and narcotic substances. It provides specialised services and trainings for such offenders. Drug courts are a setup dealing with issues related to drug abuse which differ in its working from place to place³⁵.
7. **Boot Camps:** Also known as a shock incarceration programme is targeted on changing the inmate's behaviour through training in model of military boot camps. Specialized training for developing self-discipline and proper education is also given here so that after the term the person can lead a normal life in society. Offenders who are completing this programme earlier can find a job and be released earlier on probation³⁶.
8. **Public Shaming:** This is useful in punishing petty offences which cannot be justified if provided with usual punishments. Court will order the offender to do some act that creates public humiliation for a short period of time. It has been used in United States many times³⁷.

HOW ALTERNATIVE METHODS EXISTS IN DIFFERENT PARTS OF WORLD?

Various thought are arising from different parts of the world in relation to how to reduce the number of prisoners and how more offences can be removed from grass root level. Decriminalisation of certain offences is considered as a first step along with providing

³³ *Supra* note 32

³⁴ *Ibid*

³⁵ *Supra* note 21

³⁶ *Ibid*

³⁷ See United States V Gementera , 2004 Available at <http://caselaw.findlaw.com/us-9th-circuit/1105137.html>

adequate punishments depending on the nature of offences. Not all socially undesirable acts should be classified as crime³⁸. The intensity of offences should be viewed with existing social level and should be periodically re considered. Australia, by decriminalised public drinking, has benefited a lot from procedures and was able to make changes in level of offence³⁹.

There are also voices to reduce the detentions in each stages of trial. In case of punishments many countries have already started following the alternative methods suggested by United Nations⁴⁰. Among those community services have wider acceptance from the governmental level itself. This is given as a choice to the offender in most of the cases.

In Unites States community service is considered as a prominent way of punishment and is given under law⁴¹. It serves the public protection and rehabilitation simultaneously⁴². There are conditions also attached with the same which will help the probation officer to carry out the terms easily and make changes in life of the offender. This was helpful in cases of tax fraud⁴³, bank robbery⁴⁴, escaping from custody⁴⁵, possession of fire arms and giving false information⁴⁶ etc. There are also certain guidelines provided for the same so that problems related to execution of the same can be avoided⁴⁷. All methods that are mentioned above are used by courts in United States⁴⁸.

In United Kingdom the concept of community service was existing from 1972⁴⁹ onwards. This was as a result of suggestions by Wootton Committee. There are also guidelines for determining whether a person can be eligible for community service or not⁵⁰. It also has a greater emphasis on rehabilitation of offenders and is having a generic nature⁵¹. Community

³⁸ *Supra* note 17

³⁹ R. Sarre, *An Overview of the Theory of Diversion: Notes for Correctional Policy Makers*, paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology Adelaide, 13-15 October 1999.

⁴⁰ *Supra* note 30

⁴¹ 18 U.S.C § 3563(b)(12)

⁴² 18 U.S.C § 3553(a)(2)(C)and(D)

⁴³ U.S. V Adler 52, F.3d 20 (C.A.2 (N.Y), 1995)

⁴⁴ United States v. Andrews, 353 F.3d 1154 (10th Cir. 2003)

⁴⁵ United States v. Hillstrom, 988 F.2d 448 (3d Cir. 1993)

⁴⁶ United States v. Jones, 158 F.3d 492 (10th Cir. 1998)

⁴⁷ Chapter 3: Community Service (Probation and Supervised Release Conditions), US Courts

⁴⁸ *Supra* note 21

⁴⁹ Section 15, Criminal Justice Act 1972

⁵⁰ Community Service Order (1975), Home Office Research Studies, London: Her Majesty's Stationery Office

⁵¹ Section 177, Criminal Justice Act 2003

services are usually given when offences that does not have the seriousness of issuing a warrant is committed⁵². This is given as a choice for the offenders in certain cases⁵³. Similarly Electronic tagging⁵⁴ was also having wide recognition in United Kingdom. Community Service is given in cases of sexual offences⁵⁵, shop lifting⁵⁶, conspiracy, fraud⁵⁷ etc.

In Australia also community service is widely used as an alternative to imprisonment⁵⁸. This is considered as a corrective method in itself and not as an alternative option of imprisonment. Electronic monitoring is also widely used there⁵⁹.

In Panama electronic surveillance is making great advancement in criminal justice system⁶⁰. In South Africa courts are giving great importance to community sentences after the discussion in 2008⁶¹. In Iran also punishments including restricting the rights, probation, community service etc are replacing almost every type of imprisonment sentences⁶². All of these points to the modern trend of avoiding imprisonment as much as possible.

ALTERNATIVE METHODS AND INDIA

It is true that the nature of offences is different from region to region. As KRISHNA IYER, J., observed “*What is a sex crime in India may be sweet-heart virtue in Scandinavia. What is an offence against property in a capitalist society may be a lawful way of life in a socialist society. What is permissible in an effluent economy may be a pernicious vice in an indigent community. Thus, criminologists must have their feet all the time on terra firma*⁶³”, will be difficult to implement the alternative methods in a way as in other countries. Since the

⁵² Section 148(1), Criminal Justice Act 2003

⁵³ Community Sentences Available at Community Sentences-Gov.UK

⁵⁴ Electronic Tagging Available at Electronic Tagging - Gov.UK

⁵⁵ Regina v Adam Steven Hackett [2017] EWCA Crim 250

⁵⁶ Regina v Jackie Chamberlin [2017] EWCA Crim 39

⁵⁷ Regina v Michael Tatenda Samuriwo [2016] EWCA Crim 1948

⁵⁸ Community Service Orders, Available at https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/community_service_orders.html

⁵⁹ Matt Black and Russell G Smith, Electronic monitoring in the criminal justice system Australian Institute of Criminology, May 2003

⁶⁰ Available at https://www.unodc.org/documents/ropan/TechnicalConsultativeOpinions2013/Opinion_2/Advisory_Opinion_02-2013_ENGLISH_FINAL.pdf

⁶¹ S v. Shilubane 2008 (1) SACR 295 (T)

⁶² Zahra Ahangari, Alternative Punishments Of Imprisonment In Iran Indian J.Sci.Res. 7 (1): 1089-1096, 2014

⁶³ Krishna Iyer, V. (1980). Perspectives in criminology, law, and social change. New Delhi: Allied.

general trends suggests for the better development of offenders alternative methods that reduces the prison management problems can be followed in our country also.

Our Apex court has already initiated discussing the concept of reformation as a dominant objective of the punishments and during incarceration every effort should be made to recreate a good man out of convicted prisoner⁶⁴ so that he will not repeat it in future. Death penalty and other punishments should be only considered where the chance of reformation is not there and there should be always an attempt to remove the “tamas” from the mind of offenders through community service, yoga ⁶⁵etc. These showed the beginning of consideration given to alternative methods in India.

Probation of Offenders Act 1958 was a step which pointed to idea of liberal penology in India. It brings in scope for alternative option for offences such as theft, misappropriation, cheating etc⁶⁶. The concept of community service in India to an extend can be made from this act⁶⁷. Another great step was in case of minor offenders; India also follows the global trend of alternative punishment and brings in scope of community service⁶⁸. Also there is scope for rehabilitation in case of Narcotics cases as well⁶⁹.

Apex court have discussed about the adoption of community service in cases of not providing education for children⁷⁰, attempt to suicide⁷¹, cases related to narcotics⁷², as a restorative method in dealing murder cases⁷³etc. It has already in some instances given alternatives to punishment for contempt of court⁷⁴, culpable homicide as a result of drunken-driving⁷⁵ etc. High courts have given community service for offences of attempt to murder⁷⁶, trespass and extortion⁷⁷, outraging the modesty of women⁷⁸, conspiracy and causing hurt⁷⁹, causing hurt to

⁶⁴ Mohammed Giasuddin v. State of Andhra Pradesh (1997) 3 SCC 287

⁶⁵ Bachan Singh v. State of Punjab AIR 1980 SC 898

⁶⁶ Section 3 Probation of Offenders Act, 1958

⁶⁷ Section 4 Probation of Offenders Act, 1958

⁶⁸ Section 18(1)(c) The Juvenile Justice (Care And Protection Of Children) Act, 2015

⁶⁹ Sections 64 and 64A, The Narcotic Drugs and Psychotropic Substances Act, 1985

⁷⁰ Ashok Kumar Thakur v. Union of India (2008)6SCC1

⁷¹ P.Rathinam/Nagabhusan Patnaik v. Union of India & Others (1994) 3 SCC394

⁷² Nirbhay Singh v. State of UP 2008(3)ACR3148

⁷³ Babu Singh v. State of UP (1978) 1 SCC 579

⁷⁴ R.K.Anand v. Registrar (2013) 1 SCC 218

⁷⁵ State Tr. P.S. Lodhi Colony New Delhi V Sanjeev Nanda (2012) 8 SCC 450

⁷⁶ Francis v. State of Maharashtra, 2014 SCC OnLine Bom 2777

⁷⁷ Parvez Jilani Shaikh v. State of Maharashtra 2015 SCC OnLine Bom 7171

⁷⁸ Obaid Muzafer Khan v. State of Maharashtra 2015 SCC OnLine Bom 7114

⁷⁹ Rohit Mahendra Sonkamble v. State of Maharashtra 2015 SCC OnLine Bom 7178

public servant⁸⁰, violation of municipal laws⁸¹ etc. All there were based on the idea that a reformative approach to punishment should be the objective of criminal law, that promote rehabilitation without offending the communal conscience and secure social justice⁸². The new trend is based on this idea that punishments of imprisonment is not serving the required purpose of criminal justice system and is harming the offender in many ways instead of helping him to correct. Thus the global trend of alternate options is getting more recognition in India also.

Time has ripened to think about these methods more seriously by the law makers. Courts have to think seriously about the application of such methods as they serve the justice more meaning fully. Also the advancement in technology should be utilised in carrying out criminal justice. This can be helpful in dealing with the issues related to habitual offenders. The residential centres will help in repaying the economic offence and simultaneously helps in creating a better human through training and discipline. Therefore in researcher's opinion our law makers should consider the implementation of Tokyo rules and take alternative methods to punishments seriously.

⁸⁰ Anil Kumar v. State (Govt. of NCT of Delhi), 2016 SCC OnLine Del 3255

⁸¹ Abhishek Rai v. State, 2012 SCC OnLine HP 7585

⁸² Narotam Singh v. State of Punjab AIR 1978 SC 1542

THE DEMOGRAPHIC CRISIS IN SOUTH- EAST ASIA AND THE CITIZENSHIP (AMENDMENT) BILL, 2016

Sumit Agarwala* & Shilpy**

Nationality is the legal statuses of member whose acts, decisions are all condescend through the legal concept of nation state representing them. It can be acquired either by birth, naturalization, resumption, subjugation, cession, etc. Though often nationality and citizenship are considered to be similar of each other and used interchanging but there is difference between both the concepts. Citizenship denotes the relations the relations between the nation and the individual legally. It is the prime affair of the state's law. Citizens enjoy complete political rights in a state. It is feasible that all the citizens can possess the nationality of a state but it is not mandatory that all the nationals are the citizens of that state. There are problems in regard to admission of refugees and to the standard of treatment accorded to them. State have a tendency to view asylum and the refugee concept in a restrictive manner and to measures of 'deterrence' including unjustified detention of refugees.

Additionally, there is intractable problem of violations of the physical safety of refugees through armed attacks on refugee camps and settlements, forced conscription, piracy attacks on failure of passing ships to rescue asylum-seekers in distress on high seas. Understanding the problem of refugees and citizenship, it becomes very important in context of South- East Asia, since the past decades, it has witnessed huge turmoil across the borders on the lines of ethnicity, loyalty and religion while the persecution of the people of Bangladesh (the then East Pakistan) was on the ground of ethnicity and that of people of Tibet was on the loyalty. At the same time, a less observed yet a brewing problem pertain to the 'Rohingyas' of Myanmar.

India being at the advantageous position both economically as well as geographically becomes an sitting duck for the people seeking refuge which in turn over a period of time has led to demographic identity crisis like e.g., in the state of Assam, Tripura, West Bengal etc. but there is another side of the coin that being, the Hindus, Sikhs, Parsis, etc, residing in Pakistan and Bangladesh are facing tormented harassment and persecution. As a result of

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which, they see India as their only ray of hope which a large number of them arriving in India and later refusing to go back. India feels obliged to them both on Humanitarian as well as Historical Ancestral Background. In order to help them, The Citizenship (Amendment) Bill, 2016 was passed to streamline the process of granting Citizenship in conformity with Part-II (Citizenship) of the Constitution.

Nationality and citizenship both are one of the basic necessities of human being belonging to any cultural state or nation to enjoy certain kind of civil, social or political rights. It also confers economic and cultural rights to them. Though both the concepts are totally but they are very often used as each other' place. Nationality may be defined as the legal status of membership of the collectively of individuals whose act, decisions and policy are vouchsafed through the legal concept of the state representing those individuals. It is a bond which unites a person to a given state which constitutes his or her allegiance to a state which gives him a sense of protection of that state and also subjected to certain obligations by that state over him. By nationality, we mean the legal relationship which exists between a person and a state. Citizenship, on the other hand denotes the relation between an individual and the state law. One may say that Nationality is a bunch of civil and political rights a person acquire in any state whereas Citizenship rights are the sole concern of state laws. It is possible that all the citizens may possess the nationality of an exacting state but it is not necessary that all the residing nationals may be the citizen of that exacting state. Citizenship is a legal connation of a person's relation with his state. The value of Citizenship lies in the fact that no State confers all civil and political rights to its entire population. Therefore, in order to enjoy these rights, one must acquire Citizenship of that State, civil and political citizens unlike citizens. Articles 15, 16, 19, 29, 30 etc. are available to Citizens only whereas the population of a state is divided into two classes- Citizens and Aliens. Aliens do not enjoy Articles 14 and 21 are available to aliens also. The Constitution does not lay down permanent or comprehensive provision relating to Citizenship in India.

In Indian context, Article 11 of the Constitution expressly confers upon legislature to make provisions regarding the Citizenship of nationals. Parliament, in exercise of the power conferred by the Constitution, has passed the Citizenship Act, 1955, making provision for acquisition and termination of the Citizenship. The Act provides for the acquisition of the Indian Citizenship by following 5 ways, i.e., birth, descent, registration, naturalization and incorporation of territory. The Act also provided for loss of Citizenship by renunciation,

termination and deprivation. The Act was amended certain times and the recent development is The Citizenship (Amendment) Bill, 2016. As per the New Amendment, the illegal migrants belonging to Hindu, Parsi, Jain, Sikh, Buddhist and Christian communities belonging from Pakistan, Bangladesh, Afghanistan shall be granted the Indian Citizenship.

Under this Act, the migrants of these religions from these three countries will not be imprisoned or deported and also not to be treated as illegal migrants for the purpose of Indian Citizenship. It has also been provided by the Act that the minimum years for residence in India for acquisition of Indian Citizenship are reduced to 7 years from 12 years for these migrants. That means the Hindus, Parsis, etc., from Pakistan, Bangladesh, and Afghanistan who entered in India illegally and unlawfully can claim for Indian Citizenship after residing for 6 years in India. The Citizenship Act of 1955 restricts the Citizenship to the “illegal migrants”. The objects of the Amendment are to relax the rules regarding the Citizenship for minority community from these countries. The other object is that many persons from abovementioned communities are unable to prove their Indian origin, therefore, they are further required to apply by the process of naturalization which requires minimum 12 years of residence in India and this bill reduced it to 6 years. The last aim of the bill is to regulate the Citizenship of Overseas Citizen of India (OCI), which means their registration of OCI can be cancelled on violation of law.

The instruments for the international protection of refugees are the U.N. Convention of 1951 relating to status of refugees and protocol of 1967. So far the convention has been signed by the 147 countries and India is not a signatory to this convention and protocol has been signed by 138 countries and India is also not a party to this protocol. The convention is based on two principles-(i) non- discrimination based on race, religion or country or origin amongst countries, (ii) non-discrimination, as far as possible between nationals and refugees. The problem of refugee is due to turmoil in the country of their origin due to war, internal disturbances, ethnic cleansing, etc. In recent times, the number of countries which are undergoing internal instability have grown up due to these reasons which gave birth to vast number of refugees and in order to escape from these differences, these people search for safer zones. There is difference between the treatment of refugees and standard of living accorded to them in various countries. State have a tendency to view asylum and the refugee concept in a restrictive manner and to measures of ‘deterrence’ including unjustified detention of refugees. Additionally, there is intractable problem of violations of the physical

safety of refugees through armed attacks on refugee camps and settlements, forced conscription, piracy attacks on failure of passing ships to rescue asylum-seekers in distress on high seas.

Historically, the Hindus from Pakistan and Bangladesh are part of undivided Indian Subcontinent and get shifted to Pakistan and Bangladesh after partition of India. They have their inherited roots with Hindus of this country. But Hindus in these countries are persecuted and suppressed as major population of both the countries are not Hindus. The ‘Hindus’ in these countries are forced to convert their religion and are also harassed physically, socially and culturally. As a result of this persecution, number of minorities groups like Hindus, Jains, Sikhs, etc., migrated illegally to India as refugees in states like Assam, Tripura, West Bengal from Bangladesh and to other parts like northern and western regions of the country from Pakistan. India being neighbor of these countries is at the crucial position and an asylum for them. Small populations of Muslims live near Myanmar’s border with Bangladesh. These people, known as ‘Rohingya’, have been singled out for persecution by the authoritarian government there in recent years, and many have fled the country, seeking asylum in Bangladesh or other parts of Southeast Asia. Violence directed against religious minority groups continues to upshot in the loss of thousands of lives and property, but the religious animosity, criminal intent, or property disputes are often unclear. Religious minorities’ communities are exposed due to their comparatively limited sway with political elites. Like many citizens, they are often unwilling to seek recourse from a fraudulent and ineffective criminal justice system. Police are often ineffective in maintaining law and order and are sometimes slow to assist religious minorities. This promotes an atmosphere of impunity for actions of violence and offences against them. Religion becomes a modus operandi to gain political interest then the true wisdom of democracy turns into a mere oratory or more or less goes back into the prehistoric concept of ‘Papacy’ or ‘Papal Authority’ as propounded by Plato’s nationhood under the ‘Philosopher King’.

However, this type of bill is unprecedented. This Citizenship (Amendment) Bill, 2016 is a step from India to help those refugees and to relax the rules regarding attainment of Indian Citizenship for their betterment. It is a way to provide shelter to them and to remove the position of Statelessness and the tag of refugees from them. Being a Secular country, India never objectified religion as a source for any law but this is truly a humanitarian approach to tackle and counter the issue of refugees.

CONSTITUTIONAL GOVERNANCE AND PROTECTION OF MINORITIES

Anshul Pande*

The fundamental law of the land is its constitution and therefore the subject of constitution law is of paramount importance. Constitutional law describes the framework of governance of a nation. It assigns various powers and privileges to the government and further structures into three main organs i.e. Legislature; Executive and Judiciary. The study of Constitutional Law provides interpretation of various provisions and also lays down the power to amend with the changing needs of the citizens.

Man by nature is a social animal. He has to be dependent upon others to satisfy or fulfill his needs and demands. Codes of conduct or rules are significant to control the relationships of one man with the other to ensure peace and order within a society. The Constitution of India is the longest written constitution of any sovereign country in the world containing 144 articles, in 22 parts, 12 schedules and 118 amendments with 146,385 words in English language. The philosophy of Indian Constitution and the objectives of governance have been enshrined in the preamble of the constitution which sets out the guiding purpose and principles of the document.

It expressly guarantees each of its citizens the Liberty to worship or to have faith in any religion. India is a secular state; it does not uplift or degrade any particular religion. It stands for the right to freedom of religion for all the citizens in discriminatory. Explain the meaning of ‘secularism’ as adopted by India, Alexander Owies has written, “secularism is a part of the basic of the Indian Constitution and it means equal freedom and respect for all religions.¹ Mentioning the Preamble of our Law of the Land, the utmost priority given to its people is worth mentioning. India follows a parliamentary form of government. It is the largest democracy where the interests of its citizens are reflected while framing of policies, statutes and treaties. The census of 2011 data indicated that Hinduism is professed by majority of population. The Hindu is majority in states and Union Territories except Manipur, Arunachal Pradesh, Nagaland, Mizoram, Meghalaya, Lakshwadeep, Punjab and Jammu and Kashmir. As regards to the religious minorities are those who profess a religion other than Hinduism.

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¹ M. Laxmikanth, Indian Polity, 4th edition, Mc Graw Hill Education

The Muslims is the largest religious minority followed by Christians, Sikhs, Buddhists, Jains and Parsis.²

The ratios between the minority and majority groups often create conflicts as a result of which the internal peace and functioning of a nation gets affected. The topic of “minorities” interests has been used in almost every other day of our lives. This can be very much observed during the time of elections politicians in order to get votes, make many promises for the upliftment and promotion of the rights and interests of minorities.

Before I put my views on explain what are the different problems faced by the minority population in context of education, livelihood, social status etc, it is pertinent to answer certain questions. Who are minorities? Which community fits under the definition of minorities? What is their existence in the country? What rights are guaranteed by statutes for their upliftment and growth? These questions and responses to them have been a subject of number of studies and lengthy debates in forums where the protection of minorities are addressed. However no definite answer to this has been able to convince yet. The reason is that when we see the term “minorities” as a whole we also note that not each of these lists is subjected to discrimination or inequality. Some of them are working as well as residing with the majority group of Indian population while there are some others who are separated by the dominants, while few others are scattered and some are living under extreme poor conditions. It is significant to note the various kinds of minorities. Let us try and understand each of them in brief.

Ethnic or Racial Minorities: Society is the mixture of various cultures, traditions and religions. One human is in some or the other way different from its neighbor. Similarly there can be persons belonging to different ethnicities and races. Thus we can see that one race which is different from the race of majority automatically comes under the minority group.

Religious Minorities: This kind comprises of people who profess and have faith or belief in a religion which is not similar to the religion professed by majority of population. For Example India is a Secular state and gives a right to each of its citizens to follow any religion of their choice and that is why we have a population who follows Hinduism and a Muslim population who follows Islam.

² Available at: www.shillongtimes.com/2016/01/09/who-are-minorities-under-indian-law

Gender Minorities: From the heading itself it is clear that such kind refers to an imbalanced ratio between men and women. Women acquire often a subordinate status to that of men. Whenever we discuss about the gender minorities at National as well as International level, we are not confining our views to male and female. We also take into account Lesbians, Gay, Bisexual and Transgender people. The acronym LGBT is currently used to identify these groups together and has been popular in the late 19th century.

Age Minorities: Any society, irrespective of its diversification, is dominated by the ones who have been a part of the previous generation. Most of the rules of conduct to govern the society reflect their influential role in the framework. So here children, who are bound to follow such rules, can also be understood as a part of minority circle with regards to age.

Disabled Minorities: In the recent years there had been several movements for promoting the rights of Disabled persons has created a lot of awareness and has drawn attention towards the disabled minorities. They are not only face disadvantaged from their body but from the society as well. Lastly

Though the constitution of India does not define the term minorities but Ministry of Minority Affairs in India, the apex body which works for safeguarding their rights, recognizes Muslims, Jains, Sikhs, Buddhists and Parsis as religious communities of minority.³

A good constitution ensures a better future because it is the fundamental law of the country which assigns and directs the government how to function. The prominent beauty of our Constitution is that it was drafted by a Constituent Assembly which makes it above the Parliament. Thus, it imparts ‘constitutional supremacy’ and not ‘parliamentary supremacy’. The idea of appointing a constituent assembly of India was proposed in 1934 by M. N. Roy who was born in a Brahmin family. It is worth mentioning the important figures, among 389 members, of the constituent assembly. Dr. B.R. Ambedkar, Sanjay Phakey, Jawaharlal Nehru, C.Rajagoplalchari, Rajendra Prasad, Sarsar Vallabhbhai Patel, Maulana Abul Kalam Azad, Sandip Kumar Patel, Shyama Prasad Mukherjee, Nalini Rajan Ghosh and Balwantrai Mehta. There were more than 30 members of SC and Parsis were represented by H.P. Modi.⁴ We can also trace the existence of a committee that worked for minorities then, even before the constitution was framed. This was headed by Harendra Coomar Mookerjee, who was a

³ Available at: https://en.wikipedia.org/wiki/Ministry_of_Minority_Affairs

⁴ Available at: <http://en.wikipedia.org/wiki/constituent-assembly-of-india>

Christian. Apart from this, some of the important women members were Sarojini Naidu, Durgabai Deshmukh, Rajkumari Amrit Kaur & Vijaylakshmi Pandit.⁵ It can imply that during the period when the constitution was drafted every aspect of each society was taken into consideration. There were a total of 389 members belonging to different religion, faith and class which helped in the contemporary time so resolve certain conflicts. The concern for minority section was very much thought upon and was worked accordingly by our great leaders and framers. The role of constitution is to achieve certain objectives. Once the people have chosen their form of government, they have the right to limit the government officials, who may not be depot to such rules. With the doctrine of Separation of Powers and Checks & Balances the unregulated and arbitrariness on the side of government is prevented to a great extent. Legislature has the power to laws and policies which can fulfill the aspirations of citizens. The other branch i.e. The Executive enjoys the administrative power of executing the laws. The Judiciary has a very significant role in imparting justice to those who seek for it. Adoption of a federal form of system, promotes the division of powers and the subjects among the Central, Provincial and regional level. It prevents the one branch from overburdening. This structure helps in improving efficiency in dealing with national issues. Federalism is exemplified by signifying countries like U.S.A; Australia; Britain; Canada; Brazil as a model in understanding.

The experience of sixty years of constitutional governance helps us in understanding the working of the constitution in general and role of judiciary in particular. Given range and extents of crimes in our society, there is a need to expand the judiciary. The substantial context of “constitutionalism” states that a government must function in accordance with the provision laid down in its constitution which means that actions of a government must reflect constitutionality in its performance. There is no exhaustive attribute to prove whether a country follows the philosophy of constitutionalism. However there have been certain requisites evolved with leading cases whose presence can imply constitutional governance of the nation. These are as follows:

Preamble

Rule of Law

Separation of Powers

⁵ Available at: www.parliamentofindia.nic.in/debate/facts.htm

Judicial Review

In case of *Keshavanand Bharti v. State of Kerala*⁶, 13 judges largest bench of Indian constitutional history rejected previous contentions and declared that Preamble is a part of Indian Constitution.

PROBLEMS OF THE MINORITIES

A constitutional government must also protect the rights of the minority. While many decisions in a constitutional government are made with the consent of majority, minorities and individuals cannot lose their right to say their grievance on the same platform. There are certain difficulties faced by the minority section of India many a times. Let us look into some of the common yet pertinent problems:

Problem of providing protection: Need for security and protection is very often felt by the minorities. Especially in times of communal violence, caste conflicts, observance of festivals and religious functions on a mass scale, minority groups often seek police protection. Government in power also finds it difficult to provide such a protection to all the members of the minorities. It is highly expensive also. State governments which fail to provide such protection are always criticized. For example, the Rajiv Gandhi Government was severely criticized for its failure to give protection to the Sikh community in the Union Territory of Delhi on the eve of the communal violence that broke out there soon after the assassination of Indira Gandhi in 1984. The Gujarat State Government was criticized for its inability to provide protection to the Muslim minorities in the recent [Feb. Mar. – 2002] communal violence that burst out.

Problem of Identity: Because of the differences in socio-cultural practices, history and backgrounds, minorities have to grapple with the issue of identity everywhere which give rise to the problem of adjustment with the majority community.

Failure to promote Secularism: Almost all political parties including the Muslim League claim themselves to be secular. But in actual practice, no party is honest in its commitment to secularism; purely religious issues are often politicized by these parties. Similarly, secular issues and purely law and order problems are given religious colors. These parties are always waiting for an opportunity to politicalise communal issues and take political advantage out of

⁶ AIR 1973 SC 1461

it. Hence, the credibility of these parties in their commitment to secularism is lost. This has created suspicion and feeling of insecurity in the minds of minorities.

Problem relating to the Introduction of Common Civil Code: Another major hurdle that we find in the relation between the majority and the minority is relating to the failure of Governments which have assumed power so far, in the introduction of a common civil code. It is argued that social equality is possible only when a common civil code is enforced throughout the nation. Some communities, particularly the Muslims oppose it. They argue that the imposition of a common civil code, as it is opposed to the “Shariat” will take away their religious freedom. This issue has become controversial today. It has further widened the gap between the religious communities.

CONSTITUTIONAL PROVISIONS FOR MINORITIES IN INDIA

For the protection of the interests of minorities, constitution of India has envisaged certain provisions. These are discussed under the Part III, IV and IV-A viz. fundamental rights; Directive principles of state policy and fundamental duties respectively. The Indian Constitution ensures Justice, social, economic and political to all its citizens. It lays down provisions for protecting and promoting the rights and interests of religious and ethnic minorities as well as socially and economically disadvantaged classes such as the SC & ST. It has been discussed much in my paper about the secular nature adopted by India through 42nd Amendment Act of 1976. Article 29 gives the religious and linguistic minorities' right to establish and manage educational institutions of their own. The minorities have been given the unrestricted rights to promote and preserve their own culture. Indeed, India is a country of diverse cultural groups and she is keen to preserve her cultural diversity. Thus for example, even though, Hindi is made the official language of India, primary education everywhere is given in the mother tongue. Article 29 expressly forbids discrimination on grounds of race, religion, caste, language, in admission to educational institutions run by the state or receiving aids from the state. This means that the doors of all educational institutions run by government or receiving funds from the state are open to all groups of Indians. Linguistic, religious or ethnic minority students cannot be denied admission to such educational institutions.

Article 30 is vital to the protection and preservation of rights of the minorities. The minorities have been given the right to establish and administer educational institutions of their choice.

The state also cannot discriminate against educational institutions established and managed by the minorities in matters of granting aids. Such educational institutions however must receive state recognition. The state educational authorities have the right to regulate such educational institutions because the “right to manage does not include the right to mismanage.”

Article 16 guarantees that in matters of public employment, no discrimination shall be made on grounds of race, religion, caste or language etc. This means that in matters of public employment, all Indians are placed on a footing of equality. Every citizen of India will get equal employment opportunity in government offices.

Article 25 of the Indian constitution guarantees freedom of religion to every individual. This article of the Indian constitution ensures that the members of the religious minority community have the unhindered right to follow their own religion. The state regulates the practice of a religion only when and to the extent it disturbs public peace.

Union government has enacted legislations to work on this issue. The Ministry for Minority Affairs, the National Human Rights Commission (NHRC), and the National Commission for Minorities (NCM) are governmental bodies created to investigate allegations of religious and other forms of discrimination and make recommendations for redress to the relevant local or national government authorities. Although NHRC recommendations do not have the force of law, central and local authorities generally followed them. The NCM and NHRC intervened in several instances of communal tension, the enactment of ‘anti conversion’ legislation in several states, and incidents of harassment and violence against minorities. Such intervention included high profile cases, such as the 2002 anti-Muslim violence in Gujarat and the 2008 attacks against Christians in Orissa. The national government earmarked approximately 26 billion rupees (\$552 million) for 2010-11 - an increase of 50 percent from the prior year – for the Ministry of Minority Affairs. On March 17, the Ministry of Minority Affairs informed parliament that the NCM had received 2,268 complaints in 2008-2009, compared to 1,508 complaints received in 2007-2008. The Muslim community submitted the most complaints. Despite government efforts to foster communal harmony, some extremists continued to view ineffective investigation and prosecution of attacks on religious minorities as a signal that they could commit such violence with impunity, although numerous cases were in the courts at the end of the reporting period. The government introduced the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill in the Rajya Sabha, the upper house

of parliament, in 2005. A parliamentary standing committee rejected the bill and called for a new law that provided for speedy prosecution; strict punishment for perpetrators of sectarian violence; and quick justice, relief, rehabilitation, and compensation for victims and survivors. The country established a National Commission for Minority Education Institutions that was empowered to resolve disputes and investigate complaints regarding violations of minority rights, including the right to establish and administer educational institutions.⁷

⁷ Available at: <https://www.state.gov/documents/organization/171754.pdf>

ANTI-COMPETITIVE AGREEMENT: IT'S IMPACT ON CONSUMERS

Prabhat Dixit*

An agreement which attempts to control the market (through measures like fixing prices, controlling volumes of production so that prices rise artificially, blocking certain competition law and protection of consumer interest distributors/suppliers, etc.) is an anti-competitive agreement.¹

Section 3 of the Competition Act 2002 prohibits any agreement with respect to production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India. Under Section 3, any such agreement is considered void. Hence, Provision of section 3 (1) casts a duty on enterprises to examine the proposals for agreement or arrangement from its long term effect on competition in the market.

In *Allied Tube Case*², the US Supreme Court found that a subgroup of the standard setting organization effectively “captured” the whole group and harmed competition by excluding an innovative product. In this case, an association that published a code of standards for electrical equipment required the use of steel conduit in high-rise buildings, but a new entrant into the market proposed to use plastic conduit. The new product was allegedly cheaper to install, more pliable, and less susceptible to short-circuit, thus benefiting the consumers. The incumbent steel conduit manufacturers agreed to use the association’s procedures to exclude the plastic product from the code by sending new members to the association’s annual meeting whose sole function was to vote against the new product. As a result, the potential entrant’s ability to market the plastic conduit was significantly impaired and consumers were denied the benefit of a potentially significant product innovation.

Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between ‘horizontal’ and ‘vertical’ agreements between firms. The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are

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¹ Sanchit Aggarwal, “Competition Law and Protection of Consumer Interest”, Retrieved from <http://www.cci.gov.in> on 25th January, 2013

² 486 U.S. 492 (1988)

those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as *prima facie*, horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser - seller relationship.

HORIZONTAL AGREEMENTS

Agreements between two or more enterprises that are at the same stage of the production chain and in the same market constitute the horizontal variety. An obvious example that comes to mind is an agreement between enterprises dealing in the same product or products. But the market for the product(s) is critical to the question, if the agreement trenches the law. The Act has taken care to define the relevant market.³ To attract the provision of law, the products must be substitutes. If parties to the agreement are both producers or retailers (or wholesalers) they will be deemed to be at the same stage of the production chain.

A specific goal of competition policy/law is and needs to be the prevention of economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. It needs to control agreements among competing enterprises (horizontal agreements) on prices or other important aspects of their competitive interaction. Likewise, agreements between firms at different levels of the manufacturing or distribution processes (vertical agreements, for example between a manufacturer and wholesaler) which are likely to harm competition (albeit less harmful than horizontal agreements) need to be addressed in the competition policy/law. The foremost constituent of any competition policy/law is obviously the objective to foster competition and it does observe is the need to deal effectively against practices and conduct that subvert competition. The Act reckons these propositions.

In general the '*rule of reason*' test is required for establishing that an agreement is illegal. However, for certain kinds of agreements, the presumption is generally that they cannot serve any useful or pro-competitive purpose. Because of this presumption, the law makers do not subject such agreements to the "rule of reason" test. They place such agreements in the *per se*

³ Relevant market is discussed in the section on 'abuse of dominance' under the heading 'Product Market and Geographical Market', infra

illegal category. The Act presumes that the following four types of agreements between enterprises, involved in the same or similar manufacturing or trading of goods or provision of services have an appreciable adverse effect on competition :

- Agreements regarding prices. These include all agreements that directly or indirectly fix the purchase or sale price.
- Agreements regarding quantities. These include agreements aimed at limiting or controlling production, supply, markets, technical development, investment or provision of services.
- Agreements regarding bids (collusive bidding or bid rigging). These include tenders submitted as a result of any joint activity or agreement.
- Agreements regarding market sharing. These include agreements for sharing of markets or sources of production or provision of services by way of allocation of geographical area of market or type of goods or services or number of customers in the market or any other similar way.

Manufacturer 1 → Manufacturer 2 → Manufacturer 3

PER SE ILLEGALITY

Such horizontal agreements, which include membership of cartels, are presumed to lead to unreasonable restrictions of competition and are therefore presumed to have an appreciable adverse effect on competition. In other words, they are *per se* illegal. This provision of *per se* illegality is rooted in the provisions of the US law and has a parallel in most legislation on the subject. The Australian law prohibits price fixing arrangements, boycotts and some forms of exclusive dealing. The new UK competition law, namely, Competition Act, 2000, endorses certain agreements to have an appreciable effect on competition (presumption is however rebuttable). A *per se* illegality would mean that there would be very limited scope for discretion and interpretation on the part of the prosecuting and adjudicating authorities. The underlying principle in such presumption of illegality is that the agreements in question have an appreciable anti-competitive effect. Barring the aforesaid four types of agreements, all the others will be subject to the "rule of reason" test in the Act.

VERTICAL AGREEMENTS

By and large, as noted earlier, vertical agreements will not be subjected to the rigours of competition law. However, where a vertical agreement has the character of distorting or preventing competition, it will be placed under the surveillance of the law.

For instance, the following types of agreements, *inter alia*, will be subjected to the “rule of reason”⁴ test.

- Tie – in arrangement;
- Exclusive supply agreement
- Exclusive distribution agreement;
- Refusal to deal;
- Resale price maintenance

The Act lists the following factors to be taken into account for adjudicatory purposes to determine whether an agreement or a practice has an appreciable adverse effect on competition, namely,

- A. creation of barriers to new entrants in the market,
- B. driving existing competitors out of the market,
- C. foreclosure of competition by hindering entry into the market,
- D. accrual of benefits to consumers,
- E. improvements in production or distribution of goods or provision of services, and
- F. promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.



⁴ The Legal Environment Today: Business In Its Ethical, Regulatory, E-Commerce By Roger Miller, Frank Cross, P.655

1. Cartels

In simple terms a cartel is an association of manufacturers or suppliers that maintain prices at a high level and restrict competition.⁵ A hard-core cartel as defined in the OECD recommendation is an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.⁶ In *Haridas Exports v. All India Float Glass Manufacturers Association*⁷, the Supreme Court said that the mere formation of cartel will not give rise to an action. Something more must have to be proved to demonstrate the detrimental effect.

2. Predatory Pricing

The “predatory pricing” under the Act means “the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors”.⁸ The predatory firm after driving other competitors from the market raises their price above the competitive levels to earn supra-competitive profits and recoup the losses incurred during the predatory period. This anti-competitive practice undermines the competition in the market and is not in the interest of the consumers.⁹ The US Supreme Court in *Utah Pie v. Continental Banking Co.*¹⁰ considered the price below the full cost as predatory.

3. Tying Agreement

A tying agreement is an agreement by party to sell one product but only on condition that buyer also purchases a different product, or at least agrees that he will not purchase the

⁵ Supra note 2

⁶ *Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation*, OECD Journal of Competition Law and Policy, Vol. 8, No-1, June 2006, OECD Publishing.

⁷ (2002) CTJ 353 (SC) MRTP

⁸ See Explanation (b) of Section 4of Competition Act 2002.

⁹ Einer Elhauge and Damien Geradin, *Competition Law and economics*, Hart Publishing, pp 314

¹⁰ 386, US 685 (1967)

product from any other supplier.¹¹ It is not mandatory that the tying and the tied product should be similar in character.¹²

4. Bid Rigging or Collusive Bidding

Generally, this is the case with tenders. A scheme in which businesses collude so that a competing business can secure a contract for goods or services at a pre-determined price or where for the sake of appearance several other parties also present a bid and submit offers that they know the buyer will reject because the price is too high or the terms are unacceptable in order to create the appearance of legitimate bidding while ensuring that a prearranged "competitor" will win the bid.¹³

5. Exclusive Supply Agreement

The agreements which bound the traders to purchase only from one supplier are also indirectly affecting the consumer interest. Because the supplier can impose unreasonable cost and the trader will levy the same from the consumers.

6. Exclusive Distribution Agreement

When the agreement is entered in order to restrict or withhold the supply of goods or allocating the market for supply it can cause scarcity of the good in the market which directly cause a hike in the prices.¹⁴

7. Agreements of Refusal to Deal

When an agreement is entered between the traders refusing to buy or sell any product to a class of sellers or buyers, the consumer are deprived of availability of better goods or services at cheaper prices. As these kinds of agreements directly reduces the options available for the consumer.¹⁵

8. Resale Price Maintenance Agreements

¹¹ Abir Roy and Jayant Kumar, *Competition Law in India*, Eastern Law House, Kolkata, 2008, pg 54

¹² In Re, Anand Gas, RTP Enquiry 43/1983

¹³ Retrieved from <http://www.investopedia.com> on 3rd April, 2013

¹⁴ Ibid.

¹⁵ Ibid.

These agreements directly affects the prices to be paid by consumer for the goods or services as the seller is bound to maintain the price of the goods or services as prescribed by the supplier.¹⁶

9. Denial of Market Access by Dominant Firm

The denial of market access refers to denial both for the new players and consumers. If the new players are restricted from entering into one market, the dominant enterprise can use its position for imposing unreasonable restrictions in market. When the consumer is denied to access any relevant market by a dominant firm, it causes him with a lot of trouble. As the consumer has no other option to acquire the goods or avail the services from any other market of same.¹⁷

THE RULE OF REASON

Under this rule, the effect on competition is to be found on the facts of the case. The rule of reason in examining the legality of restraints on trade was explained by the US Supreme Court in *Board of Trade of City of Chicago v. US*¹⁸ as,

"Any restraint is of essence, until it merely regulates and promotes competition. To determine this question, the Court must ordinarily consider the facts peculiar to the business to which restraint is applied, its condition before and after the restrain was imposed, the nature of restrain and its actual or probable effect.¹⁹"

The applicability of section 19(3) justifies the application of rule of reason in the Indian context, whereby the agreements have to be analyzed against the parameters laid down under Section 19(3).

THE PER SE RULE

There is no concept of per se rule in India and any kind of presumption under Section 3(3) is rebuttable on account of various grounds mentioned under Section 19(3).²⁰ The per se rule is

¹⁶ Ibid

¹⁷ Ibid

¹⁸ (1918) 246 US 231

¹⁹ Ibid

²⁰ *Neeraj Malhotra v Deustche Post Bank Home Finance Ltd. & Ors*, (5 of 2009) decided on 2nd December 2010

applicable to other jurisdiction where certain agreements are per se anti-competitive and cannot be rebutted. Under Section 3(3), certain agreements are presumed to be anti-competitive, but this presumption is clearly rebuttable.²¹

The per se rule finds no relevance under the Competition Act, 2002 but, according to US Supreme Court, certain practices or acts are deemed or presumed to have an AAEC, and therefore are themselves listed and prohibited.²²

Section 3 of the Competition Act relates to the anti-competitive agreement with respect to production, supply, distribution, storage, acquisition, or control of goods or provision of services which causes or is likely to cause and appreciable adverse effect on competition (AAEC) within India.²³ Further, section 3(2) provides that any agreement²⁴ in contravention of this provision shall be void.²⁵ An appreciable adverse effect on competition (AAEC) is not defined under the Act, but it is to be determined by Competition Commission of India (CCI) by considering factors mentioned in section 19(3),²⁶ of which one of the factor is accrual of benefits to consumers.²⁷ It provides that it is not always necessary that agreement must be in writing. It can be present in any form and which will be inferred from the facts and circumstances of each case. Agreement can be studies under two categories: 1.) Horizontal Agreement and; 2.) Vertical Agreement.

The example of such a case where consumers suffered due to anti-competitive agreement is the example of *Builders Association of India v. Cement Manufacturers' Association and*

²¹ Ibid

²² Supra note 11 at 72

²³ Section 3(1) of Indian competition Act, 2002

²⁴ Section 2 (b) "agreement" includes any arrangement or understanding or action in concert,-

- (i) whether or not, such arrangement, understanding or action is formal or in writing; or
- (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

²⁵ Section 3(2) of Indian competition Act, 2002

²⁶ Section 19(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

- (a) creation of barriers to new entrants in the market;
- (b) driving existing competitors out of the market;
- (c) foreclosure of competition by hindering entry into the market;
- (d) accrual of benefits to consumers;
- (e) improvements in production or distribution of goods or provision of services;
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

²⁷ Jayant Kumar and Garima Panwarl (2013), *An interface between Competition Law and Consumer Welfare*, Competition Law Report, Vol. 3 Part-III, December, P.325

*Ors.*²⁸. In 2011 the Indian Builders Association filed a complaint against 11 cement manufacturers alleging that they had formed a cartel to restrict the output and fixed prices. The investigating body of the Commission that is the Director General initiated the investigation and submitted in its report that there was an anti-competitive agreement between the manufacturers though it was not in writing but facts clearly stated that it cannot be mere coincidence that at the same time the price of 11 cement companies would be similar. Thus, there was formation of cartel between them.

The CCI in its judgment noted down the following points:

- i. It observed that act and the conduct of the cement companies clearly establish that there are cartels.
- ii. Their conduct of business is anti-competitive because by forming a cartel they have not only limited the competition but also have tried to control the price and production of cement in India.
- iii. CCI also observed that their act is not only detrimental to the consumers but also has affected the whole economy by limiting the competition.

Hence, in this case CCI imposed fine of just over 6307 cr. against the 11 largest cement manufacturers in India and the cement Manufacturers Association. In this case the cement manufacturers association have filed their appeal before the Competition Appellate Tribunal (COMPAT) yet looking into the seriousness of the matter the COMPAT has ordered to file 10 percent of the said amount in the escrow account. The appeal in this case was filed in June 2013 and it is yet to be disposed off.²⁹

The recent case which can be noted in this regard is the case *The Competition Commission of India v. Co-Ordination Committee of Artists and Technicians of W.B. Film and Television and Ors.*³⁰ The Supreme Court has held that prohibition on the exhibition of dubbed serial on the television prevented the competing parties in pursuing their commercial activities. Thus, the protection in the name of the language goes against the interest of the competition,

²⁸ 2012 Comp LR 629 (CCI) URL: <http://www.indiankanoon.org/doc/163933884/>. Retrieved on 16/01/2014, at 3:35 pm

²⁹ Robert. E. Connolly, Nisha Menon and Joymen Mathew, *India's competition act takes shape with enforcement actions and appeals*, DLA Piper Global Law Firm, Retrieved from http://www.dlapiper.com/indias_competitionact_takes_shape_keycases_keypoints/ on 15/01/2014 at 2:50 pm

³⁰ Civil Appeal No. 6691 of 2014 Retrieved from <http://judis.nic.in/supremecourt/chejudis.asp> on 24/03/2017

depriving the consumers of exercising their choice. Acts of Coordination Committee definitely caused harm to consumers by depriving them from watching the dubbed serial on TV channel; *albeit* for a brief period. It also hindered competition in the market by barring dubbed TV serials from exhibition on TV channels in the State of West Bengal. It amounted to creating barriers to the entry of new content in the said dubbed TV serial. Such act and conduct also limited the supply of serial dubbed in Bangla, which amounts to violation of the provision of Section 3(3) (b) of the Act.

Exceptions

The provisions relating to anti-competition agreements will not restrict the right of any person to restrain any infringement of intellectual property rights or to impose such reasonable conditions as may be necessary for the purposes of protecting any of his rights which have been or may be conferred upon him under the following intellectual property right statutes;

1. The Copyright Act, 1957;
2. The Patents Act, 1970;
3. The Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
4. The Geographical Indications of Goods (Registration and Protection) Act, 1999;
5. The Designs Act, 2000;
6. The Semi-conductor Integrated Circuits Layout-Design Act, 2000.

The rationale for this exception is that the bundle of rights that are included in intellectual property rights should not be disturbed in the interests of creativity and intellectual/innovative power of the human mind. No doubt, this bundle of rights essays an anti-competition character, even bordering on monopoly power. But without protecting such rights, there will be no incentive for innovation, new technology and enhancement in the quality of products and services.³¹

However, it may be noted, that the Act does not permit any unreasonable condition forming a part of protection or exploitation of intellectual property rights. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and

³¹ Dr. S. Chakravarthy, *MRTA Metamorphoses into competition Act*

services will fall within the contours of competition law as long as they are not in reasonable position with the bundle of rights that go with intellectual property rights.³²

The practices which are prohibited under this clause are price fixing; limiting or controlling production, supply, markets, technical development; market sharing; bid rigging or collusive bidding; cartels (horizontal agreements); tie-in arrangement; exclusive supply agreement; exclusive distribution agreement; refusal to deal; resale price maintenance (vertical agreements). The prohibition of all these practices it increase fair competition in the market which result in fair price better quality of product etc. which benefits the consumer.

Yet another exception to the applicability of the provisions relating to anti-competition agreements is the right of any person to export goods from India, to the extent to which, an agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. In a manner of speaking, export cartels are outside the purview of competition law. In most jurisdictions, export cartels are exempted from the application of competition law. A justification for this exemption is that most countries do not desire any shackles on their export effort in the interest of balance of trade and/or balance of payments. Holistically, however, exemption of export cartels is against the concept of free competition

The Central Government has power under the Act to exempt from the application of the Act, or any provision thereof, a class of enterprises, a practice, an agreement etc.

IMPACTS OF ANTI-COMPETITIVE PRACTICES ON CONSUMER

Anti-Competitive agreements results in following impact on consumers as –

- **Hike of Prices:** Anti-competitive agreements leave the consumer with no other choice other than to purchase such product on the price fixed by the seller. If the agreements are entered to limit the production of the product or supply of the same in market, there will be shortage of that product in market which would cause an unreasonable hike in the prices of that product. They increase their prices as the consumers are compelled to buy their products.

³² Dr. S. Chakravarthy, “MRTP Act Metamorphoses into competition Act”.

- **Reduce number of Choices:** Anti-competitive agreements, abuse of dominant position or combinations reduced the number of choices available to the customer on the long run. The agreements limiting the extent of market or production of goods or services either geographically or product-wise deprives the consumer of his choice to choose among the producers of product or providers of services.
- **Low Quality:** One effect of anti-competitive agreements can be that low quality products achieve a higher market share than would otherwise be the case. As the consumers are restricted to buy goods from a single producer, this assures the producer a fixed and assured consumer base and income. Thus they stop competing. Now as a result they deteriorate the quality of their products as they are assured of their customer base.
- **Lack of Innovation:** Companies participating in a cartel produce less and earn higher profits. As the consumers are restricted to buy goods from a single producer or on the price fixed by sellers, this assures the producer a fixed and assured consumer base and income. Thus they stop competing. In the long run competitiveness of the industry is undermined and the pressure is eliminated from competition to innovate and achieve cost efficiencies.
- **Misuse of Resources:** The consumers are harmed by being forced to buy an undesired good (the tied good) in order to purchase a good they actually want (the tying well), and so would prefer that the goods be sold separately. By preventing the technical development in any product or services, the consumer will be bound to reap the available product or services and will be deprived of new technically developed product and services. While, the agreements restraining investment in any market will prevent the development of that market ultimately causing the consumer to bear the cost of development of market. In this way, resources are misallocated and consumer welfare is reduced.

UNREASONABLE CONDITIONS

The agreements centralizing the power to regulate the market in one player allow him to impose unreasonable conditions in market which can be harmful to the consumer interest.

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