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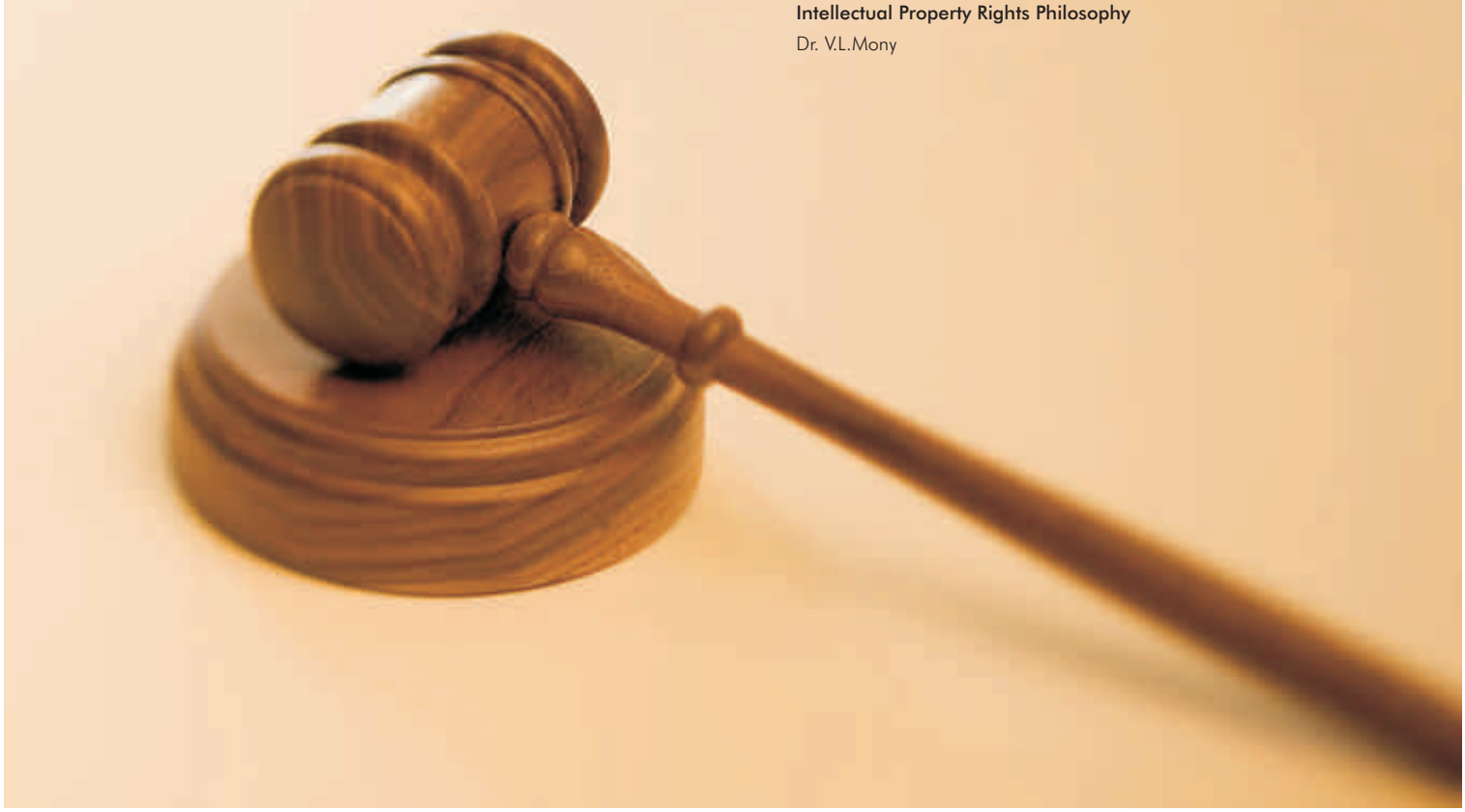
Research Papers



Pragyaan: Journal of Law

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Panel of Referees

From the Chief Editor

We draw immense pleasure in presenting June 2013 issue of our research journal-**Pragyaan: Journal of Law.** It continues to gain appreciation and accolades as it provides a platform that stimulates and guides the intellectual quest of law scholars. Pragyaan-JOL is a blind refereed bi-annual journal that brings to its readers high quality research in Law that should help to address the challenges of the 21st century.

The Journal strives to seep ways to harness the power of law to meet the real world challenges, and to provide substance for making informed judgments on important matters. The articles published in this issue of **Pragyaan: Journal of Law** focus on Court System in Tanzania, Insider Trading Law in India, The Prevention of Torture Bill, Judicial Activism, Originality in Musical Works, Future of IPR Regime, and Intellectual Property Rights Philosophy.

We would like to express our gratitude to our valued contributors for their scholarly contributions to the Journal. Appreciation is due to the Editorial Advisory Board, the Panel of Referees and the University authorities for their constant guidance and support. Our team of professionals comprising of Dr. A.S. Pandey (Professor-in-charge, Research Publications) and Mr. Nakul Sharma (Editor Pragyaan: JOL) has made a significant contribution towards making research papers error free, presentable and reader friendly. The contribution of our team members is highly appreciated. We acknowledge the contribution of Dr. S. Chaturvedi in his capacity as the editor of this issue at its initial stages. Thanks are also due to the faculty members, School of Law, for their support.

We continue our endeavour to harness intellectual capital of our scholars and practitioners of law. We do our best to oversee a review and decision-making process in which we invite appropriate individuals to review each paper and encourage them to provide timely, thoughtful, constructive, and diplomatic critiques. We work towards integrating reviewers' feedback along with our own insights into the final decision and craft fair and balanced action that acknowledges the strengths of the manuscript, addresses areas of improvement, and clearly conveys the editorial decision.

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

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

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Research Papers / Articles

Analysing Originality in Musical Works

*Sonam Sugandha**

ABSTRACT

The principle mark of genius is not perfection, but originality. Since originality is quintessential of copyright, the concept assumes great importance in the study of copyright law. To harmonize the conflicting standards of originality, this paper is an attempt to analyze originality as it is understood in copyright law. The author examines the concept of originality in musical works in light of the different thresholds for originality i.e. the sweat of the brow doctrine in UK and the modicum of creativity test in US.

Keywords: Originality, Musical Works, Copyright.

"If you copy, it means you're working without any real feeling. No two people on Earth are alike, and it's got to be that way in music or it isn't music."[1]

1. Introduction

Plagiarism of musical works is not a modern "sin". Handel was known to be a 'notorious plagiarizer[2] and Bach, Wagner and Brahms have not escaped similar allegations.[3] Cole Porter,[4] the Bee Gees,[5] and Michael Jackson,[6] have been accused of lifting their works from others. George Harrison (of Beatles' fame) has been a luckless defendant[7] and Michael Bolton has discovered that a copyright infringement action is definitely not a wonderful thing.[8]

The Indian film industry joins together several regional language industries in India, but none are as large or as successful as Bollywood, which churns out Hindi language Films.[9] Since the dawn of the Indian film industry, songs have been a major part of the films[10] and represent the most popular form of music in India.[11] Foreign influence in Indian film music is apparent from early Indian movies,[12] and Indian music eventually started imitating Western music.[13]

Bollywood film producers rely on the concept that there is no copyright in ideas, which enables them to create unauthorized derivatives of copyrighted works.[14] Big names in the Bollywood music industry continue to come

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1. *Billie Holiday, BrainyQuote, Available at http://www.brainyquote.com/quotes/authors/b/billie_holiday.html as cited in Valeria M. Castanaro, Comment, "It's the Same Old Song": The Failure of the Originality Requirement in Musical Copyright, Fordham Intell. Prop. Media & Ent. L.J, Vol. 18, at p. 1271.*
2. *Paul Orth, "The Use of Expert Witnesses in Musical Infringement Cases' (1955) 16, University of Pittsburgh Law Review 232, 232. As mentioned in Michael Paul Seifried, "Music and Copyright: Substantially "Out of Tune"?" Dissertation Adelaide University, 2002, at p. 1.*
3. *Harold Fox, "Evidence of Plagiarism in the Law of Copyright", (1946) University of Toronto Law Journal 414, 415.*
4. *Arnstein v. Porter, 154 F.2d 464 (2d Cir, 1946).*
5. *Selle v. Gibb, 567 F Supp 1173 (ND III, 1983).*
6. *Smith v. Michael Jackson, 84 F3d 1213 (9th Cir, 1996).*
7. *Bright Tunes Music Corp v. Harrisongs Music Ltd, 420 F Supp 177 (1976).*
8. *Three Boys Music v. Michael Bolton, 212 F3d 477 (9th Cir, 2000) Bolton's song, Love is a Wonderful Thing was found to have infringed the Isley Brothers' song of the same title. Bolton was ordered to pay damages of $ 5.4 million, the largest ever awaeded in an American music copyright infringement case.*
9. *Alison Arnold, "Popular Film Song in India: A Case of Mass-Market Eclecticism", 7 popular Music 177, 177 (1988) (noting that India is one of the largest film industries in the world, and at the time, Bollywood released about 750 million films per year). As cited in Harini Ganesh, Comment, "The Need for Originality: Music Infringement in India", 11 J. Marshall Rev. Intell. Prop. L. 169(2011) at p. 171.*
10. *Anna Marcom, "An Understanding Between Bollywood and Hollywood? The Meaning of Hollywood-Style Music in Hindi Films", 10 Brit. J Ethnomusicology 63, 63 (2001) (explain that Hindi films have utilized songs and background music since the coming of sound to film in India in the late 1940s).*
11. *Arnold, Supra note 8, at p. 177.*
12. *Ibid, at p. 178 (adding that Hindi film songs in the 1940s started showing obvious foreign influence mixed with traditional Indian musical elements).*
13. *Ibid, (explaining that the music director of the 1961 Bollywood film Chhaya took the first movement from Mozart's G Minor fortieth symphony, changed the key and slightly altered the verse and harmony to create a Hindi film song).*
14. *Anuradha Moulee & Chris Bevitt, "Slumdogs & Copycats", Shelston IP, Available at http://www.shelstonip.com/news_story.asp, at 2 (reporting that the Hindi film industry has an associated music industry that borrows freely from external and internal sources, and that even though copyright protection exists in India, infringement and copycatting is still a problem).*

under fire for copying and creating unauthorized derivative works, despite the cry from other heavy hitters in the industry to stop infringement.[15]

In January 2010, renowned Indian film music director Ilaiyaraja, who penned most of the musical hits for the South Indian film industry in the 1970s and 1980s, warned other players in the Indian film music industry to stop using his songs without prior permission and expressed his desire for stronger copyright laws.[16] He made it clear that advertising agencies, television channels, and TV show producers should all obtain permission from his licensing agency, Agi Music, before using his songs in any other production.[17]

2. Meaning of "Musical Works"

Indian copyright law provides protection for works created in India.[18] The Copyright Act of 1957 stemmed from Great Britain's copyright law.[19] The Copyright Act provides copyright protection to various works, including original literary, dramatic, artistic and musical works, cinematographic films, and sound recordings. The Copyright Act further grants exclusive rights to the copyright holder, authorizing the copyright holder to reproduce, distribute, perform, and translate the work, among other rights.[20] The copyright law extends no protection to concepts and ideas but their expression in a tangible medium, and only safeguards the original works. Any violation of these exclusive rights is considered copyright infringement.[21]

Copyright can subsist in musical work, only if –

1) They are musical works ;
2) They are original (originated by the author and not copied with minor change) ;
3) Amount to 'works'
that is, compositions, pieces artistically set together.

"Musical work"

Section 2 (p) of the Copyright Act, 1957 specifies **"musical work"** means a work consisting of music and includes any graphical notation of such work but does not include any words any action intended to be sung, spoken or performed with the music.[22]

Advanced Law Lexicon has defined "musical work" as any combination of melody and harmony or either of them, printed, reduced to writing or otherwise graphically produced or reproduced.[23] It further defines the term "Musical" as 'pertaining to music or the performance of music.' Some law dictionaries define the term **"musical"** as pertaining to or producing music.[25]

Further the definition of the term **"Music"** is inclusive and "includes sounds wholly or predominantly characterized by the emission of succession of repetitive beats".[26]It may also be defined as a connected series of sweet sounds.[27]

The **UK Copyright, Designs and Patents Act, 1988** under Section 3 (1) defines **"Musical Work"** as "a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.

The US Copyright Act, 1976 has defined "musical works" under Section 102 (a) (2) as including any accompanying words" as among the words of authorship protected under the Act.

Berne Convention for the Protection of Literary and Artistic Works[28] recognizes musical work as a subject

15. *Diksha Sahni, "The Partners in Copyright Crime", Wall St. J., Feb. 10, 2011, Available at http://blogs.wsj.com/indiarealtime/2011/02/10.*
16. *Malaysian Firm Ties up with Ilaiyaraja, Hindu (Indian), Jan. 6, 2010, at p. 2.*
17. *Nikhil Raghavan, "Let The Music Play On", Hidu (India), Jan. 9, 2010, at p. 9 (reporting that Ilaiyaraja authorized Agi Music, which had the rights to administrate Ilaiyaraja's works, to initiate legal proceedings for any violations of his works created before the year 2000).*
18. *Government of India Ministry of Human Resource Development, "A Handbook of Copyright Law", 13 (1999) (stating that copyright provided but the Indian Copyright Act extends only within the Indian borders).*
19. *Pradip N. Thomas, "Copyright and Emerging Knowledge Economy in India", 36 Econ. & Pol. Wkly. 2147, 2152 (2001) (explaining that the Indian Copyright Act was modeled from the Indian Copyright Act of 1914, which was based on the UK Copyright Act of 1911).*
20. *Section 14 (defining 'copyright' as giving the copyright holder the exclusive right); a copyright in musical work includes the exclusive rights to reproduce the work, to issue copies of the work to the public, to perform the work publicly, to communicate the work to the public, to make a sound recording of the work, and to translate or adapt the work.*
21. *Common acts of infringement include making unauthorized copies, performing the copyrighted work without permission, importing infringing copies into India, distributing infringing copies that harm the copyright owner's interest in the work, and any public exhibition of the infringing copies.*
22. *Justice V. R. Krishna Iyer, "Wharton's Law Lexicon", Universal, 15th Edn., 2009, p. 1132.*
23. *P. Ramnatha Aiyer, "Advanced Law lexicon", Wadhwa Nagpur, 3rd Edn., 2005, p. 3105. Also as defined under section 3 (c) of the Musical (Summary Proceedings) Copyright Act, 1902. Also Stroud's Judicial Dictionary Of Words And Phrases, Vol. 2, Sweet & Maxwell, 6th Edn., 2000, p. 1653.*
24. *P. Ramnatha Aiyer, "Advanced Law lexicon", Wadhwa Nagpur, 3rd Edn., 2005, p. 3105.*
25. *Dr. Divya Chansoria, "Law Dictionary", Kataria's Law House, 2009, p. 386.*
26. *P. Ramnatha Aiyer, "Advanced Law lexicon", Wadhwa Nagpur, 3rd Edn., 2005, p. 3105. Also as (Criminal Justice and Public Order Act, 1994 (c. 33), S. 63 (1); Licencing (Scotland) Act, 1976 (c. 66), S. 18A (9) inserted by Licensing (Amendment) (Scotland) Act, 1996 (c. 36), S.1 (1). Also*
Stroud's Judicial Dictionary Of Words And Phrases, Vol. 2, Sweet & Maxwell, 6th Edn., 2000, p. 1652.
27. *Dr. Divya Chansoria, "Law Dictionary", Kataria's Law House, 2009, p. 386.*
28. *Paris Act of July 24, 1971, as amended on September 28, 1979.*

matter of Copyright Protection. Article 2 (1) of the Convention specifies that the expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographical works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography; topography, architecture or science.

Agreement on **Trade-Related Aspects of Intellectual Property Rights**[29] (TRIPS) also affords protection to musical works under Copyright Law as Part II, Section 1, Article 9 directs the members of TRIPs to comply with the provisions of Article 1 to 21 of the Berne Convention.

Music is a unique genre in the field of copyright protection. It is a special category deserving of independent copyright consideration. "The inherent nature of music makes it difficult to detect copyright violations".[30] Each musical composition is composed of multiple elements working together. New technology and the digital world have created new and improved means for manipulating those elements in an original work and incorporating them into a new work.[31] The traditional lens for examining musical copyright is outdated because it fails to consider the complexity of a contemporary musical work.[32]

In some situations, it is difficult to reconcile a finding of actual infringement in light of the inevitable similarities that exist among musical works.[33] Musicians work with a finite set of notes and octaves in creating a composition. Further, the combination of these notes into sets of chords that are pleasing to the ear is also limited.[34] Despite the seemingly confined raw materials for creating a musical work, musicians are able to manipulate these finite elements into infinite possible compositions. In examining originality, copyright does not look to the actual notes or chords used, but rather combinations of notes and chords that are used to create tone, melody, harmony and rhythm.[35]

In **Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Assn.,**[36] Krishna Iyer, J. has held as under: (SCC pp. 833-34, paras 22 & 24)

"22. The creative intelligence of a man is displayed in multiform ways of aesthetic expression but it often happens that economic systems so operate that the priceless divinity which we call artistic or literary creativity in man is exploited, and masters, whose works are invaluable, are victims of piffling payments. World opinion in defence of the human right to intellectual property led to international conventions and municipal laws, commissions, codes and organizations, calculated to protect works of art. India responded to this universal need by enacting the Copyright Act, 1957.

24. A somewhat un-Indian feature we noticed in the Copyright Act falls to be mentioned. Of course, when our law is intellectual borrowing from British reports as, admittedly it is, such exoticism is possible. 'Musical work", as defined in Section 2(p), reads:

2. (p) musical work means any combination of melody and harmony or either of them printed, reduced to writing or otherwise graphically produced or reproduced.'

Therefore, copyrighted music is not the soulful tune, the superb singing, the glorious voice or the wonderful rendering. It is the melody or harmony reduced to print, writing or graphic form. The Indian music lovers throng to listen and be enthralled or enchanted by the nada brahma, the sweet concord of sounds, the raga, the bhava, the laya and the sublime or exciting singing. Printed music is not the glamour or glory of it, by and large, although the content of the poem or the lyric or the song does have the appeal. Strangely enough, 'author' as defined in Section 2 (d), in relation to a musical work, is only the composer and Section 16 confines 'copyright' to those works which are recognized by the Act. This means that the

29. *Available at http://www.wto.org/english/docs_e/legal_e/legal _e.htm.*
30. *Joseph K. Christian, "Too Much of a Good Thing? Deciphering Copyright Infringement for the Musician", 7 Vand. J. Ent. L. & Prac. 132, 133 (2004) (interpreting the meaning of the exclusive rights in a copyrighted work to a copyright holder in music). As cited in Valeria M. Castanaro, Comment, "It's the Same Old Song": The Failure of the Originality Requirement in Musical Copyright, Fordham Intell. Prop. Media & Ent. L.J, Vol. 18, at page 1280.*
31. *Ibid, at p. 142.*
32. *Alan Korn, "Issues Facing Legal Practitioners in Measuring Substantiality of Contemporary Musical Expression", 6 J. Marshall Rev. Intell. Prop. L. 489, 490-91 (2007).*
33. *Cristian, Supra note 7, at p. 133 ("These similarities demonstrate the need for a systematic method of distinguishing the acceptable similarities from the offensive takings.")*
34. *Bridgeport Music, Inc. v. Dimension Films, 401 F. 3d 647, 653 (6th Cir. 2004) (stating the fact that there are a limited amount of notes and chords available to composers).*
35. *Ronald Smith, "Arrangements and Editions of Public Domain Music: Originality in a Finite System", 34 Case W. Res. L. Rev. 104, 104 (1983) ("Copyright law seeks to determine whether a certain combination of tones is 'original' within this finite system.").*
36. *AIR1977 SC1443, (1977)2 SCC 820, (1977) 3 SCR 206.*

composer alone has copyright in a musical work. The singer has none. This disentitlement of the musician or group of musical artists to copyright is un-Indian, because the major attraction which lends monetary value to a musical performance is not the music-maker, so much as the musician. Perhaps, both deserve to be recognized by the copyright law. I make this observation only because art, in one sense, depends on the ethos and the aesthetic best of the people, and while universal protection of intellectual and aesthetic property of creators of 'work' is an international obligation, each country in its law must protect such rights whenever originality is contributed. So viewed, apart from the music composer, the singer must be conferred a right. Of course, law-making is the province of Parliament, but the court must communicate to the law-maker such infirmities as exist in the law extant. (Emphasis in original)"

3. The Requirement of Creativity in Musical Work

Copyrightable works require two ingredients. The first is "originality", which signifies that the work originates in the author rather than having been copied from past sources[37]. The second is creativity, signifying that the work has a spark that goes beyond the banal or trivial[38]. Those two elements, of course, apply to the domain of music no less than to any other subject matter of copyright protection.

3.1 Originality defined

The common conception of the meaning of 'original' is something that is new, not done before. In fact, 'original' is defined as "existing from the first; primitive; earliest; not imitative or derived; creative."[39]

The Indian Copyright Act, 1957 does not define the term 'original' however, it recognizes 'originality' to be the prime criteria of copyrightability. According to Section 13 of the said Act, copyright subsists in the following works:

i. Original literary, dramatic, musical and artistic works;
ii. Cinematograph films; and
iii. Sound recordings.

Similarly, Section (1)(1)(a) of the U.K. Copyright, Designs and Patents Act 1988 states that copyright subsists in "original literary, dramatic, musical or artistic works." However, the Act does not state what 'original' means. Since no statute defines originality in each jurisdiction, therefore, the requirement of originality is understood according to judicial interpretation of the concept.

In **Rupendra Kashyap v. Jiwan Publishing House**[40], the court held that "The word 'original' in Section 13 of the Copyright Act, 1957 did not imply any originality of ideas, but merely meant that the work in question should not be copied from some other work and should originate from the author being the product of his labour and skill. Thus, the term 'original' in reference to a work simply means that the particular work 'owes its origin' to the author. Original simply means that the work has independently been created by the author, and has not been copied from someone else's work. (Emphasis applied)"

In **Errabhdrarao v. B.N. Sarma**[41], the court observed:

"By an original composition, we do not convey that it is confined to a field which had never been traversed hitherto by any other person or persons, either in respect of ideas or material comprised therein. Indeed such contributions are few, as most works depend upon the contribution of others, using them as steps in aid of reaching a particular object which may be original in its design and conception. (Emphasis applied)"

3.1.1 Sweat of the Brow

The originality which is required relates to the expression of thought, and that the work should not be copied from another work, but should be original from author.

Much depends upon the skill, labour, knowledge and the capacity to digest and utilize the raw materials contributed by others in imparting to the product the quality and character which those materials lacked.

Originality does not mean that the work should be inventive, novel, stylish or unique. The creator need not touch any standard of quality and creativity, and it can be a result of accident. Hence there is no qualitative threshold for originality. The plain meaning of originality is to make sure that the work has originated from the author / creator. Thus the work should not be copied from some other source. In other words, originality means that the author must have utilized his skill, judgment and labour in making the work.

As applied to music, the requirement of originality is straightforward. Songs need not be novel to attract copyright protection, but they must reflect the composer's own contribution. It is within the domain of creativity that special considerations arise to the fore.

It has been said that a musical work consists of rhythm, harmony and melody, and that the requisite creativity must inhere in one of these three.[42]

37. *Melville B. Nimmer & David Nimmer, "Nimmer on Copyright, 2.01A (2010) (noting that there is no definition of originality in the statute and that the 1909 Act did not define or explicitly require originality).*
38. *Ibid.*
39. *Swannell, J. (Ed.) "The Little Oxford Dictionary" 6th Ed. (1986) Clarendon Press, p. 376.*
40. *(1996) PTC 439 (Del).*
41. *AIR 1960 AP 415.*
42. *Bridgeport Music, inc. v. Still N The Water Publ'g, 327 F.3d 472, 475 n. 3 (6th Cir.); Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002).*

In UK, musical work is defined by the Act as 'a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music'.

For the purposes of the Act, musical works consist of more than just a melody, or musical notes written on a score sheet. It includes all material which is capable of having an effect on the human ear, such as harmonies and orchestration. However, for the purposes of a musical work there is no requirement that it be recorded in writing or notation. Although, if music is to be afforded copyright protection, it must satisfy the requirement of fixation which is defined by Section 3 (2) of the Act which states that 'copyright does not subsist in a …musical work unless and until it is recorded, in writing or otherwise'.

3.2. Modicum of Creativity

The foundation of US Copyright law is their peculiar constitutional provision which contains the mandate "to promote the Progress of Science and useful Arts". The fundamental objective of US Copyright law has thus been to carry out this constitutional mandate, and it has therefore developed along completely different lines and has acquired a different language and ethos altogether from Indian and English law.

The US Congress alone has the power to regulate copyright. The power is derived from Article I, section 8 of the US Constitution, which provides:

"The Congress shall have power…To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."

This language provides the basis for Congressional action- in the form of legislation- to grant, define, and limit copyright and patent.

Given that the objective of US copyright law is constitutionally mandated, the US Supreme Court in Feist (1991) held that the existence of a "modicum of creativity" or a "creative spark" in the end product is an essential condition, which is constitutionally mandated, for a work to qualify as "original" under US Copyright law. Thus an evaluation of the end product becomes the central feature of the test of originality in US law. Thus, the fundamental difference between the US copyright law and English law has nothing to do with the amount of intellectual effort that is required for a work to be considered original, but relates to the substratum to which the test of originality is applied. Thus, the US law clearly distinguishes between aesthetic works and functional and utilitarian works, and requires therefore, that there be an aesthetic element in the end product before it can qualify as original.

The United States Supreme Court in Feist Publications held that the sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original as the term is used in copyright law, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. The requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.

Therefore, the US Supreme Court has settled the test of originality in derivative works in Feist Publications Inc. v. Rural Telephone Service Co. Inc. This is good law in US till today. The test laid down can be summed up as follows:

Original as the term is used in Copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possess at least some minimal degree of creativity.

This judgment in **Feist** was followed by **Matthew Bender & Co., Inc. v. West Publishing Co**.[43] where it was held that for copyright protection, the material does not require novelty or invention, but minimal creativity is required. Originality requires only that the author makes the selection or arrangement independently and that it displays some material with minimal level of creativity…"The originality standard requires that the work results from 'independent creation' and that the author demonstrates that such creation entails a modicum of creativity."

As regards musical work, it easily qualifies the standard of creativity because of its inherent nature. A composer cannot compose a tune without being creative. Every piece of music contains a level of creativity and is not a mere mechanical exercise because not everyone is gifted with the talent of composing music.

Creative works by definition are original and are protected by copyright, but creativity is not required in order to render a work original. The original work should be the product of an exercise of skill and judgment. It is workable and a fair standard. The sweat of the brow approach to originality is too low a standard which shifts the balance of copyright protection too far in favour of the owner's right, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides

43. 158 F 3d 674 (2d Cir 1998).

a workable and appropriate standard for copyright protection that is consistent with the policy of the objectives of the Copyright Act. Thus, in the case of **CCH Canadian Ltd. v. Law Society of Upper Canada**[44] the court was of the view that to claim copyright in a compilation, the author must produce a material with exercise of his skill and judgment which may not be creativity in the sense that it is not novel or non-obvious, but at the same time it is not the product of merely labour and capital.

Therefore, in the case of musical works, to claim copyright, the only condition to be satisfied is of originality that the work should be original in the sense that it has not been copied from some other persons work.

Traditionally, it is believed that originality in a musical work lies in either the rhythm, melody or harmony of the piece.[45] This notion of originality fails to account for the multitude of components that make up a musical work. Consequently, the frame of reference for musical copyright infringement is outdated it fails to consider all of the possible aspects for originality in a musical work.[46] Additional technical elements that should be examined in determining the originality of a work are "patterns of notes, using a particular phrase as melody or accompaniment, the chord structure of the piece, etc.[47]

Music is also a special genre of copyright with respect to the idea-expression dichotomy. The idea-expression dichotomy holds that only elements of original expression, separate from the basic ideas underlying the expression, are entitled to copyright protection. The elements of musical works are not easily separated into those constituting original expression and those that are part of the basic, mechanical ideas.[48] An artist's musical expression is inextricably linked to the mechanics of the music. The sequencing of notes and chords, the harmony, melody, beat, tempo, and composition, all work together to create a musical expression.[49] Individually, each of these components constitutes an unoriginal, un-copyrightable idea. Removing the individual ideas would destroy the musical work as a whole. Simply put, "in music, there is no 'idea' or 'expression' to be distinguished…it is an impossible distinction to make."[50]

In infringement cases, Indian Courts use a two-part test to determine whether the copyright holder's rights have been infringed.[51] The test requires substantial similarity between the original and infringing works, and the challenged work to be a copy of the original work.[52]

As to whether a substantial part of a musical work has been copied, the question remains whether the alleged infringement has made use of a substantial part of the skill, labour and taste of the original composer…the issue of substantial part does not depend solely on a note for note comparison but must be determined by the ear as well as by the eye, for the most uneducated in music can recognize that an altered work of music is, in effect, the same as or is derived from the original work.[53]

4. Test Laid Down By the Indian Courts

In **Ram Sampath v. Rajesh Roshan & Ors.,**[54] D. G. Kartik, J. observed that "In my view for considering whether a copy of a part of the former musical work into the latter musical work amounts to an actionable infringement, the following factors would be required to be taken into consideration. First is to identify the similarities and the differences between the two works. Second is to identify whether the latter would meaningfully exist without the copied part. It may be necessary to find the soul of a musical work. The soul cannot be determined merely by comparing the length of the part copied but from the part copied which forms an essential part of a musical work. Though a musical work may have a length of several minutes, the listener often remembers a "catch part" to which he is immediately hooked on. It is necessary to look for such "catch part" or the "hook part". If the "catch part" or the "hook part", however small, is copied the whole of the latter work would amount to actionable infringement…These factors are only illustrative and there

44. *2004 (1) SCR 339 (Canada).*
45. *Melville B. Nimmer & David Nimmer, "Nimmer on Copyright, 2.01 (2010) (noting that there is no definition of originality in the statute and that the 1909 Act did not define or explicitly require originality).*
46. *Korn, Supra note 9, at p. 490-91 (proposing that the lens for examining musical copyright is too limited in its consideration of what can make a musical work original).*
48. *Cristian, Supra note 7, at p. 135.*
48. *Aaron Keyt, "An Improved Framework for Musical Plagiarism Litigation", 76 Cal. L. Rev. 429 (1988) (explaining why music as a medium does lend itself to the idea-expression dichotomy).*
49. *Smith, Supra note 12, at p. 118.*
50. *Keyt, Supra note 16, at p. 442-43.*
51. *K. M. Gopakumar & V. K. Unni, "Perspectives on Copy right: The 'Karishma' Controversy", 38 Econ. & Pol. Wkly. 2935, 2935 (2003); Eastern Book Co. v. Modak, (2007) 1 SCC 14, 17 (India) (explaining that one approach to determining whether infringement has occurred is to see whether the plaintiff's work as a whole is original and protected by copyright, and then to "inquire whether the part taken by the defendant is substantial.")*
52. *Gopakumar & Unni, Supra note 48, at 2953 (explaining that the courts require sufficient similarity between the infringing and original works, and the infringing work to be derivative of the copyrighted work.*
53. *Copinger & Skone James, "Copyright", 15th Edn., para 7-53 at p. 409 (dealing with the infringement of a musical work by copying a part of the work).*
54. *2009 (40) PTC 78 (Bom.) para 16 at p. 86.*

would be many other factors which may be required to be looked into depending upon the facts and circumstances of each case.(emphasis in original)"

In an ongoing legal dispute between India TV and Yash Raj Films, the **Delhi High Court held that small amounts of usage of songs in a programme by India TV does not amount to copyright infringement.**[55]

In a judgment delivered in a copyright infringement case filed by Yash Raj Films against India TV, the Division Bench of the Delhi High Court has held that "use of a few words or lines from the lyrics of a song does not amount to infringement of copyright. The concerned Judges held that this amounts to "fair use" and is also "de minimus", meaning the usage is insignificant as compared to the whole programme."

A few words from the song 'Kajrare, kajrare……' from a Yash Raj Film 'Bunty aur Babli", were used in an advertisement for a consumer affairs programme telecasted on India TV, and a portion of the song 'Salaam Namaste' was sung by Vasundhara Das in a programme 'India Beats' on India TV. Yash Raj Films had claimed infringement of its copyright.

The court was of the opinion that creativity would shrink if usage of minute bits of songs/lyrics is termed infringement.

5. Conclusion

As a teenager, I was constantly subjected to my mother's opinion that all of the music I listen to either sounded the same or was a rip-off of a song from her generation. As an adult reflecting on the music of my generation, I'm inclined to agree with her and have begun to wonder where the originality in music has gone and how can we get it back?[56]

There is an ever-increasing need to protect original expression by copyright. However across national boundaries; the law regarding "originality" in copyright is as diverse as the countries themselves. Copyright protection is granted for the purpose of protecting a person's creative expression and in order to further encourage creative expression. Another school of thought claims that copyright protection is granted as a sort of reward for the effort put in by the person seeking a copyright.

Creative works are afforded copyright protection only if they are original. "Original" is usually understood as something that is new or not done before; a primary type or form, from which others are derived.[57] The only part of a work that is protected by copyright is that which is original to the author. Thus, "the sine qua non of copyright is originality."[58]

In the current copyright regime for musical works, there is no definition of originality. The Parliament must provide us with the definition of originality so that the confusion and uncertainty is cleared.

In India, as the Apex Court has not yet laid down the tests of originality which has to be followed with regard to the "Musical works" therefore it is open for the courts to follow either the test of the "Modicum of Creativity" test as opined by the US courts or the "Sweat of the Brow" test under the English law. Another option is to choose the test laid down in the **CCH Canadian**[59] case which is the mid path of these two tests.

Since the Great Britain's copyright law has been the inspiration on the Indian Copyright Act of 1957, Indian courts can follow the "Sweat of the Brow" principle and apply this test to the musical works.

In the midst of technological advancements that encourage infringing activity, one may wonder what, if anything, can be done to bring original and creative music back. One possibility is to rework the existing originality requirement for musical copyright by raising the standard for originality.

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55. *Yash Raj Films v. India TV, Delivered on August 22, 2012, unreported. Available at http://www.bestmediainfo.com// htm.*
56. *Alex Tyson, "Musicians Lose Artistic Integrity", University Wire, May 26, 2006 (commenting on the lack of the originality in "new" music and hypothesizing as to why the art of copying music sells records).*
57. *Key Publications, Inc. v. Chinatown Today Publishing Enters., 945 F.2d 509, 512 (2d Cir. 1991) ("Simply stated, original means not copied, and exhibiting a minimal amount of creativity."); WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1015 (rev. ed. 1994).*
58. *Feist Publications, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).*
59. *2004 (1) SCR 339 (Canada).*

Building International Pressure by Developed Nations on Flexibility: Shaping the Future of IPR Regime

*Aakash Saxena**

ABSTRACT

Articles 7 and 8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) provide express recognition for policy objectives that are fundamental to international intellectual property (IP) protection. Not only do they identify the goals of technological innovation and dissemination, but they also acknowledge the wider public interest agenda behind the TRIPS Agreement. While Articles 7 and 8 have acquired influence at a policy level through the Doha Ministerial Declaration and the Declaration on TRIPS and Public Health, their use within the World Intellectual Property Organisation (WIPO) Development Agenda, has resulted in both an enhanced status within the wider policy arena and an enhanced legal significance, most notably in discussions on enforcement. In other words, Articles 7 and 8 are poised to provide the foundation for a new legal and policy perspective on international IP regulation that is fully supportive of social as well as economic development in all participating nations.

This paper deals with the use of the flexibility provisions by the developed nations under TRIPs, and thus highlighting the current situation of biased use of the international IP regime, in favour of the developed nations, while ignoring the unpretentious needs of the developing countries to step up at the international level. This paper further tries to dwell into the question of whether the flexibility provisions are being used as intended by the framers of the TRIPs agreement or not.

Keywords: TRIPs, Intellectual Property Rights, WIPO, WTO.

1. Introduction

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is one of the more controversial international intellectual property agreements that have entered into force. Its negotiations were highly contentious, and the perspectives of developed and less developed countries on the role of intellectual property protection and enforcement remain far apart.[1]

TRIPS had limited practical implications for most developed countries. For nearly all developing countries, in contrast, TRIPS has very considerable implications. Strong IPR protection, for obvious reasons, is of interest of economies strong in industrial research and development; it follows that the developing countries, as a group, have considerably weaker IPR legislation than the developed countries.[2] TRIPS will require substantial new legislation and infrastructure investment in practically all developing countries.[3]

In recent years, less developed countries, including both developing and least developed countries, have expressed their deep dissatisfaction with the way the Agreement has been interpreted and implemented.[4] They are also frustrated by the on-going demands by developed countries for protections that are in excess of what they promised during the TRIPS negotiations—often through new bilateral and regional trade and investment agreements. As they claim, the Agreement as interpreted by their developed trading partners ignores their local needs, national interests, technological capabilities, institutional capacities, and public health conditions.[5] These concerns and frustrations eventually led to the

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1. *See Alison Slade, Articles 7 and 8 of the TRIPS Agreement: A Force for Convergence within the International IP System, The Journal of World Intellectual Property (2011) Vol. 14, No. 6, p. 413–440.*
2. *See Alexander Keck and Patrick Low, Special and Differential Treatment in the WTO: Why, When and How?, WTO Staff Working Paper ERSD-2004-03, May, 2004.*
3. *See Carlos Correa, Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries, Available at: http://www.twnside.org.sg/title/foster.htm.*
4. *See Ministerial Conference, Ministerial Declaration, WT/MIN (01)/DEC/1 (Nov. 20, 2001), Available at http://docsonline.wto.org/gen_search.asp [hereinafter Ministerial Declaration]; Ministerial Conference, Declaration on the TRIPS Agreement and Public Health, WT/MIN (01)/ DEC/2 (Nov. 20, 2001), Available at http://docsonline.wto.org/gen_search.asp.*
5. *Peter K. Yu (2007), 'The international enclosure movement', Indiana Law Journal, 82(4): 827–907, 828.*

establishment of a set of development agendas at the WTO, the World Intellectual Property Organization (WIPO), and other international fora.[6]

Although the TRIPS Agreement's one-size-fits-all—or, more precisely, super-size-fits all—approach is highly problematic, the Agreement, in its defense, includes a number of flexibilities to facilitate development and to protect the public interest. To safeguard these flexibilities, Articles 7 and 8 provide explicit and important objectives and principles that play important role in the interpretation and implementation of the Agreement.[7]

2. Articles 7 and 8 of TRIPs Agreement

2.1. Objectives

Articles 7 and 8 of the TRIPS Agreement refer to the objectives of the Agreement and to principles that generally apply to its interpretation and application. Article 7 confirms that the IPRs are intended to reflect a balance between the interests of private stakeholders that are relying on IP protection to provide an incentive for creativity and invention (and investment in those activities), and society that is expected to benefit from access to creations and the transfer and dissemination of technology.[8]

Article 8.1 indicates that Members may adopt, inter alia, measures necessary to protect public health and nutrition, provided that those measures are consistent with the Agreement. The Article 8.1 formulation may assist in the defence of so-called non-violation nullification or impairment claims, if these are eventually permitted under the Agreement. In more general terms, the usefulness of Article 8.1 in dispute settlement is limited by the requirement that measures be consistent with the Agreement, in contrast to the formulation of Article XX of GATT 1994 and Article XIV of GATS, each of which makes provision for measures that are necessary and otherwise "inconsistent" with the Agreement. The formula set forth in Article 8.1 is controversial.

Article 8.2 acknowledges the right of Members to take action against anticompetitive practices relating to IP, also with the proviso that such action must be consistent with the Agreement.

The role of Articles 7 and 8 in dispute settlement has so far been limited. These provisions have been invoked as an aid in interpretation, but have not exercised an identifiable influence on the outcome of any case.[9]

2.2. Review

Notwithstanding the many important points scored by less developed countries in the panel's interpretation of the TRIPS Agreement, the panel report provides these countries with some disappointments. The biggest disappointment in the panel report concerns its failure to discuss Articles 7 and 8 of the TRIPS Agreement. Article 7 delineates the objectives of the TRIPS Agreement and Article 8 sets forth the normative principles.

Although some commentators have considered Article 7 as "mere hortatory"[10] and highlighted the limitations of Article 8—especially TRIPS-consistency test—these provisions are paramount to the correct interpretation of the Agreement. Article 31 (1) of the Vienna Convention on Law of Treaties states specifically that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty…in the light of its object and purpose."[11]

Because Articles 7 and 8 were included in the text of the TRIPS Agreement, they should be given greater weight than the preambular provisions discussed in Part II.B. Notably, the Doha Ministerial Declaration has singled out these two provisions for their special importance.[12] It stated explicitly that the work of the TRIPS Council "shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension."[13]

3. Importance of Flexibility Provisions in TRIPS Agreement

Since the entering into effect of the TRIPS Agreement, commentators have noted the importance of Articles 7 and 8 of the TRIPS Agreement and how these development-friendly safeguard provisions can be interpreted to strengthen the position of less developed countries. For example, Jerome Reichman observed:

[Developing] countries could attempt to trigger the safeguards implicit in Articles 7 and 8 in one of two ways. The least destructive approach would be to convince the Council for TRIPS itself to recommend narrowly described waivers to meet specified circumstances for a limited period of time. This approach would strengthen the

6. *Peter K. Yu (2009), 'A tale of two development agendas', Ohio Northern University Law Review, 35(2): 465–573.*
7. *Ibid.*
8. *See Reji K. Joseph, 'The R&D Scenario in Indian Pharmaceutical Industry', RIS-DP # 176.*
9. *UNCTAD/EDM/Misc.232/Add.18, Available at http://www.unctad.org/en/docs/edmmisc232add18_en.pdf.*
10. *Jacques J. Gorlin, "An Analysis of the Pharmaceutical-Related Provisions of the WTO TRIPS (Intellectual Property) Agreement 16 (1999); Also see Margaret Chon, Intellectual Property and the Development Divide, 27 CARDOZO L. REV. 2821, 2843 (2006).*
11. *Art. 31.1., Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969).*
12. *See, Daniel Gervais, "The TRIPS Agreement: Drafting, History and Analysis", 121–22 (3rd ed. 2008) 1.*
13. *World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001, 19, WT/MIN (01)/DEC/2, 41 I.L.M. 746 (2002).*

mediatory powers of the Council for TRIPS and help to offset the problems arising from the inability of that body to quash or stay requests for consultations and dispute-settlement panels launched by trigger-happy governments.

Alternatively, developing country defendants responding to complaints of nullification and impairment under Article 64 might invoke the application of Articles 7 and 8(1) to meet unforeseen conditions of hardship. This defense, if properly grounded and supported by factual evidence, could persuade the Appellate Body either to admit the existence of a tacit doctrine of frustration built into the aforementioned Articles or to buttress those Articles by reaching out to the general doctrine of frustration recognized in the Vienna Convention on the Law of Treaties. Either way, overly aggressive complainants could wind up with what would amount to a judicially imposed waiver.[14]

Articles 7 and 8 can also be used to justify the validity of the fair use privilege under the TRIPS Agreement in copyright,[15] as well plant varieties.[16]

Notwithstanding the importance of Articles 7 and 8 of the TRIPS Agreement and the Vienna Convention's explicit stipulation that a treaty be interpreted in good faith "in the light of its object and purpose,"[17] the WTO panel in the U.S.-China dispute did not mention Article 7 or 8 even once. Nor did it mention anything about the objectives or the principles of the TRIPS Agreement.[18]

4. The Significance of WTO Panel's Clarification

The divergence of these positions has been well reflected in Canada-Patent Protection of Pharmaceutical Products.[19] In this dispute, the European Communities challenged the regulatory review and stockpiling exceptions in Canadian patent law for violation of the TRIPS Agreement. Calling attention to Articles 7 and 8 of the TRIPS Agreement, Canada contended that these provisions 'call for a liberal interpretation of the three conditions stated in the Agreement, so that governments would have the necessary flexibility to adjust patent rights to maintain the desired balance with other important national policies'.

Although the European Communities 'did not dispute the stated goal of achieving a balance within the intellectual property rights system between important national policies', it took a very different view of Articles 7 and 8. As the panel continued:

But, in the view of the EC, Articles 7 and 8 are statements that describe the balancing of goals that had already taken place in negotiating the final texts of the TRIPS Agreement. According to the EC, to view Article 30 as an authorization for governments to're-negotiate' the overall balance of the Agreement would involve a double counting of such socio-economic policies. In particular, the EC pointed to the last phrase of Article 8.1 requiring that government measures to protect important socio-economic policies be consistent with the obligations of the TRIPS Agreement. The EC also referred to the provisions of first consideration of the Preamble and Article 1.1 as demonstrating that the basic purpose of the TRIPS Agreement was to lay down minimum requirements for the protection and enforcement of intellectual property rights."[20]

It is, nevertheless, worth noting that neither the WTO panels nor the Appellate Body has made any definitive interpretation and application of Articles 7 and 8 of the TRIPS Agreement. As has been pointed out, the panel in Canada-Patent Protection of Pharmaceutical Products 'avoided elaboration of the content and implications of Articles 7 and 8.1, despite the specific reference that the parties made thereto in their submission'.[21] In a later case, Canada-Term of Patent Protection, the Appellate Body also acknowledged that it has yet to determine the applicability of Article 7 or Article 8 of the TRIPS Agreement in possible future cases with respect to measures to promote the policy objectives of the WTO Members that are set out in those Articles and that 'those Articles still await appropriate interpretation'.[22]

5. Possible Instances of the Use of Flexibility by Developed Nations in TRIPS

The agreement on TRIPS extends to agriculture through the patenting of plant varieties. This may have serious implications for developing countries agriculture, including India.[23] The agreement on TRIPS also extends to

14. *J.H. Reichman, "The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries", 32 CASE W. RES. J. INT'L L. 441, 461–62 (2000).*
15. *Ruth Okediji, Toward an International Fair Use Doctrine, 39 COLUM. J. TRANSNAT'L L. 75, 167-168 (2000).*
16. *See Srividhya Ragavan & Jamie Mayer O'Shields, "Has India Addressed Its Farmers' Woes? A Story of Plant Protection Issues", 20 Geo. Int'l envtl. L. Rev. 97, 101 (2007).*
17. *Article 31.1 Vienna Convention.*
18. *See Alison Slade, Articles 7 and 8 of the TRIPS Agreement: A Force for Convergence within the International IP System, The Journal of World Intellectual Property (2011) Vol. 14, No. 6, p. 413–440.*
19. *World Trade Organization (2000), Canada—Patent Protection of Pharmaceutical Products, Panel Report, WT/DS114/R.*
20. *Supra note 19.*
21. *Carlos Correa, (2007), Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement, Oxford and New York: Oxford University Press, p. 102.*
22. *World Trade Organization (2000), Canada—Term of Patent Protection, Appellate Body Report, WT/DS170/AB/R, para. 101.*

the level of micro-organisms as well.[24]

Under the law in United States for the Government use[25] the US Government does not have to seek a license or negotiate for use of a patent or copyright. The right owner is entitled to compensation, but cannot enjoin the Government or a third party authorized by the Government to prevent the use. The use of patents or copyrights by any contractor, sub-contractor, person, firm or corporation who receives authorization from the federal government is construed as use by the federal government, and the authorized party cannot be sued for infringement.

In 2001, then Department of Health and Human Services (DHHS) Secretary, Tommy Thompson used the threat to invoke the law for Government use to authorize imports of generic ciproflaxin for stockpiles against a possible anthrax attack.[26]

In a November 2005 Congressional Hearing, the then DHHS Secretary Michael Levitt testified before the House of Representatives that he had effectively required the patent owners for Tamiflu (Roche/Gilead) to invest in US manufacturing facilities for the product, so that the US Government would have access to Tamiflu if confronted with an avian flu pandemic.[27]

6. Current Situation Prevailing

In light of the provisions' strong potential, yet limited development, the lack of discussion of Articles 7 and 8 in China—Measures Affecting the Protection and Enforcement of IPRs, is therefore rather disappointing. This panel report could have been an ideal dispute for the Disputes Settlement Board ("DSB") to elaborate on the content, meaning, and implications of Articles 7 and 8. To a great extent, these countries missed a rare opportunity to establish further a pro-development interpretation of the TRIPS Agreement.[28]

In all fairness to the WTO panel, none of the parties mentioned Articles 7 and 8 in their submissions. The positions taken by these countries contrast significantly with the position India recently took in European Union and a Member State-Seizure of Generic Drugs in Transit.[29]

In its complaint, India reminded the DSB that "the provisions of the TRIPS Agreement referred to above must be interpreted and implemented in light of the objectives and principles set forth in Articles 7 and 8 of the TRIPS Agreement."[30]

In sum, the lack of discussion of Articles 7 and 8 in the present panel report provides an important lesson for all less developed countries. If these two provisions are to provide the key basis for a pro-development interpretation of the TRIPS Agreement, they need to be utilized to the fullest extent in the WTO submissions to help develop or clarify their normative content. By further developing Articles 7 and 8, countries can also "pave the way for the development of future exceptions and limitations, which can be used to restore the balance of the international intellectual property system."[31] The greater use of the two provisions may even help "persuade the DSB to recognize and give effect to developmental priorities."[32]

7. Conclusion

It is amply clear that the DSB of the WTO, which is primarily dominated by the developed nations, has been unable to provide any definitive interpretation of Articles 7 and 8 of the TRIPS Agreement. The meaning and scope of these most important provisions still await elucidation.

TRIPs agreement favours developed countries over the underdeveloped and developing countries. It extends special treatment to the developed nations as they hold a large number of patents and copyrights. Being members of WTO, the developing nations have to comply with the TRIPS agreement, and make necessary changes accordingly.

Establishing itself among one of the world's biggest economies, India needs to strengthen and formulate new policies for the development of the branch of law which currently requires attention as well as consolidation. Consultations should be essentially made with the third-world and developing/under-developed nations to raise and answer the concerns posed by the international pressure created by the developed nations and their predominance should be challenged.

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23. *Alison Slade, Articles 7 and 8 of the TRIPS Agreement: A Force for Convergence within the International IP System, The Journal of World Intellectual Property (2011) Vol. 14, No. 6, p. 426.*
24. *Ibid.*
25. *28 USC 1498.*
26. *Available at www.cptech.org/ip/health/cl/cipro.*
27. *See video excerpts from 8 November 2005 hearings of Subcommittee on Health of the House Committee on Energy and Commerce, Available at www.cptech.org/ip/health/tamiflu/hearingexcerpts11082005.html.*
28. *Ibid.*
29. *See Request for Consultations by India, European Union and a Member State—Seizure of Generic Drugs in Transit, WT/DS408/1 (May 19, 2010) at 3. Also see Request for Consultations by Brazil, EU and a Member State—Seizure of Generic Drugs in Transit, WT/DS409/1 (May 19, 2010).*
30. *Ibid, Request for Consultations by Brazil, European Union and a Member State—Seizure of Generic Drugs in Transit, WT/DS409/1 (May 19, 2010).*
31. *See J.H. Reichman, "From Free Riders to Fair Followers: Global Competition under the TRIPS Agreement", 29 N.Y.U. J.Int'l L. & Pol. 11, 35 (1997).*
32. *UNCTAD-ICTSD, Resource Book on TRIPs and Development 11, n.21 (2005) at p. 130.*

Court System in Tanzania: A Bird's Eye View

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ABSTRACT

The objective of the research paper is to critically review the court system in Tanzania with a view to highlight potential contradictions or inconsistencies that may compromise the proper functioning of the judicial system of the Union. The paper highlights the structure and function of the court systems in the Tanzania Mainland as well as Zanzibar. Further, the research paper also addresses whether the court system in the Union functioned satisfactorily in performing duties and responsibilities i.e. interpreting the law. It also highlights some other issues that may arise as a result of the fact that the Kadhi's Court in Zanzibar continues to play a dominant role in administering justice to Islamic faith people.

In the process of articulation and development, the research article identifies various parliamentary acts that were enacted to create, develop and review the court system in Tanzania so as to acquire the shape that they currently possess. More importantly the paper attempts to articulate the implied correspondence between the developments of the country's court system with the development of respective Constitution. The problem that emanates from the fact that Zanzibar has its own constitution is discussed in relative detail. The role of Kadhi's Courts, their advantages and disadvantages are also given due consideration; furthermore the duties and responsibilities of Regional Magistrate Courts are also reviewed.

The paper concludes by identifying and suggesting the need to harmonize the functions of the court system with the rights and duties given to the broad masses in the Union constitution.

Keywords: Constitution, Administration of Justice, Judiciary, Zanzibar, Tanzania, Jurisdiction, Hierarchy.

1. Introduction

This paper focuses on the court system in Tanzania demonstrating some features on hierarchy and jurisdiction of the court systems of both Tanzania Mainland and Zanzibar. The Judiciary is one of the three pillars of the State in Tanzania. The others are the Executive and Legislature (Parliament). The main function of Judiciary is to interpret the law as well as to adjudicate cases within the society and the country at large. In order to perform its function properly, the courts must be statutorily empowered by the Constitution and other existing relevant Statues of the State.[1] The courts are exclusively empowered by the aforesaid Constitution *(Grundnorm[2])* and other legislations to deal with administration of justice.

Under the Constitution of the United Republic of Tanzania, 1977 the judiciary is not a Union Matter[3] within the Union. Each jurisdiction has its own judicial system. Tanzania Mainland and Zanzibar share only the Court of Appeal of Tanzania as the only unifying factor.[4] In Tanzania Mainland, the judges of the High Court are appointed by the President in consultation with the Judicial Service Commission.[5] In Zanzibar, on the other hand, the judges of the High Court are appointed by the President of the Revolutionary Government of Zanzibar in consultation with the Judicial Service Commission of Zanzibar.[6] The Chief Justice of Court of Appeal is appointed by the

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1. *See Kazembe v. R., High Court of Tanzania at Dar es Salaam, Miscellaneous Criminal Cause No. 41 of 1989 (Unreported).*
2. *Hans Kelsen's Pure Theory of Law and its doctrine of the Grundnorm have achieved a certain notoriety rather removed from its contribution to jurisprudence as such.*
3. *See the judgment delivered by Hon. Mr. Msumi, J. in a moot court organized at the University of Dar es Salaam, in a case which involved interpretation of article 20 of the Zanzibar Constitution on freedom of association; where it was clearly decided that article 28(2) of the Zanzibar Constitution had denied the Court of Appeal jurisdiction on cases related to the interpretation of the constitution and other matters. Also Shivji, G. Issa, The Legal Foundations of the Union in Tanzania's Union and Zanzibar Constitutions, Dar es Salaam, Dar es Salaam University Press, 1990, at p. 80.*
4. *The Court of Appeal of Tanzania is Item No. 21 on the list of Union Matters provided in Schedule One to the Constitution of the United Republic of Tanzania. It is established vide Part Five of Chapter Five of the Constitution of the United Republic of Tanzania (as provided for under Articles 116-123). It is also specifically enumerated in the Zanzibar Constitution of 1984 as also provided for under Sections 98-99A, which are in Part Two of Chapter Six).*
5. *Article 109(2) of the Constitution of the United Republic of Tanzania, 1977.*
6. *Section 94 (2) of the Zanzibar Constitution, 1984.*

President of the United Republic of Tanzania and other Court of Appeal Judges are also appointed by the same President upon the recommendations of the Chief Justice of Court of Appeal.[7]

Although Zanzibar has its own Constitution, it is subjected to the provisions of the Union Constitution (Constitution of United Republic of Tanzania). The Zanzibar Court System exists parallel to the legal system of Tanzania Mainland and all cases which are tried in Zanzibar, with the exception to those involving constitutional issues and Islamic Law which have commenced in the Kadhi's Court, can be appealed against to the Court of Appeal of Tanzania.[8] In the Constitution of the United Republic of Tanzania, judicial powers are vested with the Judiciary of the United Republic of Tanzania Mainland and the Judiciary of Zanzibar.[9]

The study is divided into five sections. Section one is an introduction in general on the judiciary as one of the three pillars of the state. Section two considers an overview of the structure of court system in Tanzania Mainland in general. Section three specifically traces on the structure of the court system of Tanzania Mainland. Section four is devoted to role of Court of Appeal of Tanzania as a union court examining the existing ambiguity of the Kadhi's Court under the Union Constitution and the Zanzibar Constitution. Section five presents briefly the impact of the 10th Constitutional Amendment of the Zanzibar Constitution, 1984 in the current court system in Tanzania in general. The paper also analyses the strengths and gaps of our court systems in advancing the laudable objectives of reformers which promote the revision of laws in the United Republic of Tanzania. Section six is about conclusion and recommendations.

2. The Court System in Tanzania Mainland

As per the Constitution of the United Republic of Tanzania, there is the Court of Appeal which is the Supreme/Apex Court of the land (for both Tanzania Mainland and Tanzania Zanzibar). This court is established by the Union Constitution of 1977[10] to replace East African Court of Appeal after the collapse of the East African Community. One of its functions is to hear and determine appeals against decisions of the High Courts and Magistrates' Courts of Tanzania Mainland and Zanzibar.[11] Although the Court of Appeal is the highest appellate court in Tanzania, it has no original or appellate jurisdiction to hear and determine disputes between the Government of the United Republic and the Government of Zanzibar on the interpretation of the Constitution.[12] Such disputes, if they occur, are to be heard and determined by a Special Constitutional Court as established by the same Constitution.[13] The Chief Justice, who is the Head of the Judiciary, is appointed by the President of the United Republic of Tanzania.[14]

The United Republic of Tanzania also has the High Court which is established under the Constitution. The provision related to the High Court is provided in Part Two of Chapter Five of the Constitution of the United Republic.[15] It is the court with unlimited jurisdiction in all matters.[16] Its jurisdiction is exercised in conformity with the written laws, which are in force in Tanzania.[17] The High Court also has admiralty jurisdiction[18] to make orders, to hear and determine claims, proceedings and other matters as conferred by the Merchant Shipping Act, 2003. It is the superior court of record and at the apex of the judicial system as well. It enjoys concurrent jurisdiction with the High Court of Zanzibar under the Constitution of the United Republic of Tanzania and laws enacted by the Parliament of the United Republic of Tanzania. The horizontal courts of same hierarchy are High Court of Land Division, High Court of Commercial Division, and High Court of Labour Division.

Apart from the above stated courts, there is also the Special Constitutional Court[19] of the United Republic of Tanzania which is considered as an ad hoc division of the High Court dealing specifically with constitutional cases. It is established in accordance with the Constitution of the United Republic of Tanzania.[20] The sole function of the Special Constitutional Court of the United Republic of

7. *Article 118 (3) of the Constitution of the United Republic of Tanzania, 1977.*
8. *Article 117 of the Constitution of the United Republic of Tanzania, 1977.*
9. *Article 4(2) of the Constitution of the United Republic of Tanzania, 1977 states: 'the organs vested with judicial powers shall be the Judiciary of the United Republic and the Judiciary of Tanzania Zanzibar.*
10. *Ibid, Article 117 of the Chapter 5, Part IV of the Constitution of the United Republic of Tanzania, 1977.*
11. *G.M.Fimbo, Constitution Making and Courts in Tanzania. Dar es Salaam, Dar es Salaam University Press, 1992.p. 72.*
12. *Article 117(2) of the Constitution of the United Republic of Tanzania, 1977.*
13. *Article 125 of the Constitution of the United Republic of Tanzania, 1977.*
14. *Article 118(2) of the Constitution of the United Republic of Tanzania, 1977. Also in terms of the Article 11(2) of the Constitution, the Chief Justice has no powers over Zanzibar Courts.*
15. *Article 108 to 111 of the Constitution of the United Republic of Tanzania, 1977.*
16. *Section 2 of the Judicature and Application of Laws Act, 1920.*
17. *Section 2(3) of the Judicature and Application of Laws Act, 1920.*
18. *Section 3 of the Judicature and Application of Laws Act, 1920.*
19. *The author voluntarily did not touch/discuss another court which is said to be East African Court of Justice as it is deals with East Africana Community.*
20. *Ibid, Article 125 of the Constitution of the United Republic of Tanzania, 1977.*

Tanzania is to give conciliatory decision over a matter referred to it concerning the interpretation of the Constitution of the United Republic of Tanzania where such interpretation or its application is in dispute between the Government of Tanzania Mainland and the Revolutionary Government of Zanzibar.[21] Any decision to be reached by this court is considered as final and conclusive. Hence, there is right to appeal in any form. Next levels of courts are District Courts and the Resident Magistrates' Court.

Hierarchically, apart from the remaining courts falling under the court system of Tanzania, there are the magistrates' courts. These courts, subject to the provisions of any written law and limits of the jurisdiction of the court, have mandatory powers to exercise jurisdiction in accordance with the laws which the High Court is required, by the established laws, to exercise and with such other laws as they are enforceable in Tanzania from time to time and its application to the proceedings filed before it. However, the provision is made that no magistrates' court shall exercise any jurisdiction or powers that are by any such law conferred exclusively on the High Court as such or on a court of record.[22] Again, the judiciary is organized under Magistrates' Court Act, 1984. Primary Courts are in each of 30 administrative regions.[23] Jurisdiction of Primary Courts includes all civil suits related to Customary[24] and Islamic Law[25] and all Civil and Christian Matrimonial Suits.

Apart from sharing the Court of Appeal of the United Republic of Tanzania with Mainland Tanzania, Zanzibar has a distinct and independent court system which is well elaborated under the Constitution of Zanzibar, 1984. The Zanzibar High Court is the Supreme Court over all subordinate courts established by the Constitution and other written laws of Zanzibar. Despite that, the final court of appeal for Zanzibar is the Court of Appeal of Tanzania; the Constitution of the United Republic of Tanzania makes clear that the High Court of Zanzibar is not a union matter.[26] The Constitution of Tanzania expressly reserves the continuance of the High Court of Zanzibar institutions with their jurisdiction as well.[27] It further provides that without prejudice, in regard to the Constitution of the United Republic of Tanzania or any other law enacted by the Parliament, that is applicable in Mainland Tanzania and Zanzibar, the High Court of Zanzibar may have jurisdiction concurrent to that of the High Court of Tanzania.[28]

3. The Court System in Zanzibar

The court system in Zanzibar as per the 1984 Zanzibar Constitution is made up of four distinct courts. These are the High Court of Zanzibar, Regional Magistrate Courts, District Courts, Primary Courts and Kadhi's Court. Another important institution in the judiciary is the Juvenile Court, which is attached to the Regional Court.

The High Court of Zanzibar is specifically enumerated under Section 93(1) of the Zanzibar Constitution. It is a court of record with jurisdiction on all matters, both criminal and civil and other matters which might be trusted to it under the Zanzibar Constitution or any other applicable laws. This court is obliged to be handled by the Chief Justice of Zanzibar and other judges whose number must not be less than two.[29] The Chief Justice being the Head of the judiciary is a Presidential appointee from the judges of the High Court after the consultation with the Judicial Service Commission. Other judges of the High Court are appointed by the President on the recommendations of the Judicial Service Commission.[30] At the moment, the High Court is served by the Chief Justice and only four judges. Among the four judges, only two of them are considered to be on permanent terms. The other two can be said to be serving on contract (Contract Appointment at the pleasure of the President) after retirement as Judge. Under the contemporary situations, no one can dare enough to say that the High Court of Zanzibar is properly constituted.[31] In other words, Frankly speaking, judges serving on contract cannot be said to be free and independent to administer justice in accordance with the law. So, inference can be drawn that these judges have no security of tenure and their very existence as judicial officers is entirely dependent on the whims of the appointing authority (His Excellency President), who can terminate the said contracts or refuse to renew the same at his will. It is obvious that the masses cannot expect justice from them more particularly on the issues pertaining to the violation of the basic rights and fundamental freedoms in such a situation. Fortunately enough, the situation is more better than before as there has been a slight improvement in terms of number of judges serving in the High Court of Zanzibar. This tremendous development has been evidenced when the current president of Zanzibar, Dr. Ali Mohammed Shein, came into power.

21. *Article 126(1) of the Constitution of the United Republic of Tanzania, 1977.*
22. *Section 6 of the Judicature and Application of Laws Act, 1920.*
23. *The most recent one are Geita, Katavi and Njombe.*
24. *Refer the Case: January Mayala v Mazige Mkangal, [1983] TLR 268 (HC).*
25. *Refer the Case: Francis Adolf v Ibrahim Mustafa, [1989] TLR 219 (HC).*
26. *See J.A.Ramadhani, while delivering his judgment in the case of Seif Shariff Hamad v. Serikali ya Mapinduzi ya Zanzibar, Criminal Appeal No. 171 of 1992 (Unreported), quoted in Peter, Chris Maina, Human Rights in Tanzania, Selected Cases and Materials.p.705.*
27. *Article114 of the Constitution of the United Republic of Tanzania, 1977.*
28. *Article 115(2) of the Constitution of the United Republic of Tanzania, 1977.*
29. *Section 93(2) of the Zanzibar Constitution, 1984 as amended.*
30. *Section 260 &261 of the Zanzibar Constitution, 1984 as amended.*
31. *Even Contract Appointment also seen in Judiciary in High Court and even the Court of Appeal in Tanzania Mainland.*

There is also the Regional Magistrates Court, which is established under the Magistrates Court Act, 1985.[32] In accordance with this Act, each of the five regions in both Unguja and Pemba Islands[33] is required to have a Regional Magistrate Court.[34] The Regional Magistrate Court is normally presided over by a regional magistrate who is in law supposed to be a degree holder from any recognized University. Having discussed about the Regional Magistrate Court, there is also the District Court, which is established under the same Magistrate Court Act of 1985.[35] This court also exercises appellate and revisionary powers over the Primary Court immediately below it. As per this applicable law, each district in Pemba and Unguja is supposed to have a District Court, though unfortunately the situation has so far never been so till date. Hierarchically, below the District Court, there is the Primary Court. Again, the Primary Courts are also established by the Magistrate Court Act, 1985.[36] Normally, there is supposed to be one Primary Court in each district found in Unguja and Pemba Isles. The Juvenile Court is also another court which is not actually a separate court as such but annexed to the Regional Court. It is also given Regional Court status specifically dealing with juveniles. It is composed of a regional magistrate and two lay members of the public, one of whom should be a female. In protecting the juvenile's interest involved, it is provided by the law that the court must meet in camera.

4. The Ambiguity of the Kadhi's Court under the Union Constitution

Another important court as per the existing court system is that of Kadhi's Court. This court is declared to be a significant institution. More than 95% of all inhabitants of both islands (Unguja and Pemba) are Muslims. The Kadhi's Court is established under the Kadhi's Court Act, 1985.[37] The jurisdiction of this Court is limited and restricted to determination of matters of Muslim law pertaining to personal status, marriage, divorce or inheritance (all matrimonial issues) in proceedings where all parties to the issue in hand profess Islamic religion/faith.[38] The Act provides for the establishment of Kadhi's Court in each district of Zanzibar. Usually, appeals from this Section 6 of the Act, court directly go to the Chief Kadhi's Court which lacks jurisdiction but acts as an appellate court for the decisions of the Kadhi's Court.[39] Again, all appeals from the Chief Kadhi's Court are directly filed at the High Court of Zanzibar which is the highest judicial institution of appeal in as far as issues handled by the Kadhi's Courts are concerned.[40] The Court of Appeal of Tanzania is exclusively restricted from entertaining matters relating to Kadhi's Courts.[41] There is conflict between the Zanzibar Constitution and the Constitution of the United Republic of Tanzania on the jurisdiction of the Court of Appeal. In accordance to the Appellate Jurisdiction Act, 1979 (Cap. 141), the Court of Appeal has powers to hear appeals on all matters originating from both parts of the Union. However, under the Zanzibar Constitution, the provision is made restricting the Court of Appeal to hear and determine Islamic matters emanating only from Kadhi's Courts and issues relating to interpretation of the Zanzibar Constitution.[42] This shows that the provisions of the Zanzibar Constitution prevail over the Appellate Jurisdiction Act, 1979 because of the provisions of Article 117(4) of the Constitution of the United Republic of Tanzania which states:

'117(4)-The National Assembly or the House of Representatives of Zanzibar may enact legislation in pursuance of the provisions of this Constitution prescribing the procedures for lodging appeals in the Court of Appeal, the circumstances and grounds for lodging appeals and the manner in which those appeals should be dealt with'.

The decision of the High Court of Zanzibar in cases originating from Kadhi's Court is said to be final and conclusive and not be taken to the Court of Appeal of Tanzania. This position is well enumerated by Section 99(2) (b) of the Zanzibar Constitution. It is interesting to note that a question was raised as to whether the Zanzibar Constitution can limit or cut down the jurisdiction of the Court of Appeal included as a Union Matter as shown in the First Schedule of the Constitution of the United Republic of Tanzania. This was clearly observed in the remarkable case of Mohamed Rafik Ishaq & Another v. Anwar Hussein Jaffer & 2 others.[43] In this case the appellants, Mohammed Rafik Ishaq Ayoub and Khatoon Ishaq Ayoub, were brother and sister. They appealed

32. *Section 18(1) of the Magistrates' Court Act No. 6 of 1985.*
33. *These two Islands (Unguja and Pemba) are called as Zanzibar*
34. *The five regions of Zanzibar are: North, South and Urban West of Unguja; North and South Regions of Pemba.*
35. *Section 9(1) of the Magistrates' Court Act No. 6 of 1985.*
36. *Section 3(1) of the Magistrates' Act No. 6 of 1985.*
37. *Act No. 3 of 1985.*
38. *Section 6 of the Act No. 3 of 1985.*
39. *Section 10 of the Act No. 3 of 1985.*
40. *While handling any appeal from the Chief Kadhi's, it is mandatory under the law that the presiding High Court Judge sit together with four Sheikhs who are conversant with Islamic law, and the final decision to be reached shall be based on the opinion of the majority member. Section 10(2) of the Act No. 3 of 1985.*
41. *Section 10(3) of the Act No. 3 of 1985.*
42. *Section 98 of the Zanzibar Constitution, 1984.*

against the decision of the High Court of Zanzibar, seeking for dismissal of the respondent's prayers who sought a declaration that the house in dispute was bought by his late father and hence formed part of the estate, and two, the CCM. Branch of Mwembeladu, who were in occupation, be ordered to release the house into the estate of late Hussein so that it be distributed to their heirs.

The Court of Appeal, after quoting Section 92 (2) (b) of the Constitution and Section 10 of the Kadhi's Act, 1985 prohibiting appeals on Islamic matters to the Court of Appeals, stated that:

'It is clear that this Court has no jurisdiction to hear appeals emanating from Kadhi's Courts 'on matters of Islamic Law' or just 'Islamic matters' as the Constitution of Zanzibar provides for...'

However, the Court of Appeal went on hearing and determining that appeal, arguing that the question of who owns what does not fall within the ambits of Section 6(1) of the Kadhi's Court Act, 1985. That provision states that:

'A Kadhi's Court shall have and exercise jurisdiction in the determination of a question of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.'

This is perhaps a genuine case that calls for interference from the Court of Appeal. However, it is obvious that the highest Court of the land will not be content with the provision limiting its otherwise limitless authority over other judicial bodies be it Kadhi's Courts or Electoral Commissions.[44] In addition, it is not clear why the Constitution has ousted the jurisdiction of the Court of Appeal on matters of Islamic law, but it is presumed that the strong Islamic influence of the community may have contributed to such a decision. By the express exclusion from the Court of Appeal having powers to interpret the Zanzibar Constitution, it is implicit that this function is within the province of the High Court of Zanzibar, although no where mentioned, either in the Constitution itself or under the High Court Act, No. 3 of 1985. It is also not clear as to what will happen where in any proceeding before any court of law a question arises as to the effect of any provision of the Constitution. It is, therefore, suggested that the Constitution should be amended to give original jurisdiction to the High Court to the exclusion of other existing courts as to any question pertaining to the interpretation or application of any provision of the Constitution.

5. The Role of Court of Appeal of Tanzania under the Zanzibar Constitution

In 2010, the Revolutionary Government of Zanzibar made its 10th constitutional amendment of the Zanzibar Constitution, 1984. Among other things that were considered in that amendment of the Zanzibar Constitution, Zanzibar is declared to be one of the two states forming one United Republic of Tanzania.[45] The amendment asserts jurisdiction in the High Court of Zanzibar to entertain cases relating to violation of human rights.[46] The Constitution of Zanzibar restricts the matter determined by the High Court in this respect appealed to Court of Appeal of Tanzania. Now, in case, a person is aggrieved by the decision of the High Court in exercise of its original jurisdiction as stipulated under Article 25 A of the Zanzibar Constitution, he may refer an appeal to the High Court of Zanzibar which shall be composed of three judges excluding a Judge who entertained the matter before, when the court exercised its original jurisdiction.[47]

This has been criticised by some people worrying if the High Court will effectively protect the rights enshrined under the same constitution, and the constitutional human rights issues have in a number of cases not been properly enforced and enjoyed. Their enforceability in some instances have become difficult to enforce whenever these rights have been violated and the victims need to seek for the appropriate remedy before the courts of law and the situation is now expected to be even worse than in the past because of the absence of Court of Appeal in adjudicating various cases that would be intended to be filed by the victims of human rights violations. It is alleged that these rights have been continuously violated by the said courts of law and the same is expected to occur due the existence of some provisions under the current Zanzibar Constitution, and hence impeding enforcement and enjoyment of human right.[48] Despite the explicit guarantee of these rights, their effects remain to be realized by the courts being the interpreters of the law. This infringement seems to be done either intentionally or unintentionally and sometimes it is said to have occurred due to political interference, caused by those who wish to fulfil their

43. *Civil Appeal No. 35 of 1994 (unreported) For details about Perspectives on the Kadhi's Courts in Zanzibar written Prof.Hamudi Ismail Majamba (Present, Head, Departmentof Private Law,UDSM School of Law, University of Dar- Es-Salaam,Tanzania), Available at xa.yimg.com/kq/groups/20674633/390109494/name/Paper*
44. *Salum Toufiq, 'The Judiciary in Zanzibar: Zanzibar Court System' quoted in the Judiciary in Zanzibar, (Eds.), Peter, Chris Maina and Sikand Immi, Zanzibar Legal Services Centre Publication Series Book No. 2.p. 43.*
45. *See Article 1 of the Zanzibar Constitution, 1984.*
46. *Article 25 A of the Zanzibar Constitutions, 1984.*
47. *Article 24 (3) of the Zanzibar Constitution, 1984.*
48. *Ibid, at p. 22.*

political ambitions while they are in power without a mass defeat.[49] Majority of the Zanzibaris believe that such rights are not attainable even through courts of law under the current Zanzibar Constitution; in spite of the enactment of Bill of Rights in Tanzania's constitutions. The constitutions give courts a mandate to adjudicate cases of violations of human rights. The situation may remain as it is today if such political interference and the like will not be stopped and necessary steps taken to remedy the situation, which touches the lives of the people seriously. In the event of the above circumstances, many people in Zanzibar have beliefs and conceptions that their rights are not only being trampled on by the politicians but also the courts of law.[50] Due to such beliefs and conceptions, majority of believe that the Court of Appeal of Tanzania as empowered by the Constitution of the United Republic of Tanzania is right, appropriate and optional remedial legal instrument through which the Zanzibaris can seek justice through the same adjudication processes of the courts. According to the observation that has been carried out, there are approximately about hundreds of cases that have been filed in the High Court of Zanzibar based on the Bill of Rights in the Zanzibar Constitution. Among the cases that have been filed before the High Court of Zanzibar, the majority of them have been filed or determined by the Court of Appeal with different decisions than those decided by the High Court of Zanzibar. Majority of the people in Zanzibar believe that under the current Zanzibar Constitution, by empowering only the courts of law of Zanzibar to adjudicate cases relating to human rights violations will encourage more violations of people's basic and fundamental rights and freedom as enshrined in both the constitutions as there will not be a legal remedial instrument to remedy the situation as it was once practiced by the Court of Appeal of Tanzania. The argument here should be that invoking Zanzibar Constitution being the final court for determination of interpretation of that constitution is the High Court of Zanzibar while if one invokes the Constitution of the United Republic of Tanzania the final appellate court is the Court of Appeal of Tanzania. In that case, one can have more levels of appeals and also judges who do not accept to political or social pressure, for the Zanzibar executive or politicians. In general terms, it is believed that the people in Zanzibar are unable to obtain legal redress through courts to which they are entitled, more particularly in cases of human rights violations.[51] Most of the human rights cases are filed by Zanzibar Legal Right Center in Zanzibar.[52]

6. Conclusion

As it has been enshrined in both jurisdiction's Constitutions, judiciary is the only authority mandated with an authority to administer justice in the country. However, it remains the fact that if the current trend will continue, obviously and definitely the Court of Appeal of Tanzania which is regarded to be the highest court in the jurisdiction will one day have few cases to adjudicate in the Zanzibar despite being so empowered to adjudicate appeals throughout the United Republic of Tanzania. This creates fear amongst the citizens most particularly Zanzibaris.[53] There is every justification to conclude that the establishment of the Supreme Court of Zanzibar in the Zanzibar court system is inevitable in eliminating any kind of bias by the High Court of Zanzibar, witnessed in the past.

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49. See Abubakar Khamis Bakary, 'The 1984 Zanzibar Constitution'. In this Article, it is spelt out that it is doubtful whether a judge in Zanzibar could decide a case before him exclusively on the basis of merit without fear or favour or any extraneous conditions which could motivate his decision. Recent events have shown that a judge may be given another position and thereby effectively removing him from the bench.

50. Ibid, at p. 22.

51. This is observation of the Author when they have gone through many human rights violation cases.

52. The Zanzibar Legal Services Centre (ZLSC) is a non-governmental, voluntary, independent and non-profit making organization whose major aim is to provide legal services to the poor, women, children and disadvantaged sections of Zanzibari society; to promote and advocate for the respect and observance of human rights, to popularise knowledge of law and to produce publications in all areas of legal concern to the people of Zanzibar.

53. People who lives or inhabits of both islands are known as Zanzibaris.

54. Authors' observations and hunches.

A Critical Analysis of Insider Trading Law in India in the Light of Rajat Gupta's Case

*Dr. Saurabh Chaturvedi**

ABSTRACT

The paper furnishes a brief and comprehensive understanding of insider trading concept from its evolution and historical perspective to the contemporary issues and cases in Indian scenario with respect to existing law regarding insider trading in US and UK. This gives an opportunity for comparative study of the subject matter between these countries. Indeed it is believed that insider trading regulations in India do not provide for exhaustive legal remedy which gives authors an opportunity to analyze the lacunae in the prevalent law and further evolve idealistic and logical solutions to the problems put forth. In fact, the study will perhaps not reach the conclusion without discussing the recent advancement of law and specifically in the light of insider trading case of Rajat Gupta and other cases in India and abroad. Further, it is essential to postulate harmonization of law against insider trading, as the investment by an investor, in the present scenario, is not limited to any particular jurisdiction.

Keywords: Insider trading, Disclosure, SEBI, Committee, Prohibition, Security Market, Regulations.

1. Introduction

Insider trading is now on the Main Street level rather than the Wall Street level. We're bringing more cases about individuals who know about the companies rather than people involved in the deals.

-By Duncan King

It was the Sunday Times in the UK that coined the phrase in 1973 to describe classical feeling - "the crime of being something in the city," which means that insider trading was estimated as legitimate and at the same time a law against insider trading was like a law against high performance.[1]"Insider trading" is a term subject to many definitions and connotations and it encompasses both legal and prohibited activity. Insider trading is taking place legally every day, directors or employees of an organization buy or sell shares in their own companies within company policy and regulations governing the trade. This is the trade that occurs when the privileged confidential information about important events are used to take special advantage of this knowledge to reap profits or avoid losses on the stock market, to the detriment of the source of information and investors who buy or sell their shares typically without the benefit of "inside" information.

As per Black's Law Dictionary "Insider Trading" is -"The use of material non public information in trading the shares of the company by a corporate insider or any other person who owes a fiduciary duty to the company". Insider trading has been generally defined to mean trading in the shares of a company for gaining or for avoiding losses by manipulation of prices by persons who are in the management of the company or are close to them, on the basis of undisclosed price sensitive information regarding the working of the company which they possess but which is not available to others.[2] Most of the countries in the world with reputed stock exchange has prohibited this practice because of its potential to demolish public confidence in the stock exchange.[3]

Insider trading occurs when a corporate insider deals into information before it is disclosed to the general public.[4] It is supposed that such trading causes huge profit to the insider that comes from the losses of the general public.[5] But, because the generic investor tends to be bullish, and the premium causes the information to come to the market sooner, some argue that nothing is wrong with the insider receiving a premium.[6] However, financial markets for the most part depend on the investment of the general public, who expect that it will be done on a level playing field with others in the market.[7] Without this faith in the market, many investors would not invest.[8]

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1. *Jayant M. Thakur, Sebi guidelines on insider trading are preventive in nature-I , Monday, Aug 21, 2000, Available at http://www.financialexpress.com/old/fe/daily/20000821/fco 21044.html*
2. *L. M. Sharma, Amalgamations Mergers Takeovers Acquisitions: Principles, Practices and Regulatory Framework (1st Edn., Company Law Journal, Taj Press, 1997) 299.*
3. *Alan Dignam and Lowry Dignam, John Dignam, Company Law (4th Edn., Oxford University Press, 2006) 74.*
4. *See Twentieth Century Fund, The Security Markets 14 (1935).*
5. *Ibid.*
6. *Ibid.*
7. *Ibid.*
8. *See Robert C. Rosen, The Myth of Self-Regulation or the Dangers of Securities without Administration: The Indian Experience, 2 J. Comp. Corp. L. & Sec. Reg. 270-71 (1979) at p.286.*

2. Evolution and History Of Regulating Mechanism In India

Insider trading in India was untouched in its 125 years until about 1970. It was in the 1970s that this practice was recognized as unfair. In 1979, the Sachar Committee stated in its report that employees of companies and directors, auditors, secretaries, etc. may have some sensitive information that could be used to manipulate stock prices, which can cause financial woes to the investing public. The committee has then recommended amendments to the Companies Act 1956 to restrict or prohibit the actions of employees/insiders. Sanctions have also been proposed to prevent insider trading.

In 1986, the Patel committee recommended that securities contracts (Regulation) Act, 1956 may be amended to curb insider trading and unfair stock deals. It was also suggested that heavy fines with imprisonment should be imposed including refund of the profit made or the losses averted to the stock exchanges.[9]

In 1989, the Abid Hussain Committee recommended that insider trading is punishable by civil and criminal proceedings and also suggested that SEBI should formulate regulations and codes governing unfair dealings.

Based on the above committees reports, SEBI has, in exercise of the powers conferred on them by section 30 of the Securities and Exchange Board of India Act 1992, made regulations which are known as the Securities and Exchange Board of India (Insider Trading) Regulations 1992. This regulation of 1992 has prohibited this fraudulent practice and a person convicted of this offence is punishable under Section 24 and Section 15 G of the SEBI Act 1992. These regulations were drastically amended in 2002 and renamed as SEBI (Prohibition of Insider Trading) Regulations 1992. Both the Insider Trading Regulations are basically punitive in nature in the sense that they describe what constitutes insider trading and then seek to punish this act in various ways. More importantly, they have to be complied with by all listed companies; all market intermediaries such as brokers and all advisers, professional firms, merchant bankers etc.

According to speculations, India amended its legislation to ensure that insider trading law is ten times longer than the original and insider trading has been defined more widely so that more transactions on the stock market will be considered as illegal.[10] SEBI is as powerful as the SEC, and is authorized to conduct an investigation on its own initiative on receipt of a complaint. It can set up an investigative body and initiate an investigation and declare securities transaction null and void. Further, SEBI can also transfer the equivalent product at cost or market price of the shares on the highest investor protection fund of a recognized stock exchange.[11]

3. Legal Regime in USA, UK and India

United States was the first province to adopt regulations on insider trading and today it continues to lead the world in the regulation and enforcement. The United Kingdom considers the Directive of the European Parliament and also represents EC legal regime in insider trading deals. On the other hand, India is the country whose law regarding insider trading does not have a long history, however, changes are made to make offense more punitive and preventive.

3.1. United States of America

Before the adoption of the Securities Exchange Act of 1934, there were no rules codified in the United States that regulated insider trading. Section 17 of the Securities Act of 1933 consisted prohibitions of fraud in the sale of securities which have been greatly enhanced by the Securities Exchange Act of 1934.[12] The Securities and Exchange Act, 1934 sets out provisions to protect the interests of investors against insider trading. The 1934 Act addressed insider trading directly by Article 16 (b) and indirectly by Article 10 (b).[13] Section 16 in practice is rarely invoked. However, the actual role of Article 16 is to tell what types of people may be covered in inside trading when referred to Article 10b.[14] With the mark in early 1980s and in the middle of few interesting cases of insider trading, Congress, to curb the practice of insider trading introduced Insider Trading Sanction Act, 1984. The modification that this act comprised allowed the Securities and Exchange Commission (SEC) to bring a civil action directly rather than first having the Department of Justice to prosecute criminal and civil proceedings. Subsequently, in 1988, Congress enacted legislation against insider trading, with much deterrent effect, which was known as Insider Trader and Securities Fraud Act 1988.[15]

In this Act, "Congress enacted Section 20A to provide expressly the right to act on behalf of "traders" who were contemporaneously trading in the same class of securities. [16] Lately, United States has developed a number of

9. *S. Vadielu , 'Insider trading in Indian stock markets', Available at http://www.theindiastreet.com/2007/06/insider-trading-in-indian-stock-markets.html*
10. *P. Shah, 'A Victimless Crime? April 18, 2002, Available at http://economictimes.indiatimes.com.*
11. *C. Bhui, 'Insider Trading In India– An Overview'*
12. *See, American Insider Trading Law, Available at http://www.stocks.gl/American-insider-trading-law2.html*
13. *See, Insider Trading – A U.S. Perspective, Available at http://www.sec.gov/news/speech/speecharchive/1998/spch221.htm*
14. *Engle, Eric Allen, 'Insider Trading in U.S. and E.U. Law: A Comparison' 15, Available at SSRN: http://ssrn.com/abstract=1271868.*
15. *Vaibhav Sharma, 'Prohibition on Insider Trading: A Toothless Law' (May 7, 2009). Law School Research Paper No. 996. 27, Available at SSRN: http://ssrn.com/abstract=1400824.*

supplementary statutory rules, such as The Securities Enforcement Remedies and Penny Stock Reform Act of 1990; Rule 14e-3 Tender Offer Rule, Regulation FD, as well as the Sarbanes-Oxley Act of 2002.[17]

3.2. United Kingdom

It was only with the Companies Act 1980 that there was the first legislative intervention in the United Kingdom to combat insider trading.[18] The relevant UK provisions were in the Companies Securities (Insider Dealing) Act 1985 and the Financial Services Act 1986. A New Legislation has altered the law on insider dealing to take into account the EC Directive on Insider Dealing (89/592).[19] A number of useful and introductory changes to the law on insider dealing in the United Kingdom have been affected by the Criminal Justice Act, 1993. The earlier law, namely, the Company Securities (Insider Dealing) Act, 1985, has been wholly superseded, in relation to offences allegedly committed on or after 1 March, 1994, by Part V of the Criminal Justice Act, 1993.[20] The law against insider trading has been strengthened further by Financial Services and Markets Act 2000 (FSMA), which introduces a new offence of market abuse.[21] The FSMA introduced the wider offence of market abuse; this covers 'insider dealing', 'disclosing inside information', 'dissemination of false' and 'misleading information', 'employing fictitious devices', and market distortion. All these offences encompass insider dealing.[22]

Recently, The Financial Services and Markets Act 2000 (Market Abuse) and Regulations 2005 have been enacted. These implement Directive 2003/6/EC (Market Abuse Directive) of the European Parliament and of the Council which introduces a common EC legal regime on insider dealing and market manipulation.[23]

3.3 India

Following the recommendations by the committees, SEBI has, in exercise of the powers conferred on them by section 30 of the Securities and Exchange Board of India Act 1992, made regulations which are known as the Securities and Exchange Board of India (Insider Trading) Regulations 1992. Until these regulations were framed there were no specific provisions in India for dealing with the offence of insider trading. Now, by virtue of the said regulations, definitions have been provided as to what is an "insider", and dealing, communicating or counseling on matters relating to insider trading that has been prohibited. Regulation 4 of the said Regulations makes any insider who deals in securities or communicates any information or counsels any person dealing in securities in contravention of the provisions of the said Regulations, a person guilty of insider trading who is liable to be punished with imprisonment for a term which may extend to one year or with a fine or with both under the provisions of Section 24 of the Securities and Exchange Board of India Act 1992.

3.3.1. Insider and Insider Trading Defined

Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992, does not directly define the term "insider trading". But it defines the terms-

- "insider" or who is an "insider;
- who is a "connected person";
- what are "price sensitive informations".

As per the Regulations, "insider" means any person who is or has been connected with the company or is deemed to have been connected with the company, and is reasonably expected to have access connection for information on unpublished price sensitive securities of a company or who has received or has had access to information on such unpublished price sensitive information.

The above definition in turn introduces a new term "connected person". The Regulation defines that a "connected person" means any person who-

- is a director, as defined in clause (13) of section 2 of the Companies Act, 1956 (1 of 1956) of a company, or is deemed to be a director of that company by virtue of sub-clause (10) of section 307 of that Act or
- occupies the position as an officer or an employee of the company or holds a position involving a professional or business relationship between himself and the company whether temporary or permanent and who may reasonably be expected to have an access to unpublished price sensitive information in relation to that company.

16. *Mark I. Steinberg, Understanding Securities Law (Matthew Bender and Company Incorporated, 1989) 177.*
17. *Han Shen, 'A Comparative Study of Enforcement of Insider Trading Regulation between the U.S. and China' (February 21, 2007) 11, Available at SSRN: http://ssrn.com/abstract=964548.*
18. *In United Kingdom Insider Trading is referred as Insider Dealing.*
19. *Nicholas Bourne, Company Law (Cavendish Publishing Ltd, Reprinted 1994) 153.*
20. *Supra note 2, 306.*
21. *Part VIII of FSMA contains the provisions relating to market abuse and section 118 (1) defines the specific offence of market abuse.*
22. *Brian Ikol Adungo, 'The New European Union and United Kingdom Regimes for Regulation of Market Abuse' (January 8, 2009), Available at SSRN: http://ssrn.com/abstract=1324678.*
23. *Financial Services and Markets Act 2000 (FSMA): Recent developments, Bulletin number 43 from HM Treasury, Available at http://www.hm-treasury.gov.uk/fsma_bulletin_43.html*

3.3.2. Unpublished Price Sensitive information

The gist of the Insider Trading Regulation is mentioned in Regulation 3, which specifically provides for the prohibition in dealing, communication or counseling on matters relating to "insider trading" and it is applicable to all such other information, which can be termed as "unpublished price sensitive information".[24] It is this information that is not published by the company or its agents in a specified manner. Also this information if published, should materially affect the price of the securities of the company. The SEBI regulations further cover the information that is price sensitive information like:

- Periodical financial results of the company.
- Intended declaration of dividend.
- Issue or buy back of securities.
- Any major expansion plan or execution of any major project.
- Amalgamation, merger and takeover.
- Any significant changes in the policies, plans or operations of the company.[25]

4. SEBI Guidelines on Insider Trading are Preventive in Nature

The SEBI (Insider Trading) Regulations prohibit "insiders" from dealing in exchange-listed securities on his or another's behalf based on unpublished price sensitive information, communication of such information unless in the ordinary course of business, or counseling others based on that information.[26] "Dealing in securities" means trading or agreeing to trade either as a principal or agent.[27] Liability is not imposed on tippees, persons who have been given information by the insider.[28]

An "insider" is a person connected to a corporation, and is reasonably expected to have access to, has received, or has previously had access to unpublished price sensitive information.[29] A "connected person" can include directors,[30] officers, employees, or "professionals" who may be reasonably expected to have access to such information.[31] The "professionals" included under this definition stock exchange members,[32] self-regulatory organization (SRO) members,[33] and bankers.[34] The "information" is any unpublished information that relates to the company that if published would materially affect the market.[35]

SEBI may delegate an investigative authority if it receives a complaint of insider trading by investors, intermediaries, or others.[36] SEBI may also investigate an insider based on supposition arising out of its own knowledge or information.[37] The insider must be given notice of the investigation,[38] unless public interest dictates that no notice should be given.[39] The insider is then required to give reasonable access to relevant records with him or others, such as his stockbroker.[40] The authority can interview partners, employees, or members of the insider and these persons are required to give full assistance to the authority.[41] Unlike broker violations, the authority is required to give a report to SEBI within a month.[42] The report can also be generated through a qualified auditor, provided that the auditor has the same access to information as would the authority.[43]

Before taking any action, SEBI must give the insider a statement of its findings and an opportunity to respond.[44] The Board can then proceed with criminal prosecution after receipt of the response.[45]

Other actions the Board can take include injunctions against dealing with securities,[46] prohibition of disposal of securities,[47] and the restraint of communication or counsel to deal in securities.[48] An insider may appeal to the Central Government if the Board sanctions him.[49]

5. Insider Trading Prohibition and Sanctions

5.1. Civil Sanctions

There is a need to add heavy civil consequences on the insider trader. According to SEBI, it does not have the

24. *As defined in regulation 2(k). This information has an impact on the company's securities' price in the market. or "As any information which relates to or concerns a company, and is not generally known or published by the company for general information, but if published or known, is likely to materially affects the price of the securities of that company in the market".*
25. *Arin dam Pal, Insider Trading A Global Perspective, Online Journal, Available at http//www.tradelawonline.com/search/articles/*
26. *See the Gazette of India Part III (1992), Securities and Exchange Board of India (Insider Trading) Regulations, 1992, under S. 30 of the Securities and Exchange Board of India Act, 1992, Securities and Exchange Board of India, Bombay, 19 Nov. 1992.*
27. *Ibid. S. 2(d).*
28. *Ibid. S. 2(c).*
29. *Ibid. S. 2(e).*
30. *Ibid. S. 2(c)(i).*
31. *Ibid. S. 2(c)(ii).*
32. *Ibid. S. 2(h) (ii).*
33. *Ibid. S. 2(h)(v).*
34. *Ibid. S. 2(h)(iii).*
35. *Ibid. S. 2(k).*
36. *Ibid. S. 5(2) (a).*
37. *Ibid. S. 5(1).*
38. *Ibid. S. 6(1).*
39. *Ibid. S. 6(2).*
40. *Ibid. S. 7(1).*
41. *Ibid. S. 7(3).*
42. *Ibid. S. 8.*
43. *Ibid. S. 10.*
44. *Ibid. S. 9(1).*
45. *Ibid. S. 11.*
46. *Ibid. S. 11(a).*
47. *Ibid. S. 11(b).*
48. *Ibid. S. 11(c).*
49. *Ibid. S. 12.*

power to impose civil penalties on the violator but SEBI could seek civil powers over violators with assistance from civil courts. Section 11 of the SEBI Act gives, the Board, discretionary powers to issue appropriate remedies. To quote "Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit". It also has the power to issue to any person connected to the securities market such directions "as may be appropriate in the interests of the investors in securities".

5.2. Criminal Sanctions

Of course, there is the usual threat of a jail sentence for the offender under Section 24 of the SEBI Act. Though the jail sentence may look good on the statute, history bears out the difficulty in enforcing criminal prosecution against an economic offender. The burden of proof of proving a criminal charge is so onerous that a matter lies in the courts to unravel the complicated issues of facts of illegal transactions consummated over a period of time.

5.3. Other Sanctions

The Securities and Exchange Board of India may without prejudice to its right to initiate criminal prosecution under section 24 or any action under Chapter VIA of the SEBI Act, to protect the interests of investors and in the interests of the securities market and for due compliance with the provisions of the Act, Regulations made there under issue any or all of the following order, namely:

a) directing the insider or such person as mentioned in clause (i) of sub-section (2) of section 11 of the Act not to deal in securities in any particular manner;
b) prohibiting the insider or such person as mentioned in clause (i) of sub-section (2) of section 11 of the Act from disposing of any of the securities acquired in violation of these Regulations;
c) restraining the insider to communicate or counsel any person to deal in securities;
d) declaring the transaction(s) in securities as null and void;
e) directing the person who acquired the securities in violation of these regulations to deliver the securities back to the seller; and
f) directing the person who has dealt in securities in violation of these regulations to transfer an amount or proceeds equivalent to the cost price or market price of securities, whichever is higher to the investor protection fund of a Recognized Stock Exchange.

6. Legal Critique of Insider Trading Law of India

This particular emerging economy has to strengthen its enforcement of recently amended insider trading regulation, so as to prove to both the domestic and foreign investor that they are investing in fair and transparent securities market, where strict compliance of the prohibition is ensured by the enforcement agencies. Loopholes in the enforcement prohibition against insider trading are evident from the movement of stock prices of the company, prior to some important news becoming public. One of the recent cases that can be illustrated is allegation against Reliance Petroleum, that it has indulged in insider trading activity on large scale, which is evident from the fluctuation in its share price in the past fifty two weeks, the share has fluctuated in a wide range of between sixty seven rupees and two hundred ninety five rupees, as per information available with the stock exchange. But according to company sources, 'the sale of Reliance Petroleum shares was conducted by transactions through the Stock Exchanges and has helped to further broad base the shareholding pattern of Reliance Petroleum'. So it will be interesting to see that whether SEBI will be able to prosecute the insider's in this, case or will they be let off due to the poor drafting of its insider trading regulation, which place emphasis on motive rather than action.[50]

Finally, the poor enforcement of insider trading regulation in India should be viewed with the glasses of cost-benefit aspect of enforcement on. Even if restriction on insider trading is considered desirable, its sound implementation is extremely expensive. Virtually every one comes under the definition of "insider", by virtue of possessing information material to securities prices. As a result the Enforcement of restrictions upon insider trading runs the risk of either being ineffective or being a witch hunt.[51]

Enforcement of prohibition against insider trading in a country like India is very difficult. Further, in the United States of America, there is anecdotal evidence that a great deal of successful speculation continues based on insider trading. Hence, in order to ensure effective enforcement of insider trading regulation, India needs to strengthen its enforcement regime, by strengthening its insider trading regulation and to ensure that every insider, trading on non-public information is booked, so as to be at par with other developed economies, in order to provide equal level playing field, to all the investors. Insider trading regulation for most insiders is of little relevance as they often trade under disguised entities, easily allowed by our ill-designed shareholding disclosure format.

Enforcement of insider trading can be made more efficient in India, if the time limit for disclosure of holding to the

50. Online edition of Economics times.

51. A. Shah, "Why Forbid Insider Trading?", Available at http://www.mayin.org/ajayshah//MEDIA/1998/insider.html

company by any person holding more than five percent (now four days) and further the disclosure by the company to the stock exchange of information received about the above transaction (now five days), is reduced to one day in totality. Also like other developed countries the above stated disclosure should be made to both exchanges and the regulator, instead of exchange alone.[52]

Further, there should be a provision of civil penalties, like in US, where the penalties are based on the profit made or loss avoided. Also SEC let's off the offender, if he pays without admitting to offence, but merely publishes the settlement, which acts as a deterrent to the society and prevents cases from being locked up in the court. Additionally, the maximum penalty limit of half million rupees[53] should be increased, as the profit reaped by the insider may be a huge amount.

Finally, preventing insider trading is not about a set of rules or filling alleged loopholes. It is about a determination to go after illicit trades and the power to punish offenders. Until SEBI shows it is serious about checking insider trading, the activity will continue to thrive unchecked. For that the regulatory authority has to ensure that the SEBI Regulations on Insider trading is a separate code by itself. Preferably, it must be made into a separate Act as a part of general law relating to frauds, as is the case in the US. This will ensure that SEBI does not have to draw concepts and principles from the UK and US laws to strengthen its case. At the same time, it must also avoid the impression that there is ambiguity or weakness in the Indian Insider Trading Regulations.[54]

It is important to understand that insider trading is illegal because it may affect you as an investor and the company in which you are investing. One recent comprehensive survey of insider trading regulations in every country that had a stock market at the end of 2002, showed that one hundred percent of the twenty three developed countries, and about eighty percent of the eighty emerging markets, had insider trading laws in their books. But the enforcement of these laws, however, has been spotty. And further, it showed that there has been a prosecution in only one out of three countries. Developed countries have a better record than emerging markets (approximately seventy eight percent of developed countries, and twenty three percent of emerging markets have had prosecutions).[55] Though the findings of this survey are not updated, but it shows that there is a wide gap between the practice of law and enforcement theory.

An important drawback in the insider trading regulation in India, which is worth mentioning, is that the regulation of insider trading should incorporate a mens rea requirement for liability for the offence of insider trading. Mere possession of unpublished price-sensitive information should not be enough to constitute insider trading. Along with these suggestions in the imposition of criminal liability, statutory civil liability for insider trading should also be introduced. As the standards of proof would be easier in the case of civil liability, this would safeguard against abuse caused by liberalising criminal liability standards.[56] To fill the gaps in the present regulation against insider trading and in its enforcement, Professor Macey suggests that the enforcement agencies like the SEC, FSA and SEBI, has a comparative advantage in prosecuting insider trading. He further contends that these agencies should monitor insider trading, but refer observed cases to the affected corporation for private prosecution.[57]

While others assert that the present regulations are not justified, as they believe that for creating respect for such regulations, they should be supported by studies that isolate the individuals or groups who are fraudulently harmed by insider trading, if any such groups exist, then the legislators should pass a clearly worded legislation that prevents any fraud from being committed against these individuals and groups, while allowing non fraudulent transactions to be completed without fear of prosecution, as such fear violates individual rights and will likely have a negative market reaction.[58]

7. The Insider: Case of Rajat Gupta

Rajat Kumar Gupta is an Indian American businessman and has been the Director General at management consultancy McKinsey & Company from 1994 to 2003 and an entrepreneur in India and the United States. He was convicted in June 2012 on charges of insider trading from the Raj Rajaratnam Galleon Group case led by four criminal charges of conspiracy and securities fraud. He was sentenced in October 2012 to two years in prison, additional year probation and ordered to pay $ 5 million in fines.[59]

Gupta served as company president, board director or strategic advisor to various organizations, large and notable such as Goldman Sachs, Procter & Gamble and American Airlines, and nonprofit organizations, including the Gates Foundation. In March 2011, the SEC filed a civil administrative complaint against Gupta for insider trading

52. *P. Haldea, 'Insider Trading A critique of regulations and practices', FICCI's National Conference on Securities Market Regulations.*
53. *In India 1 million is equal to 10 lakh.*
54. *K. Thiagarajan, Available at www.thehindubusinessline.com/iw/2003/11/09/stories/2003110900270700.htm - 22k*
55. *Utpal Bhattacharya and Daouk Hazem, 'The World Price of Insider Trading' (2004).*
56. *N. Jain 'Significance of mens rea in insider trading' (2004).*
57. *Jonathan R. Macey, 'Insider Trading: Economics, Politics, Policy' (American Enterprise Institute Press 1991), "40."*
58. *Robert W. McGee, 'Ethical issues in insider trading: Case studies'*
59. *Available at http://www.latimes.com/business/money/la-fi-mo-gupta-sentenced-20121024,0,7839103.story*

with the billionaire Galleon Group hedge fund founder Raj Rajaratnam. Coverage of the event noted that Anil Kumar - who, like Gupta, had graduated from IIT, was a senior partner at McKinsey, had already pleaded guilty to charges in the same case. Gupta, Kumar and Rajaratnam were all close friends and business partners.

After retiring from McKinsey in 2007, Gupta joined numerous boards and is active on Wall Street. He grew close to Mr. Rajaratnam, the former head of hedge fund Galleon Group. The two went into business together, from a private equity firm. Mr. Gupta has also invested in Galleon and used his gold-plated Rolodex to raise money for the fund. It is during this sequence, in 2008, the government wiretapped phones of Mr. Rajaratnam and Mr. Gupta and heard saying boardroom gossip about Goldman Sachs. On other calls, Mr. Rajaratnam bragged to his colleagues to have a Galleon tipster inside Goldman. Records turned emphasis by the Government on Mr. Gupta, who was arrested on charges of insider trading recently.

He is one of 23 people charged criminally in a plot of seven insider orchestrated by Mr. Rajaratnam, who was convicted in 2011. Mr. Gupta also fought the charges. A jury convicted Mr. Gupta guilty in May. Federal prosecutors have no evidence wiretap direct Gupta passing inside information about Goldman. Instead, the government's case consisted of telephone records, trade journals, instant messages and e-mails. In one example, the circumstantial evidence showed that Mr. Gupta participated in a Goldman board call during the financial crisis in which he learned that billionaire Warren E. Buffett would make an investment of $ 5 billion in the bank. After the call and before the public announcement of the investment, he quickly called Mr. Rajartanam, who then bought shares in Goldman.

On 24 October 2012, Gupta was sentenced to two years in prison by Judge Rakoff of the U.S. District Court of the United States to Manhattan for disclosing secrets of boardroom to former hedge fund manager Raj Rajaratnam.[60]

8. Insider Trading Cases and Stories Across the Globe

An important case which deserves mention is the Hindustan Level Limited (HLL) case. Shortly before HLL announced its merger with Brooke Bond Lipton Limited, HLL purchased 800,000 shares of the company from Unit Trust of India (UTI). After this deal, it has been argued that this is the case of insider trading. HLL defended itself by claiming that the stock was purchased at Rs 350 per share, representing a premium of ten percent of the market price.[61] After this case SEBI has amended the regulations and defines "insider" as a person who reasonably be expected to have access to information of such unpublished price sensitive and also changed the definition of "price sensitive information". The important point to note here is that insider trading laws were used, in this case to prosecute in a shady deal while lighter form of insider trading occurs almost daily in India. The fact that the government has pursued a criminal investigation against HLL in this case shows that the use of the laws on insider trading is less effective than the use of traditional civil law offenses.[62] The prevalence range of insider trading and market abuse of Indian securities market may be highlighted by the citation of an author "price rigging and insider trading have become a way of life in the stock market Indian market".[63] There have been several cases of insider trading since, but no strict action has been taken against them. The most important of them being sell-out of Lakme to Unilever and Tata sell-out their stock in Merind to Wockhardt, where in the later case, the scrip of Merind had jumped to Rs191.30 from Rs174 i.e. 9.94 percent hike to the Bombay Stock Exchange on February 24, a day before the public announcement of this case. In addition to the cases mentioned above, there have been many cases of insider trading, but due to a lack of corporate governance in India, this practice is widespread in the corporate culture of India.

8.1. Dilip S. Pendse v. SEBI

This was perhaps the simplest most case of Insider Trading which was handled by SEBI and it had no difficulties in punishing the offenders. The facts were that Nishkalpa was a wholly owned subsidiary of TATA Finance Ltd (TFL), which was a listed company. D. P. was the MD of TFL. On 31/03/2001, Nishkalpa had incurred a huge loss of Rs. 79.37 crore and this was bound to affect the profits of TFL. This was basically the unpublished price sensitive information of which Pendse was aware. This information was disclosed to the public only on 30/04/2001. Thus, any transaction by an Insider between the period 31/03/2001 to 30/04/2001 was bound to fall within the scope of Insider Trading; 'DP' passed on this information to his wife who sold 2, 90,000 shares of TFL held in her own name as well as in the name of companies controlled by her and her father-in-law. It was very easy for SEBI to prove Insider Trading in this cake walk or vanilla case.

60. *"Ex-Goldman Director to Serve 2 Years in Prison on Insider Trading Case". The New York Times. October 24, 2012.*
61. *J. Ghosh, Surprise Move, Available at http://www.the-week.com/97Aug31/biz3.htm.*
62. *M. Miller, The insider: Parasite or Legitimate Profit- Maker? State, Market & Economy.*
63. *S. Sivakumar, insider Trading—Following the SEC'sLead, Available at http://www.hinduonnet.com/businessline/2001/04/26/stories/042662ss.html*

8.2. Rakesh Agrawal v. SEBI

Former Asia Pacific Head of Alliance Mutual Funds sold large number of shares of Alliance which was under his management; this caused a sharp fall in the valuation of Alliance shares in the market. The person was found guilty of insider trading and banned from trading for 5 years by SEBI.

A famous case of insider trading involved co-founder of Galleon hedge fund group Mr. Raj Rajaratnam and Mr. Deep Shah an employee of Moody's credit rating agency. Mr. Shah was disclosing confidential and material information that included mergers, acquisitions and complete corporate financial results before the information was made public from various financial firms to Rajarathanam. Rajarathanam made a profit of over $20 million from 2006 through 2009 by trading in the securities on the basis of the information provided by Shah for consideration of cash. Shah has been alleged of selling information about acquisition of Hilton Hotels by the Blackstone Group to an investor Roomy Khan for money.

Another famous case of insider trading has come up in the name of housing loan scam. Money Matters, a local debt syndication firm, promoted by Rajesh Sharma, has collected unpublished price sensitive information about many companies from Naresh Chandra, secretary (investments) LIC and made huge profit dealing in the securities on the basis of the information. Former First Cash Financial Services chairman Phillip "Rick" Powell is accused of buying 100,000 shares of First Cash through his broker, the day before the company began the buyback. He has entered into the Transaction on the basis of non disclosed information from collateral and payday lending company.

A US food and drug administration chemist Chen Yi Liang and his son Andrew were charged for insider trading. They used information about drug approvals to trade into the securities of the concerned firm and made a profit more than $ 3.7 million.

9. Recommendation to Overcome Insider Trading Issues

Having discussed the practice of insider trading and the regulations prohibiting it in different jurisdictions, a firm support is provided to the furtherance of the regulation against this practice on international level, by harmonizing the conflict of laws dealing with insider trading. In this era of globalization many initiatives have been taken by the countries around the world to harmonize their commercial law. Similarly, the need of the hour is to harmonize the law against insider trading, as an investor in this present scenario is not limited to any particular jurisdiction, rather with the liberalization of markets especially of the emerging economies, there has been an increase in foreign investments, so it is must for these economies in particular to bring their securities market at par with the developed economies, by making their markets more fair and transparent. At present, as discussed above, all the developed countries and almost all the developing countries have a regulation against insider trading, but the scope of the law governing insider trading is different in different countries. For example, country like India lack civil liability and imposes criminal liability upon the insider accused of trading on non- public information which is difficult to prove, hence reducing the enforcement rate. So in order to provide a safer and equal level playing field to investors all over the world, there should be harmonized law all over the world dealing with insider trading on the lines of EC Directive 89/592, which acts as guideline for the securities regulatory authorities all over the Europe, as to how to tackle the menace of insider trading. Further, International Organization of Securities Commissions (IOSCO) can play a leading role in this initiative, as its membership covers near about ninety percent of the securities markets around the world. And one of its main aim as mentioned in its preamble is to unite the efforts of the securities regulatory authorities around the world, so as to ensure effective surveillance of international securities transactions. This section can be summarized on the lines of Thomas Newkirk and Melissa Robertson of the SEC that:

The importance of policing insider trading has assumed international significance as overseas regulators attempt to boost the confidence of domestic investors and attract the international investment community. Reports from the international press confirm a proliferation of law-making and regulatory actions within just the last several months in countries across the globe aimed at curbing insider trading.[64] Finally, these recent developments herald a new era of universal recognition that insider trading, in the words of the SEC's Chairman Levitt, "has utterly no place in any fair-minded law-abiding economy.[65]

10. Conclusion

The core objective of the securities regulatory implementation is that all investors should have equal access to the rewards of participation in securities transactions. Inequalities based on unequal access to knowledge should not be shrugged off as inevitable in our lifestyle. What is sought to be caught is crime and treating all insiders as inherently tending towards a presumption of unfair dealing should be avoided. The controller must

64. *Insider trading- A US perspective, further cited from Warren, The Regulation of Insider Trading in the European Community, 48 Wash. & Lee L. Rev. 1037 (1991).*

65. *D.W. Carlton, D.R. Fischel, 'The regulation of Insider Trading' (1983) 35 Stan. L. Rev. 857. 869- 871.*

specify in the schedule to Regulation a list of optional procedure to limit the scope of insider trading. What should be mandated rather should be a statement in the annual report of the degree of compliance with the standards set out in the schedule.

Thus, companies that do not meet the guidelines of corporate governance, in essence, should be penalized by its shareholders. Introduction of corporate governance, similar to the notation of management would be under pressure to comply with these measures. The insider threat is one which is difficult to treat, and manipulators trying to find a way or another for that instance HLL is set example. Even after the formation of the SEBI (Insider Trading) Regulations, 1992, the insider trading is still widespread in the stock market, and therefore clearly SEBI regulations need to be more comprehensive. Although, the SEBI introduced regulations in 2002 to control this type of activity and to avoid damage to investors in general, it is worth noticing that SEBI has no Transnational jurisdiction.

Therefore it is proposed that the SEBI should amend its present regulations on the lines of SEC or better than the SEC. It is necessary to increase investor education about the complexities of insider trading and to make an investor aware of their rights. Additionally, SEBI should also include civil remedies against insider so it would not be difficult as in the case of criminal responsibility. Indian law i.e. the SEBI Act seems quite inadequate. Nothing is mentioned in the regulations about the application of criminal sanctions against the directors of a foreign company, who has engaged in insider trading, as the SEBI Act is not applicable to the territory outside India and it will be the extraterritorial application of the law. Therefore, if now a director of Infosys can use his inside information, decide to deal in shares listed on the NASDAQ stock exchange through a broker in U.S., then under this Act, the Director shall not be guilty of insider trading, it would be almost U.S. stock broker who will be liable for insider trading.

Legislating From the Bench: Judicial Activism

*Asmita Dhingra**

ABSTRACT

Judicial activism has always been a source of heated debate, particularly in the light of recent developments. Over the last few years with various controversial decisions, judges of the Supreme Court as well as various high courts have once again triggered off the debate that has always generated a lot of heat. The Indian Judiciary has taken upon itself the task of ensuring maximum freedom to the masses and in the process, to galvanize the executive and the legislature to work for public good. However, this changing stance of the judiciary from moderate to active role has invited wrath from some sections of the society, criticism from some others and support and cheers from still other sections. Some political scholars feel that the judiciary is usurping powers in the name of public interest while according to others, judicial activism and interference is actually preventing the executive from going astray.

But what the term "judicial activism" actually connotes is still ambiguous. It is opined that judicial activism is an attempt to promote democracy but on the other hand it is argued that judicial activism is in itself undemocratic. This paper is an attempt to bring out the exact connotation of "judicial activism" and to find out its effects on today's changing society.

Keywords: Judicial Activism, Public Interest Litigation

1. Introduction

The framing of the Constitution of India established the three wings of effective governance namely the legislature, the executive and the judiciary. It provides for separation of powers and hence demarcates the powers and areas of all these three machineries. However, sometimes with the failure of the legislature and the executive, the separation of power remains a theory only in the text book and the third wing of governance, the judiciary assumes powers unprecedented for under the name and guise of judicial review, which is a very basic feature of the constitution of India.

From the inception of legal history till date, various critics have given various definitions of judicial activism, which are not only different but also contradictory. Lord Hewart, CJ. Once said "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[1] It is from this concept that judicial activism emanated and found expression through judgments of various "activist" judges. They have been responsible for taking justice to the doorsteps of the citizens, when necessary, through a gratuitous and uncalled for measure. By stretching the letter of the law a little and acting according to the spirit behind it, the judiciary has intervened in cases where there is blatant misuse of discretion of executive authority.[2]

2. Origin of Judicial Activism

Two theories can be named to the origin of judicial activism:

2.1. Theory of Social Want

This theory states that judicial activism emerged due to the failure of the existing legislations to cope up with the existing situations and problems in the country and it became incumbent upon the judiciary to take on itself the problems of the oppressed and to find a way to solve them. The only way left to them within the framework of governance to achieve this end was to provide non-conventional interpretations to the existing legislation, so as to apply them for greater good. The supporters of this theory opine that "judicial activism plays a vital role in bringing in the societal transformation. It is the judicial wing of the state that injects life into law and supplies the missing links in the legislation…having been armed with the power of review, the judiciary comes to acquire the status of a catalyst on change."[3]

2.2. Theory of Vacuum Filling

The theory of vacuum filling states that a power vacuum is created in the governance system due to the inaction and laziness of any one organ. When such a vacuum is formed, it is against the good being of the nation and may cause disaster to the democratic set up of the country. Hence,

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1. *Simon James and Chantal Stebbings (eds.), A Dictionary of Legal Quotations, 1997, Universal Law Publishing Co. Pvt. Ltd., Delhi, at p. 80.*
2. *Sheela Barse v. Union of India (1986) 3 SCC 596.*
3. *Shailja Chander, Justice V.R. Krishna Iyer on Fundamental Rights and Directive Principles, 1998, Deep and Deep Publications, New Delhi, at p. 223.*

nature does not permit this vacuum to continue and other organs of governance expand their horizons and take up this vacuum. In this case, the vacuum is created by the inactivity, incompetence, disregard of law, negligence, corruption, utter indiscipline and lack of character among the two organs of governance, the legislature and the executive.[4] Hence, the judiciary is left with no other alternative but to expand its horizons and fill up the vacuums created by the executive and the legislature.

3. Origin Traced to Equity and Natural Rights

The concept of judicial activism found its roots in the English concepts of 'equity' and 'natural rights'. On the American soil, these concepts found expression in the concept of 'judicial review'. The first landmark case in this regard was the case of Marbury v. Madison.[5] In this case, for the first time the judiciary took an active step and took a step above the legislative actions. It was concluded that a law repugnant to the Constitution is void and that the courts as well as other departments are bound by that instrument. This judgment received lots of criticisms from different quarters, but judicial review was here, and it was here to stay. In the initial stages, only in respect of substantive laws, the doctrine of due process was applied but later the procedural laws were also brought within its purview. Between 1898 and 1937, the American Supreme Court declared 50 Congressional enactments and 400 State laws as unconstitutional.

With the power of judicial review up in its sleeves, the American judiciary started the modern concept of judicial activism in 1954 with the landmark judgment in Brown v. Board of Education.[6] The earlier position taken in Plessy v. Ferguson,[7] was rejected by the Supreme Court at the risk of disturbing the institutional comity and delicate balance between the three organs of the State.

4. Introduction of Judicial Activism in India

The history of judicial activism can be traced back to 1893, when Justice Mehmood of the Allahabad High Court delivered a dissenting judgment which sowed the seed of activism in India, in which he gave the widest possible interpretation of the relevant law and laid the foundation stone of judicial activism in India.

After independence, the Indian executive has always looked upon the judiciary as a hostile branch of the State. This view gained popularity and exploitation and corruption became inbuilt in the political system.[8] In this scenario, some emergency situations arose which could not wait for the Parliament for its looking into. Hence, it became a responsibility of the judiciary to do something to provide relief to the oppressed masses of the society. In the historic case of Mumbai Kamghar Sabha v. Abdul Bhai,[9] the Apex Court introduced the doctrine of judicial activism, though without the nomenclature. The theory of judicial activism received impetus in the case of Maneka Gandhi v. Union of India,[10] where the Apex Court substituted the due process clause in Article 21 instead of 'procedure established by law' in order to bypass the absolutism of the Executive and its interference with individual freedom.

Prior to the 1970's, the view which was prevalent among the masses could be seen through the landmark judgments such as Golaknath v. Union of India.[11] The Judiciary, however, changed its stance and formulated new interpretations of laws based on the principles of natural justice, i.e. humanity, morality, reason, liberty, justice and restraint along with the wholesome spirit of the Constitution through the case Keshvanand Bharati v. State of Kerala[12] and Maneka Gandhi v. Union of India.[13] It was in the case of Keshvanand Bharati v. State of Kerala that the Court outright rejected the stance that the Parliament is sovereign and also formulated the 'doctrine of basic structure' which formed an impenetrable structure against all the despotic and whimsical actions of the executive or for that matter, the legislature and which stated that the basic structure of the Indian Constitution could not be amended. In Sunil Batra v. Delhi Administration,[14] Justice V. R. Krishna Iyer described the situation in the following words: "Though legislation was the best solution, but when lawmakers take for far too long for social patience to suffer, Courts have to make do with interpretation and curve on wood and sculpt on stone without waiting for the distant marble." It is often suggested that the judiciary tried to regain its constitutional place and people's faith through judicial activism. Though this could be one of the reasons, this cannot be the sole reason. The judiciary fought a long struggle for its place in the governance since its inception. Most notable amongst them are: the evolution of basic structure doctrine in Kesavananda Bharati; insistence on due process requirement in post-Maneka Gandhi era; liberalization of substantive and procedural requirements of locus standi; and vigilant safeguard of the power of judicial review.

5. Judicial Activism and Public Interest Litigation

Public Interest Litigation (PIL) is an offshoot of Judicial Activism. The term PIL comes to us from American Jurisdiction where it was designed to provide legal

4. *Subhash C. Kashyap (ed.), Judicial Activism and Lokpal, 1997, Uppal Publishing House, New Delhi, at p.71.*
5. *Marbury v. Madison (1803) 5 U.S. (1 cranch) 137.*
6. *Brown v. Board of Education (1954) 347 U.S. 483.*
7. *Plessy v. Ferguson(1896) 163 U.S. 537.*
8. *B. Venkatachalapathi, "Politics of Violence in India", 1998, The Third Concept, Vol. 12, No. 141, at p. 17.*
9. *Kamghar Sabha v. Abdul Bhai, AIR 1976 SC 1465.*
10. *Maneka Gandhi v. Union of India, AIR 1978 SC 853.*
11. *Golaknath v. Union of India, AIR 1967 SC 1643.*
12. *Keshvanand Bharati v. State of Kerala, AIR 1973 SC 1641.*
13. *Supra note 10.*
14. *Sunil Batra v. Delhi Administration, AIR 1978 SC 1548.*

representation to previously unrepresented groups and interests. Therefore, it is a judge-led and judge- induced strategy and represents high bench mark of judicial creativity and sensitivity to the problems of the weak and vulnerable. In S.P. Gupta v. Union of India,[15] the Supreme Court held that independence of Judiciary is a matter of grave public concern.

The Indian judiciary has always been active in the sense that whenever approached, it has responded, and has hardly decided not to decide. But 'judicial activism' is not activism in this sense. Instead, it denotes a phenomenon when the judiciary departs from its role as a conventional adjudicator and acts in innovative manners by entering into policy issues normally assigned to the other organs of the government. In many cases the judiciary has either acted without being activated, i.e., suo motu, or enabled its activation in simple and speedy manner by relaxing the substantive and procedural requirements of locus standi.[16] Just to illustrate, the canvass of judicial activism ranged from the protection of historical places to environmental pollution; from sexual harassment at the work place to adoption of children by foreigners; from exposing corruption at high places in the government to granting compensation for violation of FRs, etc. Consequently, now the Judiciary can legitimately claim itself to be 'an arm of social revolution'.[17]

Modification of the traditional requirement of standing was sine qua non for the evolution of PIL and any public participation in justice administration. The need was more pressing in a country like India where a great majority of people are either ignorant of their rights or are too poor to approach the court. Realizing this, the Court held that any member of public acting bona fide and having sufficient interest has a right to approach the court for redressal of a legal wrong, especially when the actual plaintiff suffers from some disability or the violation of collective diffused rights is at stake. The Court has, however, been careful that any 'busybody' or 'meddlesome interloper' does not misuse this liberalization. In certain instances fine has been imposed for misusing the judicial process.[18]

The judicial activism and PIL have, however, led to new problems. Some of them include unanticipated increase in the workload of the superior courts; lack of judicial infrastructure to determine factual matters; gap between the promise and reality; abuse of process; friction and confrontation with fellow organs of the government; and dangers inherent in judicial populism. The Supreme Court on 17th of December 2007 came down heavily on Judicial Activism, warning Judges that they must exercise restrain or else they politicians may curtail their independence. The Court further observed that "If the judiciary does not exercise restraint and overstretch its limits, there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the powers or even the independence of the Judiciary".[19]

6. Judicial Activism Justified or Not

The question now arises whether judicial activism is right or wrong. Here is some inquiring into the views of that segment of the society, which postulates judicial activism as a wrong practice:

(i) The first opinion they have is that, judicial activism will have a detrimental effect on our democratic order. They opine that the people are losing their faith in their political leadership, bureaucracy and governmental mechanism. No one is spared of a serious suspicion, not even the Prime Minister of the country.[20]

(ii) According to them, judicial activism is the outcome of the judiciary's zeal to be in the limelight. Moreover, there are similar flaws and shortcomings in judicial administration as in other administrative systems. In other words, the healer becomes the killer, the saviour the captor.[21]

(Iii) The critics point out the abuse of PIL. Even the Chief Justice of the Supreme Court has cautioned the legal community against misuse of PIL and emphasized the need for its proper regulation.[22] The cases of Janta Dal v. H.S. Chowdhari,[23] Krishna Swami v. Union of India[24] and Simranjit Singh Mann v. Union of India,[25] are fine examples where the petitioners tried to abuse PIL to achieve political ends.

On the other hand, the supporters of judicial activism give the following parallel arguments to the above:-

(I) It has become obvious that not only has judicial activism activated the judiciary but also has awakened the executive and the legislature too. Several new legislations have appeared on the scene after judiciary's efforts and directions (The Consumer

15. *S.P. Gupta v. Union of India, AIR 1982 SC 149.*
16. *S. P. Sathe, Judicial Activism in India – Transgressing Borders and Enforcing Limits, 2002, Oxford University Press, New Delhi at p. 201-09.*
17. *Granville Austin, The Indian Constitution: Cornerstone of a Nation, 1966, Oxford: Clarendon Press, at p.164.*
18. *Balco Employees v. Union of India AIR 2001 SC 350.*
19. *Is Judicial Activism Itself on Trial? Available at http://www.merinews.com/catFull.jsp?articleID=128554.*
20. *S. N. Chary, Mera Bharat Mahan (My India is Great), 1997, Wheeler Publishing, New Delhi, at p.56.*
21. *P.B. Sawant, Judicial Independence- Myth & Reality, 1987, Board of Extra-Mural Studies, Pune, at p. 70.*
22. *T. R. Andhyarujina, Judicial Activism and Constitutional Democracy in India, 1992, N. M. Tripathi Pvt. Ltd., Bombay, at p. 8.*
23. *Janta Dal v. H.S. Chowdhari, (1992) 4 SCC 653.*
24. *Krishna Swami v. Union of India, (1992) 4 SCC 605.*
25. *Simranjit Singh Mann v. Union of India, (1992) 4 SCC 653, Ashok Kumar Pandey v. The State of West Bengal and Ors., AIR 2004 SC 280.*

Protection Act, 1986, The Environmental (Protection) Act, 1986, Protection of Human Rights Act, 1993 etc.). Judicial activism has unearthed several scams and scandals.[26]

(ii) The judiciary, like the legislature, is also manned by human beings who come from the same social milieu and are subject to same human frailties and social constraints. No institution has monopoly rights to weaknesses or to making mistakes.

(Iii) The apex Court itself has given cautious guidelines on the abuse of PIL in several cases.[27]

7. Conclusion

Recently, our country has witnessed instances of judicial activism. Tinsel world celebrity Sanjay Dutt has been convicted of offences under the Arms Act committed in 1993. Manu Sharma's acquittal was a patent miscarriage of justice and there was a shrill public outcry. On appeal, the High Court has convicted Sharma, despite Ram Jethmalani leaving no stone unturned to ensure his acquittal. No matter what be the criticisms against judicial activism, it cannot be disputed that judicial activism has done a lot to revolutionize the conditions of the masses in the country. The fact that judicial activism has set things right is difficult to ignore.

The treatment of the Constitution by the Supreme Court as a "living" document that is able to be translated differently over time for the good of the people has as many skeptics as it does supporters. But, if we do not allow the Supreme Court to translate the Constitution who then, should the people chose to do such an important job. However, problem arises when instead of directing the authorities concerned to perform their duties, Courts start doing it themselves by what is called "Judicial Enactments" or by inadvertently performing executive functions. There are several instances where the Legislature or/and the Executive have questioned Judiciary's authority to perform functions not to be discharged by Courts.

However, with the aim to reduce this growing trend, the Apex Court has said that the Judiciary should confine itself to its proper sphere, realizing that in a democracy many matters and controversies are best resolved in a non-judicial setting. In the name of Judicial Activism judges cannot cross their limits and try to take over functions which belong to other organs of the State. As rightly opined by Justice A.S. Anand, "Acting within the bounds of law, judges must always rise to the occasion as 'guardians of the constitution', criticism of judicial activism notwithstanding."[28]

26. e.g. Hawala Scam, Fodder Scam, St. Kits Scam, Illegal Allotment of Government Houses and Petrol Pumps, Fertilizer Scam etc.

27. People's Union for Democratic Rights v. Union of India, Bandhua Mukti Morcha v. Union of India, M.C. Mehta v. Union of India.

28. Justice A.S. Anand, Former Judge, Supreme Court of India, Justice N.D. Krishna Rao Memorial Lecture Protection of Human Rights - Judicial Obligation or Judicial Activism, Aavailable at http://www.ebc-india.com/lawyer/articles/97v7a2.htm.

The Prevention of Torture Bill, 2010: Kantian versus Utilitarian Reasoning

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ABSTRACT

To answer the moral and legal question of justification of torture, most of the Jurists have taken for granted the proposition that the infliction of torture is a sufficiently grave evil to require a distinctly demanding moral scrutiny.

Immanuel Kant developed a theory that is based on the belief that reason is the final authority for morality. A moral act is an act done for the right reasons. Kantian Theory is closely related to the doctrines of all major religions, the Bible states 'do unto others as you would have them do unto you'. At the centre of Kantian ethics is his categorical imperative, which is a set of universal rules that outline 'that only the good will, a will to act out of a sense of duty, has unqualified moral worth'. Therefore, as per his theory, where actions are intrinsically right or wrong, torture can be seen to be unacceptable, whatever the circumstances and consequences. Kant holds that one cannot undertake immoral acts like torture even if the outcome is morally preferable, such as the early ending of a war or the saving of lives.

However, Jeremy Bentham put forward the theory of utilitarianism. Utilitarianism can be summed up in the phrase, 'everyone should act in such a way to bring the largest possible balance of good over evil for everyone involved'. Using this theory, torture can be justified if it brings about a 'greater good for a greater number of people'. The ends justify the means. Using Utilitarianism Theory, if the torture of one person means that several people are located and rescued from a dire situation, then that torture is justifiable. Therefore, what a utilitarian has to decide would be whether or not the torture has a good enough success rate at revealing information that a suspect is unwilling to give otherwise.

In this paper the authors try to analyse the proposed 'Prevention of Torture Bill, 2010' on the basis of the conflicting ideologies of the two great jurists i.e. Immanuel Kant and Jeremy Bentham.

Keywords: Torture, Human Rights, Liberty, Utilitarianism.

1. Introduction

Torture as a tool of interrogation is not a new phenomenon. It has been used to coerce information from subjects at least since the first written law codes, and its use has, at various times in the past, been ubiquitous. While all ethicists agree that torture is morally repugnant, there are competing theories-deontology and utilitarianism.[1] The deontological claim is that torture is categorically wrong under any circumstances because of its intrinsic affront to human decency and dignity. If there is anything meaningful in the concept "human rights", then the right of the individual not to be subjected to torture is so fundamental that it cannot be derogated from even in extreme circumstances. The opposing view, which is analysed in this paper, is that there are utilitarian "exceptions" that would allow torture in certain circumstances, even while acknowledging that the practice is morally repugnant.

In particular, this paper considers the underpinnings of the prohibition against torture in international law and also analyses the Prevention of Torture Bill, 2010 proposed by the Indian Parliament.

2. Prevention of Torture Bill, 2010

2.1. An Overview

The Prevention of Torture Bill, 2010 introduced by the Ministry of Home Affairs, India, makes torture a punishable offence. India being a signatory[2] to the U.N. Convention against Torture, 1975[3] is under an obligation to ratify the Convention by enacting a law on torture in India. The Bill is an attempt on the part of the Indian Legislature to bring its laws in conformity with the international standards. The Bill defines torture and prescribes conditions under which torture is punishable.

The Preamble states "A Bill to provide punishment for torture inflicted by public servants or any person inflicting torture with the consent or acquiescence of any public

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1. *The most important proponent of deontological moral theory in Western thought is undoubtedly Immanuel Kant. See Immanuel Kant, "Foundations of The Metaphysics of Morals" (London: Cambridge Univ. Press, 1991). Important proponents of utilitarianism (or, more generally, consequentialism) include Jeremy Bentham, (see Jeremy Bentham, "An Introduction to the Principles of Morals and Legislation" J.H. Burns & H.L.A. Hart eds., Univ. of London 1970)).*
2. *India signed the U.N. Convention against Torture on October 14th, 1997.*
3. *United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1975.*

servant and for matters connected therewith or incidental thereto." The Bill seeks to provide punishment for torture committed by Government officials. It states that if a public servant acts in a way that causes grievous hurt to a person or endangers the life, limb and health (whether mental or physical) of a person in order to obtain information or a confession, the act shall be termed as torture. However, it exempts any hurt caused due to an act that falls within the purview of any procedure established by law.[4] The Bill makes torture a punishable act only when a public servant tortures any person for the purpose of extorting from him any information leading to detection of offences, or on the ground of his religion, race, place of birth, residence, caste, community, language or any other ground. The Bill further prescribes the punishment i.e. imprisonment of either description for a term which may extend to ten years along with fine.[5] The proposed legislation, inter alia, defines the expression "torture", provides for punishment to those involved in the incidents of torture and specifies the time limit for taking cognizance of the offence of torture.

3. Bentham's Utilitarian Argument

Jeremy Bentham propounded the theory of utilitarianism. Its main idea is "the highest principle of morality is to maximize happiness, the overall balance of pleasure over pain." According to him, the right thing to do is whatever will maximize utility. By "utility", he means whatever produces pleasure or happiness, and whatever prevents pain or suffering.[6]

Maximizing utility is a principle not only for individuals but also for legislators. In deciding what laws or policies to be enacted, a government should do whatever will maximize the happiness of the community as a whole. Community, as per Bentham, is a fictitious body, composed of the sum of the individuals who comprise it.

Let us take the 'ticking bomb scenario'. Imagine you are the Head of the National Intelligence Agency, and you captured a terrorist suspect, whom you believe has information about a bomb set to go off in the city later on the same day. In fact you have the reason to suspect that he planted the bomb himself. As the clock ticks down, he refuses to admit to being a terrorist or to divulge the bomb's location. Would it be right to torture him until he tells you where the bomb is and how to disarm it? Would the utilitarian theory as proposed by Bentham justify the use of torture in the 'ticking bomb scenario'?[7]

Argument for doing so begins with a utilitarian calculation. Torture inflicts pain on the suspect, greatly reducing his happiness or utility. But thousands of innocent lives will be lost if the bomb explodes. So one might argue that on utilitarian grounds, that it is morally justified to inflict intense pain on one person if doing so will prevent death and suffering on a massive scale.

Jeremy Bentham argued that there are cases in which nobody would object to the deployment of torture. Bentham's justification for the use of torture was based on his theory of utilitarianism— that, in a particular case, the benefits that would flow from the limited use of torture would outweigh its costs. The ticking bomb scenario seems to support Bentham's side of the argument. Numbers do seem to make a moral difference. If thousands of innocent lives are at stake, as in the ticking bomb scenario, even the most ardent advocate of human rights would have a difficult time insisting it more morally preferable to let vast number of innocent people die than to torture a single terrorist suspect who may know where the bomb is hidden. Using this theory, torture can be justified if it brings about a 'greater good for a greater number of people'. The ends justify the means. If the torture of one person means that several people are located and rescued from a dire situation, then that torture is justifiable. Therefore, what a utilitarian has to decide would be whether or not the torture has a good enough success rate at revealing information that a suspect is unwilling to give otherwise.

On the utilitarian side, a number of commentators believe that in a post-September 11 world, the use of torture is permissible, or indeed justifiable, in extreme situations to obtain information for investigative purposes.[8] The use of torture, under this view, would be justifiable in the war against terrorism as a last resort "when there is no alternative and when hundreds, thousands, potentially hundreds of thousands of lives hang in the balance . . . ."[9] The argument is that "methods of interrogation that normally would not be tolerated in a free society however might be constitutionally permissible if there is a compelling government interest that out-weighs an individual's rights."[10] Under this utilitarian view, torture is morally permissible if the benefits to third parties significantly outweigh the harm to the victim.

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4. *Section 3, Prevention of Torture Bill, 2010.*
5. *Section 4, Prevention of Torture Bill, 2010.*
6. *Michael J. Sandel, "Justice: What's The Right Thing to Do?" (New York: Farrar, Straus and Giroux, 2009) 34.*
7. *Ibid.*
8. *John Alan Cohan, "Torture and the Necessity Doctrine"; See Marcy Strauss, Torture, 48 N.Y.L. SCH. L. REV. 201, 227 (2003-04). No less a civil libertarian than Justice Thurgood Marshall said in a dissent: The public's safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. . . . If trickery is necessary to protect the public, then the police may trick a suspect into confessing. . . . All the Fifth Amendment forbids is the introduction of coerced statements at trial. New York v. Quarles, 467 U.S. 649, 686 (1984).*
9. *Ibid, at p. 254.*
10. *Ibid, at p. 239.*

"It just isn't true that one should allow a nuclear war rather than killing or torturing an innocent person. It isn't even true that one should allow the destruction of a sizable city by a terrorist nuclear device rather than kill or torture an innocent person. To prevent such extraordinary harms extreme actions seem to be justified."[11]

4. Kant's Deontological Reasoning

A Kantian moral system revolves around the concept that the basis of morality is our shared humanity. What makes our humanity a moral trait is our ability to have reasons for our actions, and therefore, our potential to have a common good will, is the most valuable object in Kantian philosophy. A good will is in turn made possible by our ability to control our own actions in accordance with the categorical imperative.

Kantian philosophy recognizes the 'Categorical Imperative' as a motive for an action derived independently of any circumstance a situation may offer. This differs from the hypothetical imperative: If you want X, then do Y. These are always conditional, where motive to action rises from the ends necessary to fulfil a goal, and authorizes all means necessary to achieve that goal. "If the action would be good solely as a means to something else," Kant writes, "the imperative is hypothetical. If the action is represented as good in itself, and therefore as necessary for a will which of itself accords with reason, then the imperative is categorical."[12]

For Kant, a categorical imperative commands, well, categorically- without reference to or dependence on any further purpose. "It is concerned not with the matter of the action and its presumed results, but with its form, and with the principle from which it follows. And what is essentially good in the action consists in the mental disposition; let the consequences be what they may." Only a categorical imperative, Kant argues, can qualify as an imperative of morality.[13] Therefore, in Kantian philosophy, in order for any action to be moral, to stem from a truly good will, the motive behind it must conform to a categorical imperative.

There are two methods of forming a categorical imperative. The first is the universal formula of the categorical imperative. This formula stipulates that for an action to be moral, a person's maxim for that action must be able to be a universal law for all beings. By "maxim", Kant means a rule or principle that gives the reason for your action. He is saying, in effect, that we should act only on principles that we could universalize without contradiction. An action can fail to universalize by either being producing a contradiction in the law of nature or a contradiction in the will. A contradiction in the law of nature is when one is unable to universalize the maxim because doing so would prevent one from performing the action that the maxim wishes to effect. A contradiction in the will is when one cannot have a maxim that he may at one time or another time later wish to. It will not be a universal law for all beings.[14]

However, in order to test the universality of the maxim, it is necessary to establish what the maxim is. Torture cannot be justified. As per Kant, for use of torture to become a categorical imperative it has to be universally applicable to each and every circumstance. We cannot make it our categorical imperative by justifying it in one situation and unjustified in another. In a ticking bomb situation we may use torture against a suspect and we succeed in getting the information and if we make torture as our categorical imperative then there might be instances when we do not succeed in getting the desired information and hence end up torturing an innocent person. Therefore, there is a contradiction and the maxim is not satisfied.

Even the legislators cannot justify the use of torture in all situations. Torture may be justified against a terrorist for the purpose of obtaining information about the location of a bomb in order to protect the lives of many citizens but it cannot be justified for the purpose of seeking consent of the poor farmers for acquisition of their lands. If the use of torture is not legitimate at all times, then, it does not hold the ground as a categorical imperative in Kantian notion of 'universalize your maxim.'

The second method of formulating the categorical imperative is the humanity formula- Treat persons as ends. Kant says that "man, and in general every rational being, exists as an end in himself, not merely as a means for arbitrary use by this or that will."[15] This is the fundamental difference between persons and things. Persons are rational beings. They don't just have a relative value, but if anything has, they have an absolute value, an intrinsic value i.e. to say human beings have dignity. "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."[16] This is the formula of humanity as an end.

The humanity formula stipulates that people have to always be treated as humans, with the ability to make their own, autonomous choices utilizing their practical reason. It specifically states that human beings are not means to an end, and cannot be used as such like one would use a common tool. To use someone as a tool strips them of their dignity, another inviolable human trait. The underlying message is to respect the basic humanity of every person, and never to use anyone as a means to an end.

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11. Michael S. Moore, "Torture and the Balance of Evils", 23 ISR. L. REV. 280, 328 (1989).
12. Kant, "Groundwork", p. 414.
13. Ibid, at p. 416.
14. Supra note. 7 at p. 142.
15. Supra note. 13 at p. 428.
16. Supra note. 13, at p. 429.

5. Analysis of the Bill

The Statement of Objects and Reasons says that one of the reasons for introducing the Bill is to ratify the U.N. Convention against Torture. For the purpose of the Convention, the term 'torture' means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[17] Article 4 of the Convention makes all acts of torture and attempts to commit torture, punishable. However, the proposed Bill makes only the public servants culpable whereas the Convention also includes 'a person acting in official capacity.' Therefore, the language of the Convention is wider than the Bill.

The Bill does not contain a number of provisions contained within the definition of torture in the Convention. The definition of torture (a) is inconsistent with the definition of torture in the Convention against Torture, (b) requires the intention of the accused to be proved, (c) does not include mental pain or suffering, and (d) does not include some acts which may constitute torture. The Bill states that grievous hurt or danger to life, limb or health has to be inflicted intentionally. The person alleging torture will have to prove that the accused intended to grievously hurt or endanger the life, limb or health of the victim. This requirement is additional to the provisions in the Indian Penal Code, 1860.[18]

The Bill defines torture as the causing of grievous hurt, or endangering the life, limb, or health of a person. The Bill states that the meaning of grievous hurt in the Bill is the same as that in the IPC. Grievous hurt as defined in the IPC does not include mental suffering. The definition of torture in the Bill covers danger to mental health, but does not cover damage caused to mental health or any other form of mental suffering.

The Bill does not contain any provision allowing victims of torture to claim compensation. Article 14 of the Convention against Torture requires member countries to ensure that victims of torture have a right to compensation. The Supreme Court has held torture to be a violation of the fundamental right to life under Article 21 and has stated that compensation may be granted to victims of torture.[19]

6. Conclusion

The use of torture by a public official is clearly against the basic human rights of an individual. Such an act is also prohibited by the UN Convention on Torture. Further, in the ticking time bomb scenario, the official, in stripping the suspect of his ability to conduct practical reasoning, turns him into a tool for obtaining the information related to the bomb. This obviously violates the humanity formula of the categorical imperative, and makes the action immoral. For Kant, justice requires us to uphold the human rights of all persons, regardless of who they are and whatever they do, simply because they are human beings, capable of reason, and therefore, worthy of respect. As per his theory, torture can be seen to be unacceptable, whatever the circumstances and consequences. Kant holds that one cannot undertake immoral acts like torture even if the outcome is morally preferable.

On the contrary, Bentham's utilitarianism seems to support torture in exceptional circumstances. But if we take such a stand then it would put an individual into a vulnerable state. As this would imply that we are justifying the abuses practised by US soldiers in the One-Alpha cell block of Abu Ghraib prison.[20] In the present scenario, especially in the era of global human rights movement, such a stance is incorrect. The emerging human rights jurisprudence seems to be a reflection of the Kantian philosophy as both condemn torture as a crime against humanity.

Although, the proposed Indian legislation prohibits the use of torture by public servants, however, in Section 3,[21] it exempts any hurt to be termed as torture, if it is caused due to an act that falls within the purview of any procedure

17. *Article 1, United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1975.*
18. *Section 320, Indian Penal Code, 1860, defines 'Grievous Hurt'. It does not require the intention of the accused to cause "grievous hurt" to be proved.*
19. *Sube Singh v. State of Haryana, AIR 2006 SC 1117; D.K. Basu v. State of West Bengal, AIR 1997 SC 610.*
20. *The soldiers forced Iraqis into simulated sexual positions, stripped them naked, and forced them to masturbate. The officer in charge of these torture sessions, Charles Graner, reportedly hit prisoners with his fists and iron rods. He made the prisoners eat food from a toilet. In another technique, the US soldiers confronted the Iraqis with police dogs. Yet another instance of inhumane treatment had a prisoner's neck tied to a dog's leash, forcing him to walk on all fours. Many of these tortures, including the act of taking pictures of them, put Iraqi prisoners to shame because of established Iraqi custom. Such kind of public embarrassment could be considered as the highest form of dishonour for Iraqis. See Interrogation and Torture White Paper Team Report for Project 2 University of Washington, Seattle, CSEP 590 TU University of California, Berkeley, PP 190/290-009 By Barbra Ramos (UCB GSPP).*
21. *Section 3, Prevention of Torture Bill, 2010 states- Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purposes to obtain from him or a third person such information or a confession which causes—*
    (i) grievous hurt to any person; or
    (ii) danger to life, limb or health (whether mental or physical) of any person,

established by law. The expression 'procedure established by law' suggests that if any law provides for use of torture, in that case torture is justified, and it also gives a very slippery slope as in a way it legalizes few acts of torture, which may be abused, resulting in torturing an innocent person. As per Kant, torture is per se immoral, there are no exceptions. Therefore, at this juncture alone the Bill does not hold good at the touchstone of the Kantian philosophy. Otherwise, the proposed legislation is a good attempt on the part of Indian Parliament to prevent the use of torture by public servants.

is said to inflict torture:
Provided that nothing contained in this section shall apply to any pain, hurt or danger as aforementioned caused by any act, which is inflicted in accordance with any procedure established by law or justified by law.

Explanation—For the purposes of this section, 'public servant' shall, without prejudice to section 21 of the Indian Penal Code, also include any person acting in his official capacity under the Central Government or the State Government.

Intellectual Property Rights Philosophy

*Dr. V.L.Mony**

ABSTRACT

Intellectual Property Right is type of property right, which is based on the philosophical concepts of right and property. Under the Legal Theory, much effort has not been made to conceptualize the philosophical aspect of IPR. However, with the increased significance of IPR in the modern context after the adoption of TRIPSs, a mandatory requirement, the theorists have stated codifying the topic. The major contributions on the philosophy of property are by Hegel and Lockean Theories. This article is an attempt to look into the philosophy of Intellectual Property by analyzing their views and arrive at a philosophical base for the Intellectual Property Right Theory. The branch of IPR philosophy need to be more focused by the academicians in days to come.

Keyword: Intellectual Property, Hegel, Locke, Philosophy.

1. Introduction

Intellectual property generally refers to creative idea or knowledge "creation of the mind" which includes copyright and industrial property such as patents, trademarks, and industrial designs. Although the history of intellectual property protection could be traced back to as early as Roman law which offered "maker's marks" legal protection, the first formal intellectual property right protection is said to be decree in Venice between 1544 and 1545 which protected copyrights against piracy. Contemporary international protection of intellectual property rights in based on an integrated trade framework which goes way back to the Paris Convention 1883 protecting industrial property and the 1886, Berne Convention Protecting copyrights. Its latest development is the establishment of the World Trade Organization (WTO) and the Conclusion of the Agreement of Trade- Related Aspects of Intellectual Property Rights (TRIPS) in 1995. Under the TRIPS framework, protection of intellectual property has domestic as well international significance.

2. Hegel's Philosophy

Many proponents of intellectual property law seek refuge in a personality theory of property associated with G.W.F. Hegel.[1] This theory seems to protect intellectual property from potential attacks based on utilitarianism. Famously, utilitarianism disallows natural rights and recognizes property only contingently in so far as it furthers society's goal of utility or wealth maximization. Personality theory, in contrast, supposedly offers a principled argument that property in general, and intellectual property, specifically, must be recognized by the state, regardless of efficiency considerations. Personality theory also seems to protect intellectual property from assault by critics who maintain that it is not "true" property at all. Finally, personality theory has also been used to support an argument for heightened protection of intellectual property beyond that given to other forms of property such as the Continental "moral" right of artist in their creations.

It is true that Hegelian theory supports the proposition that a modern constitutional state should establish a minimal private property regime because property plays a role in the constitution of personality; it is not true, however, that Hegelian theory requires that society respect any specific type of property co or any specific claim of ownership. It is true that Hegel thought that intellectual property could be analyzed as "true" property and not as sui generis right merely analogous to property; however. It is not true that Hegel ascribed any special right to intellectual property as such, Hegel's theory cannot be used to support the proposition that the state must recognize intellectual property claims. Rather, Hegel would argue that if the state, in its discretion, were to establish an intellectual property regime, it would be consistent to conceptualize it in terms of property. However, a model that advances a moral right of artists would be inconsistent with Hegelian property analysis (although, society could decide to grant such a right for other practical reasons).

To clarify, although Hegel argued that property is necessary for personhood, he left to practical reason the decision as to which specific property rights a state ought to adopt. Hegel did not romanticize the creative process that gives rise to intellectual property. Despite a widespread misconception among American legal

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1. *Edward J. Damich, The Right of Personality: A Common –Law basis for the Protection for the Moral right of Authors, 23 Ga.L.Rev.1 (1988); Justin Hughes, The Philosophy of Intellectual Property, 77 Geo.L.J. 287 (1988); Neil Netanel, Alienability Restrictions and the Enhancement of Author Autonomy in United State and Continental Copyright Law, 12, Cardozo Art & Ent. L.J. 1 (1994)*

scholars, Hegelian theory does not accept a first –occupier theory of property rights. More generally, Hegelian theory completely rejects any concept of natural law, let alone any natural right of property. Jeremy Bentham, the founder of modern utilitarianism, believed the very concept of natural rights to be "nonsense on stilts."[2] Hegel goes a step further and considers the expression "natural rights" to be an oxymoron. To Hegel, nature is unfree. Legal rights are artificial constructs we create as means of escaping the casual chains of nature in order to actualize freedom. Consequently, rights are unnatural.

Having no recourse to nature, Hegel explained property on purely functional grounds and the role it plays in the modern state. In his Philosophy of Right,[3] Hegel revealed the internal logic that retroactively explains why constitutional, representative governments were supplanting feudal governments and why free markets were supplanting feudal economies in the Western world at the time he was writing. Hegel's question is precisely that of contemporary nation-building: Is the rule of private law a condition precedent to the establishment of a constitutional representative government?

Hegel agrees with classical liberal philosophers of the eighteenth century that the modern state derives from a founding concept of personal freedom, but believes that classical liberalism is too self-contradictory to explain the relationship between the state and freedom. The modern state is not liberalism's hypothetical state of nature, and its citizens are not naturally autonomous individuals exercising negative freedom. Rather, the state and its members engage in complex interrelationships in civil, familial, commercial, and other contexts. Hegel asks, what are logical steps by which the abstract individual of liberty theory becomes the concrete citizen of the liberal state? How do we structure a state so that it actualizes, rather than represses, the essential freedom of mankind? The answer is through mutual recognition. In this sense, personality is erotic; it is nothing but the desire to be desired by others.

This means, first and foremost, that Hegel's property analysis does not relate to all aspects of personality or generally to what Margaret Jane Radin calls" human flourishing," but only to this political aspect of citizenship as respected for the rule of law. Secondly, Hegelian property does not even directly relate to full citizenship, but only to the first intermediary step above autonomous individuality, which I refer to as "legal subjectivity".

Legal Subjectivity is the capacity to respect the rule of law, and nothing more. This is a precondition to the liberal state governed by the rule of law, not the rule of men, as was the feudal state. The autonomous liberal individual enjoys negative freedom from restrains because she hypothetically lives a solitary life. By engaging in commercial relationships of property and contract, the individual subjects herself to legal duties and learns to recognize other people as bearers of legal rights (i.e., legal subjects). When other legal subjects reciprocate and recognize that they have duties to respect the first individual's right of contract and property, that individual also attains the status of subject.

Hegel called this regime of property and contract "abstract" right, precisely because it is a necessary but insufficient part of modern society. Although the legal subject is more developed than the autonomous individual, the subject is empty; devoid of content. The subjectivity created by abstract right provides only the form of personality. Content is added to personality through more complex interrelationships among people at the higher levels of morality, the state in which the person internalizes right, and ethical life, the stage in which the internal subjectivity of morality is reconciled with the external objectivity of obligations to others. Consequently, Hegel would insist that abstract right (including property) is external to the subject. The subject is subjected to law. The legal subject obeys private law not because she subjectively believes that it is right, but because she recognizes it as a mean to accomplish her ends.

This suggests that the legal subject is an uncultured creature who represents an impoverished conception of personhood. The legal subject is fit only for the tawdry business of buying and selling. She is not yet capable of morality or ethics and cannot yet become a lover, mother, friend, participant in civil society, voter, or legislator, let alone an artist. In other words, the subject is only a lawyer. Higher aspects of personality will be created not through the crude legalities of property, but through more complex human interaction.

It follows form the fact that subjectivity created by abstract right is purely formal, that it is only form of property, and not its content, that is relevant to Hegel's analysis. All that matters is that some minimal private property rights exist; the identity of what is owned, bought, and sold is irrelevant for the purpose of establishing the rule of law. One implication of this concept is that although in order to function successful a modern state must recognize some property rights, it is not necessary that it protect any specific property rights. Specific property rights are purely contingent. In Hegel's words, "everything which depends on particularity is [in the regimes of abstract] matter indifference...."

Hegel argues that intellectual property can serve as property because of its formal characteristics, despite its

2. Jeremy Bentham, A Critical Examination of Declaration of Rights, in Bentham's Political Thought 257, 269(Bhikhu Parekh ed., 1973).
3. G.W.F. Hegel, Philosophy of Right (Allen W. Wood ed., H.B. Nisbet trans., 1991).

unique content. Indeed, for Hegel, intellectual property is an ideal candidate for property treatment because its abstraction and intangibility epitomize the radically negative abstraction that is the lowest common denominator of property. Hegelian theory emphasizes that property is a legal right enforceable against legal subject with respect to objects, not a natural relationship between subject and object. However, we frequently conflate our intuitive, natural, empirical relationships with physical objects and out intellectual, artificial, formal, legal property relationships among subjects. Intellectual property is obviously artificial and famously anti-intuitive, thereby making this crucial distinction crystal clear.

Further, a Hegelian property analysis cannot legitimately by use to justify the droit morale or other enhanced right with respect to intellectual property. First, a moral right assumes a unique relationship between artist and creation so that destruction of the creation is somehow harmful to the artist. This is an empirical claim based on the content of the artwork irrelevant to the formal role of property. Second, in so far, as moral right limit an artist's right and power of Alienation over her creations, they conflict with Hegel's analysis of property. Hegel observed that property rights are only fully consummated in the alienation of property through contract. This is because it is only through performance of reciprocal contractual obligations that two legal subject effectively recognize their mutual rights and duties. In other words, in contract, the subject who claims to be law abiding proves it be literally putting his money where his mouth is.

On one hand, Hegel's property theory is powerful not merely because it is satisfying on a metaphysical level, but also because it has surprisingly practical applications. Traditional property analysis finds many aspects of intellectual property doctrine and practices to be mysterious and wonders whether intellectual property is true property. Hegelian analysis, however, makes these problems evaporate. These supposedly troublesome intellectual property rules are not only consistent with property categorization; they are explained by an analysis of the foundations of property. Hence, Hegelian theory offers a powerful tool for the development of coherent, internally consistent, positive law of intellectual property. On the other hand although Hegel invoked elevated ideals of personality and freedom, he proves to be a terrible disappointment to the romantic who cherishes artistic creativity. Hegel's theories cannot legitimately be used to bolster any argument that society must, or even should, adopt any form of intellectual property regime.

3. Locke's Philosophy

Locke starts his analysis of property from a "positive community".[4] For Locke, "the earth and all inferior creatures" are given by God to "mankind in common".[5] What Locke need then is a tool to enable individuals to distinguish something from the common into his/her own without obtaining the consent of the others. For Locke, this is "labor". Locke states:

"Whatsoever then he removes out of the state of nature has provided and left in it, he has mixed his labor with, and joined to it something that it is his own, and thereby makes it his property. It is being removed from the common state nature has placed in it; it has by this labor annexed to it that excludes the common right of other men."[6]

Starting from a common which belongs to all, labor makes all the difference. It is labor that differentiates something from the commons and excludes the common rights of others, therefore, transforms it into private property. The Lockean story of property is a labor oriented theory.

For Locke, the rights to private property are the foundation of his analysis of the governance framework and the thesis of separation of powers. For Locke, it is labor that "in the beginning" removed something from the common and made it private property. Thus labor here then, is a boundary between self and others, between private and common. In this very beginning of the founding moment labor, which is the self, something uncommon, was injected into the common. The injection of labor not only changes part of the common into private domain and extracts or detaches a part from a whole; but also separates the self from others and causes the dissolution the relationship between the private from the public. This injection produces something that the self can defend against the others. A limit of the one's self that excludes others and the same is the basis for rights. In this regard, property rights, and rights in general, come all from a separation and dissolution of relationship.

However, one thing that should not be forgotten (but has seen) is that, however important they might be, private property rights should have their own limit. Both Lockean and Hegelian theses implicitly or explicitly imply limitations on owing private property. Locke sets a clear limit of private property rights:

The same law of nature that does by this means give us property does also bound that property, too… (God has given us all things) as much as anyone can make use of to any advantage of life before it spoils, so much he may by this labor fix a property in ; whatever is beyond this is more than his share and belongs to others.[7]

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4. J.Locke, The Second Treaties of Government (Prentice-Hall Inc., 1997) (1690), S.25, 27.
5. Ibid.
6. Ibid.

This clearly indicates Locke's limit on property rights, which sets the measure of property nature by the extent of people's labor and the convenience for their life. So anyone can claim land, gather fruit, or hunt animals as their private property for their livelihood. However, if people allow their private properties to perish without due use, eg. the fruits they picked rotted before they could use them, the people should be punished. Locke calls this the "common law of nature". Most importantly, any property beyond this limit belongs to others, which means that the limit of private property rights comes from the need of others.

4. Conclusion

The Hegel and Lockean concepts have been analyzed as foundation for the concept of property, recognized in the IPR. It is needed that many efforts have to be done to analyze the property and right theories in relation to various new dimensions by probing it in to the more fundamental texts of Indian origin like Arthasasthra, Bhagavad Gita and other relevant texts which will give more analytical philosophical base for the topic. The subject of Intellectual Property itself is in a state of evolution and hence more focus and further study is required to crystallize and philosophies the concept of IPR as emerging in modern days and context.

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7. Supra note 4.

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