Removing the Barriers in Access to Justice

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Access to Justice: Delayed and Denied

Dinbandhu Vats

"The Judiciary would be the weakest branch of three pillars of the proposed government because it had no influence over either the sword or the purse ...It may truly be said to have neither force nor will, but merely judgment."

- Alexander Hamilton

Introduction

A welfare state governed by the Constitution ensuring welfare for its citizens cannot work without ensuring the Rule of Law which can be understood as equal treatment of all the citizens by the law of the land.

For establishing the Rule of Law it is mandatory for a nation to make sure that all its citizens have equal and open access to justice. Justice as an idea is very dynamic and needs to be looked with different perspective. It is the hall mark of civilized society and can't be equated only with Access to Court or mere legal representation. In simple terms it can be understood that all citizens of a society will get all such opportunity and chance which is promised to all of its citizens.

For understanding the scope of justice let's look at following situations –

"What does a parent from one of India's historically marginalized community do when his/her child is not allowed to sit with others in class? Or, if during the mid-day meal at school, his/her dishes are kept separate from others? Whom does a young mother turn to when a health worker refuses to enter her house? Where does she go when the village headman refuses to give her husband work under a mandatory job guarantee scheme? These are but a few examples of the harsh reality of everyday life for millions of poor and marginalized people in India." [1]

1 Access to justice: A Development Challenge in India?, http://web.worldbank.org/archive/website01291/WEB/0__C-440.HTM

The above paragraph perfectly sums up the situation from ordinary day to day life of Indian society and explores the idea of justice for a person who belongs to marginalized section of society and faces challenges in education, work and other social sphere. To do away with this injustice and ensuring proper and equal opportunity for all its citizens, the Constitution of India promised equality before law under article 14 and to make sure that citizens have equal access to justice delivery mechanism, the Indian Constitution under article 32 provides the right of constitutional remedies.

Constitutional Protection

Owing to the strict separation of power as given under the Indian Constitution, the Indian judiciary is empowered with the task of providing relief and remedies to the citizen in cases when their rights are violated. This institution can be broadly divided into 3 parts- the institution at the district level, state level and the national level.

At the district level the District and Sessions courts are empowered with settling civil and criminal disputes. At the state level, the High Court is empowered with the delivering justice. If we look at the jurisdiction of High Courts its jurisdiction are wider from both the District and the Supreme Court. The High Court, which is situated in every Indian States acts both as the court of first appeal from the decision of as well as takes up the role of Constitutional Courts- which means that a citizen under article 226 of the Indian Constitution can approach the High Court directly in case of violation of its fundamental rights in response to which the High Court can issue writs which are orders which act as constitutional remedies. At the central level, the Supreme Court acting as the guardian of the Indian Constitution ensures justice of the people. The Supreme Court apart from hearing appeals from the high court directly takes up matters of a specific nature that includes the question of large public good under a very innovative concept of Public Interest Litigation.

Being situated in the National Capital Delhi, the SC at times becomes far from the reach of ordinary citizen. There has been demand of establishing various different benches of SC in different parts of country and also of setting up separate central courts of appeal only dealing with the appeals coming from the High Courts.

Buck Stops with Bench !

Justice delayed is justice denied. People lose valuable years of the life in running around the court and they feel deceived, denied and defeated in the absence of timely justice. The huge pendency across states and Union territories is the glaring problem in speedy justice. There are 61300 cases pending in Supreme Court of India.[2] Number

2 http://supremecourtofindia.nic.in/p_stat/pm01032015.pdf

of pending cases in High Courts is 41.54 Lakh and half of these cases are pending for more than 10 years while in District and Subordinate Courts the gigantic more than 2.6 crore cases are pending.[3] The reason behind this pendency is said to be the burden on judiciary due lack of adequate number of Judges. Law Commission in 1987 had recommended 40,000 judges in the country to tide over the problem of pendency of that time. As per this report there should be at least 50 judges available per 10 lakh population.[4] However, in India only 17 judges per 10 Lakh populations are available. Number of Judges per 10 lakh population in Australia are 58, in Canada 75, this ratio is 80 in France, in Britain it is 100 while in US 135 judges are available per 10 lakh population.

But is it true that number of judges alone is the remedy the pendency and the lethargy with which the courts proceed? Experts argue that while lack of judges is no doubt a very pressing issue and the state needs to look into the matter, it cannot be the only cause for pendency of cases. Incompetent judges, rampant malpractices, decreasing quality of legal education, unethical lawyers, are some of the most important reasons that are bogging down the third pillar of our democracy.[5] Lackadaisical approach of police and other investigative agencies slow down justice delivery mechanism. In Indian criminal justice system use of forensics suffers from both an inadequacy of facilities and a lack of capability in the police forces in gathering forensic evidence. Forensic evidence plays a critical role in the investigation of serious crimes, including sexual assault cases. Courts rely on it and it has led to major breakthroughs in a number of cases. However, delay in submitting forensic reports by laboratories or "incorrect expert opinion" often hampers a case and can even lead to acquittal. The Jessica Lal murder case in 1999 is a classic example of an FSL giving an "incorrect" report. The trial court had acquitted Lal's killer, Manu Sharma, while relying on the ballistic report.[6] The role of police is also important in justice delivery. Police takes quite a long time to file the charge sheet, collect the evidences and produce it before the court. According to the Former Chief Justice of India VN Khare "the entire case depends on the investigation conducted in an incident, reports by field experts and materials brought on record by the prosecution and biasness and favouritism of police probe can't be denied in most of the cases because the police work under the political administration." Collection of evidence has become a protracted exercise. In famous hit and run case of actor Salman Khan the prosecution took 13 years to collect evidence and examine and cross examine 27 witnesses.[7] Additionally, the government is one of the major litigants opening Pandora Box of complaint before the courts as large numbers of ceases have filled against the government.

3 PIB Government of India Ministry of Law and Justice 03rd March 2016.
4 http://www.thehindu.com/news/national/cji-thakurs-emotional-appeal-to-modi-to-protect-judiciary/article8516096.ece
5 http://www.thenewsminute.com/article/weep-not-dear-cji-judiciary-much-blame-pendency-cases-42230
6 http://timesofindia.indiatimes.com/india/Forensic-delay-is-defeat-of-justice-Experts/articleshow/49696258.cms
7 http://www.firstpost.com/india/justice-delayed-again-former-chief-justice-of-india-explains-why-cases-like-salman-khan-drag-on-2234398.html

Who Bears the Brunt?

Access to justice, depends on ethos and socio-economic history, and developmental potential of society. However, some group or individual in a society finds the door to justice closed, or at least too stiff to move on its hinges just because of economic deprivation. The sufferers of delayed justice may be, in general, the poor, or the lower class, or some other disadvantaged section. In some societies, it is a racial minority or an ethnic group, or simply the working class. If advocates and the other formalities become too expensive, a large majority of the poor are priced out of the judicial market. Good lawyers have to be paid high. The complicated procedures demand investment beyond the means of the indigent litigant who belongs to weaker classes while the opposite party hires expensive lawyers and vanquishes the handicapped, although justice may be on his or her side.[8] While on the one hand the police are known to artificially subdue the incidence of crime by not registering complaints against the rich and powerful, they often harass the poor by slapping false cases against them. Of the 4, 20,000 individuals in prison in the country, the undertrials are about 68 per cent and of those 53 per cent belong to Dalit, Adivasi and Muslim communities.[9] The justice system across the nation needs to be made accessible to the poor and the handicapped that are currently priced out of the courts and tribunals.

An Effective Free Legal Aid System Still a Distant Goal

Charles de Montesquieu said that; *"In the state of nature...all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the law."* The protection of law to poor, illiterate and weak is important to ensure equal justice. Legal aid is one of the means to ensure that the opportunities for securing justice are not denied to any person by reason of poverty, illiteracy, etc, but the sorry state of legal aid is falling short of its original intentions. An effective free legal aid system that will provide Adivasis and other backward classes with lawyers of competence and commitment and accessible to the humblest should be brought in. According to the survey report of DAKSH, a Bangluru based organisation, only 2.36 per cent of litigants were using court-appointed lawyers. Eminent lawyer Prashant Bhushan said that 80 per cent of our country is shut out of judicial system because they cannot access lawyers and that legal aid quality is poor. Apart from the poor quality of legal aid, lack of trust, accountability, communication gap and alienation drives people away from legal services.[10]

8 The Dynamics of Access to Justice by VR Krishna Iyer accessed on http://www.thehindu.com/todays-paper/tp-opinion/the-dynamics-of-access-to-justice/article1848798.ece

9 http://indianexpress.com/article/opinion/columns/cji-points-to-judicial-backlog-but-judiciary-must-also-identify-the-root-cause-2814269/

10 http://dakshindia.org/

Economics of Delayed Justice

The long judicial battle spoils the economic structure of the people. It affects the livelihood and productivity. According to the DAKSH survey report average cost incurred per case per day is Rs 1039 and average wages and business loss is around Rs 1746 per case per day. The loss of productivity due to attending the court hearing because of wages and business lost comes to 0.48 percent of the India GDP.[11] Enhancing the infrastructure of judicial system needs more money. The union budget for 2016-17 has earmarked Rs.900 crore for the development of judicial infrastructure in the states, merely Rs.93.35 crore higher from Rs. 806.65 crores allocated in 2015-16. The allocation of funds for the development of judicial infrastructure was Rs. 500 crore in 2015-16 but has been scaled down to Rs.460 crore in 2016-17.[12]

Demystifying the Laws

Lack of basic legal education transforms further into total negligence of legal rights. A citizen unaware of its legal rights can never achieve access to justice. The rules of interpretation of statutes are too technical, arcane, sometimes fossilised making the meaning of the law beyond plain understanding. This also affects the poor who cannot afford to consult lawyers for every riddle in the law. Our jurisprudence needs to be more plain and promotive of justice, not legalistic and wrapped in a mystery inside an enigma.[13] Parts of the country still suffers problems and issues which are in their core pure legal issues and has been solved with providing effective legal remedies through legislations. Untouchability Abolition Act, Protection of Women from Domestic Violence Act, Right to Education Act are some of such legislations which aims to eradicate social issues by providing legal remedies but ordinary citizens unaware of the legal remedies available to them never approach the legal institutions for availing the legal remedies.

Often lack of legal awareness clubbed with the misconception about the judicial process adds up to the violation of right. For example in case of denial of FIR registration by the police, the complainant can approach the Judicial Magistrate under section 156 of CrPC.[14] It is a right given to the aggrieved person to approach the court directly, present his case before the Magistrate and if the Magistrate is satisfied that there has been a legal wrong directs the police to lodge a FIR and start the investigation. Also under the same provision an aggrieved person not satisfied with the way with which the

11 Ibid 10

12 http://www.business-standard.com/article/news-ians/paltry-increase-in-budget-for-judiciary-and-its-infra-structure-116022901361_1.html

13 The Dynamics of Access to Justice by VR Krishna Iyer accessed on http://www.thehindu.com/todays-paper/tp-opinion/the-dynamics-of-access-to-justice/article1848798.ece

14 http://www.legalservicesindia.com/article/article/the-power-of-the-magistrate-under-section-156-(3)-of-cr-p-c-1142-1.html

police is handling the investigation can approach the court again and seek orders from the court ordering police to continue the investigation in proper and effective manner.

While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for 'anticipatory bail' under the provision of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, the aggrieved people can avoid the arrest under that provision by obtaining an order from the court."[15]

Similarly for arresting an accused under various provisions the police is first required to issue a notice to the accused under Section 41-A Crpc.[16] This is a crucial part of the criminal procedure and violation of it can result in frustrating the whole criminal proceeding. Also right of arrested person to have legal advice while being questioned, no arrest of women during night (without special circumstances) and presence of a female police personnel at time of arrest of women are some of basic legal rights available to general people which is usually not known to the common people.[17]

Another social phenomenon that is frequent is criminal disputes settlement at the thana level without even reaching to its proper forum. Although the Indian Constitution enables and appreciate settlement of disputes through mediation and mutual understanding, only few types of disputes can be settled by this process. Ignoring this fact the local police harass both the accused as well as the victim and arbitrarily 'settle' the dispute at its level. This results in two problems-first an accused who should be tried and punished as per the law get the chance of walking free and the victim also loses its right to judicial remedy. Section 320 of CrPC[18] provides for offenses which can be compounded at the level of police station and offense which can be compounded at the court level. This is, again, a very useful provision unaware of which the general public suffers injustice.

Conclusion

Although it's impossible to reach a utopian society free of any wrong but in order to increase people's access to justice other than the already set goals of the Indian Democracy, including basic introduction to the legal system and legal rights in school and college curriculum, creating knowledge bank by initiating public-private

15 Allahabad High Cout Judgement in BramhaNand & Other v/s State of UP ,case accessed at http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgment.do.
16 http://www.legalservicesindia.com/article/article/notice-format-u-s-41-a-crpc-1942-1.html
17 Ibid
18 https://www.kaanoon.com/indian-law/crpc-320/

partnership at grassroots level (establishing a cadre of kanoon mitraon the lines of shiksha mitra) providing more powers, resources and enabling better accountability of the Legal Services Authorities can be some of the areas which must be explored for ensuring access to justice. Experts also emphasise on the importance of 'people's courts' that could address the everyday legal needs of individuals.

The huge backlog is the result of a combination of factors like delay in police investigation, unwarranted adjournments, poor judge-population ratio, shortage of judicial professionals, lack of infrastructure, ineffective and weak alternative dispute resolution mechanism, the gap between the allocated and actual working strength of judges ,work culture of the bench , too many appeals, revisions, and reviews among others. While pronouncing a judgment, no court gives reasons why and how the conclusion of the matter got delayed and who was responsible for it – the police, prosecution or the accused.[19] The primary responsibility of the delayed justice and pendency has never been fixed. The unchecked impunity of government machinery defeats the purpose of efficient justice delivery system. It is, therefore, the high time to fix the responsibility and accountability for delayed justice.

✍ Mr. Dinbandhu Vats is Programme Co-ordinator at PAIRVI.

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19 http://www.firstpost.com/india/justice-delayed-again-former-chief-justice-of-india-explains-why-cases-like-salman-khan-drag-on-2234398.html

Access to Justice and Judicial Behaviour in Indian Scenario

Dr. C.P. Singh

Introduction

Justice is the foundation and object of any civilized society. The quest for justice has been an ideal which mankind has been aspiring for generations down the line. Justice is a constitutional mandate. The Constitution of India has, in its Preamble, defined and declared the common goal for its citizens as, *"to secure to all the citizens of India, Justice- social, economic and political."* Article 14 guarantees equality before the law and the equal protection of the laws. Article 39A of the Constitution mandates the State to secure that the operation of the legal system promotes justice on the basis of equal opportunity and ensure that the same is not denied to any citizen by reason of economic or other disabilities. All have equal rights, but unfortunately, all cannot enjoy the rights equally. Enforcement of the rights has to be through courts, but the judicial procedure is very complex, costly and tardy, putting the poor persons at a detachment. It is one of the most important duties of a welfare state to provide judicial and non-judicial dispute-resolution mechanisms to which all citizens have equal access for resolution of their legal disputes and enforcement of their fundamental and legal rights. For effective justice dispensation system at least three things are to be provided i.e. access to courts, effective decision-making by judges and the proper implementation of those decisions. Equal opportunity must be provided for access to justice. It is not sufficient that the law treats all persons equally, irrespective of the prevalent inequalities. But the law must function in such a way that all the people have access to justice in spite of economic disparities. The expression *"access to justice"* focuses on the following two basic purposes of the legal system:

1. The system must be equally accessible to all.
2. It must lead to results that are individually and socially just.

Concept of Access to Justice

Access to justice is more than improving an individual's access to courts or guaranteeing legal representation. Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards. There is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible, where individuals have no lawyers; where they do not have information or knowledge or rights; or where there is a weak justice system. Access to justice supports sustainable peace by affording the population a more attractive alternative to violence in resolving personal and political disputes.[1]

The Constitution of India is the living document of this country and the basic law of this Nation. As disclosed in its Preamble, it stands for securing justice to all the citizens. In Article 39-A, the Constitution retains its aspiration to secure and promote access to justice, in the terms: *"The State shall secure that the operations of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or scheme or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."* In India, the National Commission to Review the Working of Constitution (NCRWC), constituted in the 50thyear of independence, in its final report suggested for incorporation of this right as fundamental rights by incorporating Article 30A, in the Constitution stating 'access to courts and tribunals and speedy justice'.[2]

Access to Justice vis-a-vis Constitution

India became free from British rule after a long battle for independence, and finally we attained our long-awaited desire for self-rule. Our founding fathers drafted for us the basic rule of governance for the country in the form of the constitution. The major task of the Constitution Assembly was to provide us a vehicleof national progress, which reflects best from past experience, catering the need of present and also at the same time having enough resilience to cope up with the demand of the future.[3]

The framers of the constitution while keeping in mind the bitter experience of the past made ample provisions for achieving social, economic and political justice to all the sections of society, and for the same reason devoted chapters on fundamental rights and directive principles in the constitution. The judicially enforceable 'Fundamental Rights' provisions of the Indian Constitution are set forth in part III in order to

1 Necessary Condition: Access to Justice, available at: www.usip.org>7-rule-law>access-justice (Last Modified October 13, 2015).
2 Supra note 9.
3 Ibid.

distinguish them from the non-justifiable 'Directive Principles' set forth in part IV, which established the inspirational goals of economic justice and social transformation. It means that the constitution does not provide any judicial remedy when directive principles are not followed; but in the words of **Dr. Ambedkar**, *"State may not have to answer for their breach in a Court of Law. But will certainly have to answer for them before the electorate at election time."*[4]

The constitution provides for safeguards when the provision of fundamental right are violated by the state in the form of right to constitutional remedy to move directly to the Supreme Court or High Courts under Article 32 and Article 226 respectively. This is the most unique feature of the Indian Constitution. Article 32 states that: *(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part [Part III] is guaranteed; (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for any of the rights conferred by this Part.* In the Constituent Assembly Debates, **Dr. B.R. Ambedkar** once said; *"If I am asked which is the most important provision of the Indian Constitution, without which the constitution would not survive I would point to none other than Article 32 which the soul of the Indian Constitution."* In addition to this, constitution includes Article 226 which gives the claimant the opportunity to file a writ in the High Court, when there is a violation of fundamental right or right guaranteed by a statute. Similarly Article 136 is also a very significant provision in the constitution. Hence, in our constitutional scheme, the High Court and Supreme Court have been depicted as a guardian of fundamental rights and have been bestowed with the power to make void any law passed by state and union legislature, which is violate any fundamental right, as enshrined under Article 13 of the constitution and thereby deliver justice.[5]

Public Interest Litigation and Access to Justice

One of the recent modes of getting access to justice is by way of filling a Public Interest Litigation. The term *'Public Interest'* means the larger interest of the public, general welfare and interest of the masses[6] and the word *'Litigation'* means *'a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or seeking a remedy.'* Thus the expression *'Public Interest Litigation'* means *'any litigation conducted for the benefit of public or for removal of some public grievance.'* Now, the court permits pubic interest litigations at the instance

4 Ibid.
5 Ibid.
6 Oxford English Dictionary, 2nd Edn., Vol. XII.

of the so-called *'Public-spirited Citizens'*[7] for the enforcement of Constitutional and Legal Rights.[8]

The concept of PIL first emerged in USA. The American concept of PIL is clarified by a statement made by "the council of public interest law" an organisation set up by the "Ford Foundation" in USA, "Public Interest Law is the name that has been given to efforts to provide legal representation to previously unrepresented groups and interests. Such groups and interest include the poor, environmentalist, consumers, racial and ethnic minorities, and others." However, PIL in India substantially differs from that in USA. Prof. Upendra Baxi in his published opinion "Social Action Litigation in the Supreme Court of India" has pointed out that the prime focus on American PIL was not so much on state repression or governmental lawlessness as on public participation in governmental decision making. And since the Indian notion of PIL has assumed the character of more of a moral and humane process in providing justice to the victim as in individual or to a group in matter relating to infringement of fundamental rights or denial of civil privileges on the basis of caste, colour or creed, Prof. Baxi, therefore, insisted that the Indian phenomenon described as PIL should be termed as "Social Action Litigation".[9]

Justice P. N. Bhagwati rightly stated in ***S.P. Gupta v. Union of India, 1981***, "the court has to innovate new methods and strategies to provide access to justice to large masses of people who are denied basic human rights, to whom freedom and liberty have no meaning".[10] Further the PIL or Social Action Litigation was put on a firm foundation by Justice Bhagwati in case of ***People's Union for the Democratic Rights v. Union of India***[11] wherein he stated; *"it would not be right or fair to expect a person acting probonus public to incur expenditure out of his bag for going to a lawyer and preparing a regular writ petition. In such a case a letter addressed by him can legitimately be regarded as an appropriate proceedings."* In ***TN Godavaraman Thirmulpad v. Union of India***[12] the court examined the issue that where a litigant filing the PIL lacks bonafide, then the court has to decline its examination at the behest of a person who, in fact is not a public interest litigant and whose bonafides and credentials are in doubt. In a recent judgment in ***Lalita Kumari v. Govt. Of UP***,[13] my lord the Chief Justice of India P. Sathasivam, while dealing with a writ petition regarding FIR and anticipatory

7 They are people of this country who do not have direct interest at stake in the PIL before a court but work Pro Bono Publico, i.e. in the larger interest of the public and for their general welfare in good faith. Noted public-spirited citizens in India who have represented mass interests before the Supreme Court and other High Courts are, M.C. Mehta and Subhas Dutta.

8 Supra note 9.

9 Importance of Public Interest Litigation in India, available at: www.lawctopus.com>academike>importance (Last Modified October 14, 2015).

10 5 Public Interest Litigation Cases, available at:www.thequint.com>india>2015/08/29 (Last Modified October 14, 2015).

11 1992 SC Page No. 1473.

12 (2008) 2 SCC 14.

13 2013 (13) SCALE 559.

bail held as; "*The underpinning of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system but also ensure 'judicial oversight.*" Section 157(1) deploys the word 'forthwith'. Thus any information received under Section 154(1) or otherwise has to duly inform in a form of a report to the magistrate. Thus the, commission of a cognizable offence is not only brought to the knowledge of the investigating agencies but also to subordinate judiciary... While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for 'anticipatory bail' under the provision of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court."[14]

Judicial Activism

The phrase 'Judicial Activism' carries more than one connotation. The common law tradition conceives of courtroom litigation as an adversarial process where the onus is on the pleaders to shape the overall course of the proceedings through their submissions. In this conception, the role of the judge is cast in a passive mould and the objective is to dispassionately evaluate the arguments made by both sides. However, the actual experienced of a court room clearly bears witness to the tendency on part of some judges to pose incisive questions before the practitioners. This may have the consequences of proceedings being judicially-directed to certain degree. While this literal understanding of activism from the bench may have its supporters as well as detractors. In the Indian context, there has been a raging debate on the proper scope and limits of judicial role especially of that played by higher judiciary which consist of the Supreme Court of India at the centre and the High Court in the various States that form the Union of India. The terms of that debate have been broadly framed with respect to the considerations of ensuring an effective 'separation of powers' between the executive, legislature and judiciary as well as concerns about the efficacy and legitimacy of judicial interventions in the long run.[15]

Judicial interpretation and judicial legislation has a very thin line of difference, one could easily face confusion while discerning or interpreting the same. Judicial Activism is also alleged to have taken a form of judicial legislation. But it is through this tool, the judiciary has also taken up the responsibility to fill up the legislative vacuum in order to uphold the rule of law. The silence of the Constitution and the abeyances left to be filled by the growth of conventions within the meaning of the enacted provisions.

14 Supra note 9.

15 Judicial Activism, available at: Supremecourtofindianicin>speeches>judicialactivism (Last Modifies October 14, 2015).

This exercise has been performed by the Supreme Court of India in consonance with the constitutional scheme.[16]

Responding to the changing time and aspirations of the people, the judiciary, with a view to see that the fundamental rights embodied in the Constitution of India have a meaning for the down-trodden and the under-privileged classes, pronounced in ***Madhav Haskot's case***[17] that providing free legal services to the poor and needy was an essential element of the 'reasonable, fair and just procedure'. Again in ***Hussainara Khatoon's case***[18] while considering the plight of under trails in jail, speedy trial was held to be an integral and essential part of right to life and liberty contained in Article 21 of the Constitution. In *Nandini Satpathy v. D.L. Dani*[19], the Supreme Court held that an accused has the right to consult a lawyer during interrogation and that the right not to make self-incrimination statements should be widely interpreted to cover the pre-trial stage also. When there was no existence of any compensatory jurisprudence, it was the Supreme Court who ushered new hope by introducing right of compensation in case of 'torture' including mental torture inflicted by the state or its agencies. Using this weapon, many tortured victims were provided their rightful compensations in cases like *Rudal Shah v. State of Bihar*[20], *Bhim Singh v. State of Jammu and Kashmir*[21], *Saheli v. Commissioner of Police.*[22]

Role of Indian Judiciary in Expansion of Access to Justice

It can be stated with some certainty that the doctrine of 'Judicial Review' helps in binding the polity to its core constitutional principles. In the post World War II era, the memory of devastating conflicts and oppressive colonialism ensured that these principles were initially centred on the protection of basic civil-political rights such as free speech, assembly, association and movement as well as guarantees against abusive practices by state agencies such as arbitrary arrest, detention, torture and extra-judicial killings. The growth of Constitutionalism is also been synonymous with that of liberal values which seek to safeguard an individual's dignity as well as collective welfare at the same time. Depending upon the social profile of a country's population these safeguards may be in the nature of exceptional treatment for ethnic, religious and cultural minorities as well as proactive measures designed for the advancement of historically disadvantaged communities and poorer sections of society. Hence, the role of court in protecting constitutional values goes beyond the enforcement of

16 Supra note 9.
17 AIR 1978 SC 1548.
18 AIR 1979 SC 1819.
19 AIR 1978 SC 1025.
20 AIR 1983 SC 1086.
21 1984 (Supp) SCC 504.
22 1990 (1) SCC 422.

clearly defined civil-political rights that can be litigated by individual citizens and incorporates a continuously evolving understanding of 'group rights' which necessarily have socio-economic dimensions as well.[23] As in the words of Justice Bhagwati:[24] *"we think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms."*

Notably, over the decades, the Supreme Court has affirmed that both the Fundamental Rights and Directive Principles must be interpreted harmoniously. It was observed in the ***Kesavananda Bharati case***[25], that the directive principles and the fundamental rights supplement each other and aim at the same goal of bringing about a social revolution and the establishment of welfare state, the objectives which are also enumerated in the Preamble to the Constitution. Furthermore, in ***Unni Krishnan, J.P. v. State of Andhra Pradesh***[26], Justice Reddy declared: *"The provisions of Parts III and IV are supplementary and complementary to each other and not exclusionary of each other and that the fundamental rights are but a means to achieve the goal indicated in part IV."*[27]

Conclusion and Submission

To see judiciary as an independent governance institution means that it stands apart from other governance institutions in a state and that it has a mind and will of its own under a doctrine of separation of powers sufficient to provide an effective check on the abuse of power by the political branches of government. The judiciary must have a high degree of structural autonomy and immunity. Autonomy and immunity sustain both the independence and the related, but distinct, idea of impartiality in the judicial process. A judiciary may be in principle independent, but in a particular case, a judge may not be impartial- that is, may display favouritism towards on party.[28]

Every government has one major role to play in a democracy that is to protect rights of all its citizens. In our country also, steps are being taken by both the parliament and judiciary to secure the ends of justice. Many government schemes were started for removing poverty across the country, scholarships were given to the weaker sections of society so that they can pursuit their education without any financial burden; many important beneficial legislations were also passed. The Indian judiciary which is well regarded domestically and internationally for its progressive role in interpreting various

23 Supro note 43.
24 Observation in Francis Coralie v. Union Territory of Delhi, (1981) 1 SCC 688.
25 (1973) 4 SCC 225.
26 (1993) 1 SCC 645.
27 Supra note 43.
28 Supra note 7 at 856.

provisions of the constitution also took its work remarkably with a view to promote social, economic and political justice to all the sections of the society. Expanding the interpretation of fundamental rights enshrined in the constitution, overcoming restrictions based on rules relating to locus standi, creating new avenues for seeking remedies for human rights violation through public interest litigation pleas and promoting genuine judicial interventions in the areas of child labour, bonded labour, judicial intervention to uphold the rule of law and ensure justice. The courts are the only forum where both the poor man and a retired Supreme Court judge can approach and access it for justice. They are therefore, rightfully called the "Guardian of Justice". Despite of all its efforts, at the same time it can be denied that the intention of the constitution to achieve social, economic and political justice is yet unfulfilled. The occurrence of long delay in conclusion of litigation huge arrears of case are the major headaches in the administration of justice and to a great level, affect the programmes for strengthening access to justice.[29]

In the end I would like to quote a quotation by 'Martin Luther King Jr.': ***"Injustice anywhere is a threat to Justice everywhere."***

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29 Supra note 9.

Indian Judiciary and Access to Justice

Ms. Richa Saxena

Justice is legitimate end of law

Introduction:

It is not easy to describe the justice, because the idea of justice always influenced by the change of time and circumstances, change with the political and social outlook and with the economic pressure of the society. In general the journey of idea of justice is from the small group of people to the present social justice or from the partial justice based on specific principles of law to the present overall justice. Though it is said that justice is subject of cognition and when in accordance to the social political and economic status of society it is required to explain the concept of justice it described it described in accordance to these factors. For example it is said that *"Justice is nothing else than which is advantageous to the stronger."*[1] Socrates and Plato criticized this definition and said it upside down and against the community welfare. Plato gives the definition of justice as *"the meaning of justice for a person is to do his expected duty in accordance to his capacity."* (Though this definition is in accordance to the then caste system which is totally in appropriate in present concerns). Similarly in accordance to Aristotle justice is scared (nihit) in the equality. He said that justice is social quality which fixes the relation of people in the society. Aristotle accepts the justice in the form of validity in law (vidhimanya), equitability (nyayasangat) and equality (samta). While Roman Jurist Ulpian said that *"Justice is constant and perpetual will to render to everyone that to which he is entitle."* Some add in the definition of justice concept of freedom also and said that *"everyone is free to do that which his wills provided he infringes not the equal freedom of any other man"*[2] Thus it can be said that justice cannot be fixed in a settled formula for forever but it is a continuous process to establish a balance between equality and freedom and other objects. Friedrich said that *"Justice is never given, it is always a task to be achieved."*

1 Thrasymachus, as quoted in A.D. Lindsey(ed.)Republic (1950), Book I P.338
2 Spencer

Access to Justice

When it comes to end that justice cannot be given but has to be achieved the next question is how it has to be achieved and answer is through access to justice. Access to justice is more than improving an individual's access to courts or guaranteeing legal representation. Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards. There is no access to justice where citizens fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. Access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight. Access to justice supports sustainable peace by affording the population a more attractive alternative to violence in resolving personal and political disputes.[3]

Access to justice has been defined simply as access to lawyers and courts and as complexly as *"an equal right to participate in every institution where law is debated, created, found, organized, administered, interpreted and applied."* In this sense, increasing access to justice may mean ensuring physical accessibility to the courthouse, simplifying procedural rules, using plain language in a statute, explaining what the law means on the internet, provision of translation, and dispute resolution other than through the courts, legal aid and similar steps to removing barriers of various kinds. A more comprehensive understanding of access to justice goes beyond the legal system to encompass efforts to assess and respond to ways in which law impedes or promotes economic or social justice, for example, recognizing the interrelationship of these systems. In short, access to justice may involve steps to diminish substantive injustice in society at large.[4]

The right to access to justice is recognised under Universal declaration on Human Rights 1948 under following heads:

- Everyone has the right to recognition everywhere as a person before the law.[5]
- All are equal before the law and are entitled without any discrimination to equal protection of the law.[6]
- Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.[7]

3 http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law/access-justice
4 http://www.lco-cdo.org/en/family-law-reform-final-report-partI-section , visited on 18/6/2016
5 Article 6 of UDHR
6 Article 7 Of UDHR
7 Article 8 of UDHR

- Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.[8]
- Everyone has the right to take part in the government of his country, directly or through freely chosen representatives and everyone has the right of equal access to public service in his country.[9]

International Covenant on Civil and Political Rights, the European Convention and other regional conventions that underscore the importance of the right of access to impartial and independent justice. Article 14(3) of the International Covenant on Civil and Political Rights which guarantees to everyone,

"the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interest of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it."

The Fourteen Report of Law Commission of India also echoed this idea:

"----------equality is the basis of all modern system of jurisprudence and administration of justice…….in so far as person is unable to obtain access to court of law for having his wrongs redressed or for defending himself against the criminal charge, justice become unequal and the laws which are meant for his protection have no meaning and to that extent fail in their purpose. Unless some provisions is made for assisting the poor man for the payment of court fees and lawyer's fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice."[10]

Indian Scenario

A country like India the problem of access to justice is deep and pervasive and has affected the ability of the legal system and judicial process to respond to injustices. Indian law and its instrumentalities are accused of being out of step with social justice. Where the bulk of people are backward, socially and economically but the national goal is social and economic justice, the rule of law, notwithstanding its mien of majestic equality, will fail its mission in the absence of scheme to bring the system of justice nearer the downtrodden. In India those who are poor, those who are suppressed from centuries socially and economically (Scheduled Castes and Scheduled Tribes), those

8 Article 10 of UDHR
9 Article 21(1)and 21(2)of UDHR
10 Law Commission Of India, Fourteenth Report, page no.587

who inhabit extensive backward regions and suffer the handicaps of geographical barriers (Scheduled Areas), those who are in acquisitive society, remain at the bottom to toil without adequate reward (the working class), those who are constrained for the country's sake to remain in perilous climes and distant borders (the armed forces), those suffering discrimination (girls and women), those who are without proper care and protection or destitute (Children) needs access to justice. Despite the progressive measures, the *'access to justice'* in India has been costly and beyond the reach of poor citizens. Delays in disposal of cases add to the woes of the litigants. Poor and marginalised sections of the society have not been able to fully claim their legitimate stake in the protections provided by the Constitution and legal system, because of which, the realization of justice remains a challenge. One of the serious challenges to the protection of rule of law and human rights is the inability of formal justice system to deliver speedy and affordable justice to the poor. The number of pending cases in Indian courts is an indication of this.

Challenges towards the Access to Justice in India

Lack of Legal Awareness

Lack of knowledge about the basic legal and civil liberties, human rights, constitutional directives, and principles and other guidelines that protect the people's dignity, liberty and freedom manifests itself in the society in the form of problems such as child labour, human trafficking, domestic violence, child marriage, dowry etc. that threatens the safety of all. Majority people in India are legal illiterate and not aware of the basic rights conferred upon them by law. Substantial population of the country living in the cities, towns and villages do not know what are their rights and entitlements under the law. Even the literate people are helpless and confused when there is a violation or infringement of a right enforceable in law.Therefore, the absence of the legal awareness in the society is mainly responsible for the deception, exploitation and deprivation of rights and benefits, from which the people suffer in the hands of state apparatus.[11]

Limited Approach of Legal Services Authorities

Approach of the poor, marginalised and deprived uneducated people towards the formal institutions of justice is very difficult.The Government of India,United Nation Development Programme Project on Access to Justice for the Marginalised has highlighted that majority of the respondents in seven States in India did not even know about existence of Legal Services Authorities. In addition to lack of infrastructure, lack of adequate human resources, additional charge of Legal Services being given to sitting judges at the District and Taluka levels, and the need for improvements in

11 http://www.e-pao.net/epSubPageExtractor.asp?src=education.Human_Rights_Legal.Legal_literacy_and_legal_awareness_campaign_The_ways_to_public_empowerment_Part_1

selection, training and monitoring of empanelled lawyers are some of the systemic problems that affect the ability of the SLSAs in fulfilling their mandate.[12] There is acute underutilization of funds by State Legal Services Authorities in several states: Madhya Pradesh-with 87 percent funds unspent, Jharkhand (53.87 percent) and Uttar Pradesh (44.8percent) In addition to NALSA, SLSAs also received significant funds from the Thirteenth Finance Commission for holding lok adalats, mediation and legal aid. While there is under-spending on the one hand, funds for training and payments to the paralegals and panel lawyers and for setting up legal aid clinics are reported to be insufficient. This suggests the need for enhancing capacities of SLSAs for planning, budgeting and delivering legal-aid and the need for creation of systems that help better tracking and increase transparency.[13] Absence of non-state legal aid systems to supplement formal legal services through probono attorneys, legal clinics, public interest law groups, law colleges, retired judges is also a constraint and limits outreach of legal services to the poorest and disadvantaged.[14]

Inaccessibility of Courts, Judicial Vacancies and Delays

The formal justice mechanisms in India are very complex, expensive and beyond the reach of majority of India's population, especially the marginalized. As the Report of the Working Group for Twelfth Five Year Plan of the Department of Justice highlights, the cost of litigation has increasingly become prohibitive, shutting the doors of justice to large sections of the society, especially the weaker and the marginalized. Recently the Chief justice of India mentioned that India required more than 70000 judges to clear the pending cases.CJI Thakur said shortage of judges was one of the formidable challenges faced now. Of some 900 sanctioned posts of judges in different high courts of the country, there are over 450 vacancies, which need to be filled up immediately.[15] Despite the best efforts to speed up disposal of cases, pendency in the high courts may spiral to a monstrous one crore cases by the end of this year from the present 45 lakh cases as 24 HCs are functioning at present with 43% vacancies with only 599 judges as against a sanctioned strength of 1044.The SC has a pendency of around 60,000 cases, HCs have 45 lakh cases and trial courts around 2.75 crore cases making it a total of around 3.25 crore cases. Judges fear that it might touch 4 crore cases by the end of this year because of large number of vacancies.[16] The Standing Committee on Law and Personnel in its report on *"Infrastructure Development and Strengthening of Subordinate Courts"* stated, *"The major reasons for the high pendency of cases in subordinate courts are the poor judge-population ratio, prolonged and costly litigation*

12 Increasing Access to Justice for Marginalized People: GoI-UNDP Project avialiable at http://doj.gov.in/sites/default/files/Increasing-A2J_0.pdf

13 Ibid.

14 ibid

15 The Indian Express, May 9, 2016, http://indianexpress.com/article/india/india-news-india/chief-justice-of-india-cji-judges-shortage-ts-thakur/

16 Dhanajay Mahapatra, 7 Jan 2016, TOI available at http://timesofindia.indiatimes.com/india/43-of-high-court-judges-posts-vacant-backlog-of-cases-may-hit-1-crore-mark-by-year-end/articleshow/50475567.cms

caused by procedures and lawyers' interests, poor infrastructure, shortage of judicial personnel and weak alternative dispute resolution mechanisms."[17]

Gender Discrimination in Access to Justice

The Indian Constitution guarantees equality for men and women. A variety of rights-based laws have been enacted which outlaw domestic violence, provision for equal pay, provide equal right to property and inheritance and also provide protection against sexual assault and harassment. Yet, the effective implementation of these laws continues to be a challenge. Under the Legal Services Authorities Act, all women are entitled to free legal aid irrespective of their financial status. However, they continue to face multiple barriers in accessing justice and obtaining redressal of their grievances. Violence against women is pervasive within the domestic and in public spaces. Crime against women has been on the rise in the last one decade.Crime against women in India is reported more than doubled in the last ten years[18] as revealed in latest DATA of National Crime Records Bureau. In every two minutes a complaint of crime against women reported.Situation of poor and illiterate women is worse of, as they do not have information on their basic rights and find redressal difficult. Communities discourage women from seeking help and the ones who dare, face stigma and marginalization within family and society. In India, 86 percent of rural women depend on agriculture for their livelihoods yet one survey revealed that less than 10 percent of privately held land nationwide was in the name of women.[19]

Measures to Access to Justice in India

Constitutional Mandates

Access to justice as a human right concept of ancient vintage is not unknown to Ancient India. In India Concept of Dharma was multidimensional and it was something which sustained humanity in all its facets and coherence. So with in broad sweep of Dharma comes both human rights and law.[20] Social Justice was one of prime object of the Constitutional framers of the India. The quest for the justice Indian's suffered in hundred years national movement was in the mind of the framers of the Constitution and they were conscious to ensure the access to justice for people of India. The social, economic and social justice which is ensured in the preamble of the Constitution,

17 Indu Bhan, 14 Jan The Financial Express, available at http://www.financialexpress.com/article/fe-columnist/justice-delayed-is-justice-denied/29727/

18 http://scroll.in/article/753496/crimes-against-women-reported-every-two-minutes-in-india

19 Food and Agriculture Organization, India Agricultural Census 1995/1996 and Livestock Census 1997 at 1 (2000) New Delhi: Ministry of Agriculture, Government of India, Available Online. URL: http://www.fao.org/es/ess/census/wcares/2000indiaweb.pdf

20 Chief justice P.B. Gajendragadkar, Historical Background and Theocratic Basis of Hindu Law II THK CULTURAL HLRITACK OF INDIA 414.

various other provisions in the Constitution ensure the access to justice. Article 14 is one of such provision which is often called of *'mother of justice'*, ensuring equality, because once equality disappears from the courts it is impossible to ensure justice. Access to justice is an inbuilt feature of the Article 14 which provides equality before the law and equal protection of laws. If the access to justice is denied due to inequality at any stage or in any form the purpose of the article 14 would fail. As theit was opined by the Supreme Court while interpreting Article 14 of the Constitution that *"our constitution is not meant for only for elite, but it is also for the butcher, the baker and the candlestick maker."*[21]

Later Supreme Court incorporated access to justice under Article 21 by various judicial interpretations. Articles 22(1) and 22(2) specifically ensure the *'access to justice'* for persons who are arrested and detained in custody. The rightto move the Apex Court for enforcement of Part III rights by appropriate proceedings is a guaranteedfundamental right under Article 32. This fundamental right was conferredas it was thought that a right without a remedy has no meaning. The SupremeCourt's right to do *'complete justice'*, cutting across all procedural wrangles, has been recognized in Article 142. At times the Supreme Court exercises its jurisdiction under Article 32 in conjunction with its power underArticle 142. Acting under these powers, the Apex Court has granted relief, where there is manifest illegality andnever felt inhibited on the question of standings.[22]

The Supreme Court has taken upon itself this task of expanding *'access to justice'* not only in view of theduty cast on it by the Preamble and the Fundamental Rights but also in view of the clear mandate under Article38 of the Constitution which is based on the concept of Article 14. Article 38 imposes a duty on the State, which obviously includes the judiciary, to usher in a social order in which justice-social, economic and political,must inform all institutions of national life. So by widening the *'access to justice'*, the Court is discharging itsconstitutional duty to promote a just social order. Realizing that free and unrestricted access to justice is the hallmark of an independent judiciary which is committed to the Rule of Law, Justice Krishna Iyer in ***M/sCentral Coal Fields Ltd. v. M/s. Jaiswal Coal Co.4*** drew inspiration from Magna Carta and held that India is a Republic:

"Where equality before the law is a guaranteed constitutional fundamental and the legal system has been directed by Article 39A 'to ensure that opportunities for securing justice are note denied to any citizen by reason of economic...disabilities.' The learning Judge further held "that right of effective access tojustice has emerged in the Third World countries as the first among the new social rights with public interest litigation, community based actions and probono publico proceedings."

21 Justice Vivan Bose in Bidi supply co. v UOI AIR 1956SC at 487
22 Justice A. K. Ganguly, 'Access to Justice', Cuttack Conference ILI Golden Jubilee1956-2006

Court for protection of other rights apart from those granted under Article 32. Article 226 has been designedly couched in very wide terms and has been repeatedly construed by the Apex Court as wide enough to reach injustice wherever it is found. So one discerns a common thread which originates from the Preamble and runs through the texture of all these Articles, namely, Articles 14, 21, 22(1), 22(2), 32, 38, 39A, 142 and 226. Rights guaranteed under these Articles are not confined to citizens alone but are available to any personwho may not be even a citizen of this country.[23]

Public Interest Litigation as an Effective Tool for Access to Justice

One of the recent modes of getting access to justice is by way of filling a Public Interest Litigation. The term *'Public Interest'* means the larger interest of the public, general welfare and interest of the masses[24] and the word *'Litigation'* means *'a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or seeking a remedy.'* Thus the expression *'Public Interest Litigation'* means *'any litigation conducted for the benefit of public or for removal of some public grievance.'* Now, the court permits pubic interest litigations at the instance of the so-called *'Public-spirited Citizens'*[25] for the enforcement of Constitutional and Legal Rights.

The traditional rule of locus standi that petition under Article 32 can be only filed by a person whose fundamental right is infringed is relaxed. The Supreme Court permits the petition by any person for the enforcement of fundamental rights of other person or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. This is called public interest litigation. Public Interest litigation is a novel tool in the hands of people, particularly deprived and poor section of society, to seek redressal of their grievances against the indolent executive. The role Supreme Court has been exponential in this regard as it actively helped the disadvantaged people in an unprecedented manner.[26] Through PIL relief has been granted to women,[27] children,[28] under trails,[29] prisoners,[30] workers,[31]

23 Ibid
24 Oxford English Dictionary, 2nd Edn., Vol. XII.
25 They are people of this country who do not have direct interest at stake in the PIL before a court but work Pro Bono Publico, i.e. in the larger interest of the public and for their general welfare in good faith. Noted public-spirited citizens in India who have represented mass interests before the Supreme Court and other High Courts are, M.C. Mehta and Subhas Dutta.
26 J. P.N.bhagwati :Public Interest Litigation ,manupatra newsline dec 2008 , pg11
27 Shella Barse v. State of Maharastra AIR 1983SC378, Vishakha V. State of Rajasthan AIR 1997 SC3011, Appreal Export Promotion,Council v.A.K.Chopra AIR 1999SC 625 Domestic Workring Women's Forum V. Union Of India (1995)1 SCC 14
28 Laxmi Kant Pandey v. Union of India AIR1984 Sc 469, Garav Jain V. Union of India AIR 1990 SC 292, M.C.Mehta v. State of T.N (1996) 6SCC756, Munna V.State of U.P.(1982) 1 SCC 545
29 Hussainarra Khatoon v State of maharastra,AIR 1979SC1367,Kendra Pehadiya v.State of Bihar,AIR 1982SC1167,R.D Upadhaya v. State of AP (2001)437.
30 Sunil Batra V delhi administration AIR 1980 SC 1579, D.K.Basu V. State of West Bengal,D.S.Nakara V.Union of India (1983) 1SCC 304
31 A.K.B.S.K.S (Rly) V. Union of India AIR 1981 SC 298

bounded labourers,[32] environment protection,[33] medical services[34] and to many others. In ***Bandhua Mukhti Morcha V. Union of India***[35] J Bhagwati explains the nature and purpose of Public Interest litigation as follows- *"public Interest litigation is not in the nature of adversary litigation but it is a challenge and opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the significant tune of our Constitution. The Government and its officers must welcome public Interest Litigation, because it would provide them an accession to examine whether the poor and downtrodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community. When the court entertain public interest litigation, it does not do so cavilling sprit or controversial mood or with view to tilting at executive authority or seeking to usurp it , but its attempt is only to endure observance of social and economic programmes framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive, the court is thus merely assisting in realization of the constitutional objective."* In ***People's Union for Democratic Rights and Others v. Union of India and Others***[36] The Supreme court defines *'Public Interest litigation'* as follows *"Public Interest Litigation is a Cooperative or collaborative effsorts by the petitioners, the state of public authority and the judiciary to secure observance of constitutional or basics and human rights, benefit and privileges upon poor downtrodden and vulnerable sections of the society."* In ***State of Uttaranchal v. Balwant Singh Chauffal and Others***[37] the Supreme Court of India explained the motivation behind the PIL *"This court while exercising its jurisdiction of Judicial Review realized that a very long section of the society because of extreme poverty, ignorance, discrimination and illiteracy had been denied justice for time immemorial and in fact they have no access to justice. Predominantly, to provide access to justice to the poor, deprived, vulnerable, discriminated and marginalised sections of society, this court has initiated, encouraged and propelled the Public Interest litigation. The litigation is upshot and product of this Court's deep and intense urges to fulfil its bounden duty and constitutional obligations."*

Further the PIL or Social Action Litigation was put on a firm foundation by Justice Bhagwati in case of ***People's Union for the Democratic Rights v. Union of India***[38] wherein he stated; *"it would not be right or fair to expect a person acting probonus public to incur expenditure out of his bag for going to a lawyer and preparing a regular*

32 Bandhua Mukhti Morcha V.Union Of India AIR 1985 SC 802
33 Rural Litigation and Entitlement Kendra V.State of U.P.(1985) 2SCC 431, Indian Council For Enviro Legal Action V. Unioun of India (1996) 3SCC 212, Vellore Citizen Forum V. Union Of India (1996) 5SCC 647, M.C.Mehta V.Union of India AIR 1987 SC 463,AIR 1997 SC 735
34 Parmanand Katara V. Union Of India AIR 1989 SC 2039,Common Cause V. Union of India (1996) 1SCC 753
35 AIR 1984 SC 803
36 (1982)3SCC 235
37 AIR 2010 SC 2550
38 1992 SC Page No. 1473.

writ petition. In such a case a letter addressed by him can legitimately be regarded as an appropriate proceedings". In ***TN Godavaraman Thirmulpad v. Union of India***[39] the court examined the issue that where a litigant filing the PIL lacks bonafide, then the court has to decline its examination at the behest of a person who, in fact is not a public interest litigant and whose bonafides and credentials are in doubt. In a recent judgment in ***Lalita Kumari v. Govt. Of UP***[40], the Chief Justice of India P. Sathasivam, while dealing with a writ petition regarding FIR and anticipatory bail held as; "The underpinning of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system but also ensure 'judicial oversight'. Section 157(1) deploys the word 'forthwith'. Thus any information received under Section 154(1) or otherwise has to duly inform in a form of a report to the magistrate. Thus the, commission of a cognizable offence is not only brought to the knowledge of the investigating agencies but also to subordinate judiciary... While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for 'anticipatory bail' under the provision of Section 438 of the Code if the conditions mentioned therein are satisfied.

Free Legal Aid is to Ensure Access to Justice

Legal Aid implies giving free legal service to the poor and needy who cannot afford the services of a lawyer for the conduct of a case or a legal proceeding in any court, tribunal or before an authority. The concept of legal aid in the form of Article 39A into our constitutional framework. Hence, legal aid is not a charity or bounty, but is a constitutional obligation of the State and right of the citizens. The problems of human law and justice, guided by the constitutional goals to the solution of disparities, agonies, despairs, and handicaps of the weaker, yet larger brackets of Bharat's humanity is the prime object of the dogma of *"equal justice for all"*. Thus, legal aid strives to ensure that the constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the downtrodden and weaker sections of the society. It is the duty of the state to see that the legal system promotes justice on the basis of equal opportunity for all its citizens. It must therefore arrange to provide free legal aid to those who cannot access justice due to economic and other disabilities.[41]

The concept of legal aid can be witnessed in the 40th paragraph of the Magna Carta, which stated as; *"To no one will we sell, to no one will we deny or delay right or justice."* In our Constitution legal aid is provided by Article 14, 21, 22(1), 38 and

39 (2008) 2 SCC 14.
40 2013 (13) SCALE 559.
41 Free Legal Aid, available at: www.lawyersclubindia.com>articles>free (Last Modified October 14, 2015).

39A. In the opinion of Justice Bhagwati in ***Hussainara Khatoon v. State of Bihar***, "The procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just'. Free legal services to the poor and the needy are an essential element of 'reasonable, fair and just' procedure. Article 39A also emphasis that free legal services is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. This right is implicit in the guarantee of article 21. This is a constitutional right of every accused person who is unable to engage a lawyer. A State is under a mandate to provide lawyer to such person."[42] Free legal services included payment of court fee, process fee and all other charges payable or incurred in connection with any legal proceedings; providing advocate in legal proceedings; obtaining and supply of certified copies of orders and other documents in legal proceedings; preparation of appeal, paper book including printing and translation of documents in legal proceedings.[43]

Section 304 of Criminal Procedure Code

Where, is a trial before the court of session, the accused is not represented by a pleader and where it appears to the court that the accused has no sufficient means to engage a pleader, the court shall assign a pleader for his defense at the expense of the state.

Order 33 Rule 18 of CPC

Government has the power to make supplementary provisions as it thinks fit for providing free legal services to those who have been permitted to sue as indigent persons.

Access to Justice and ADR

Alternative dispute resolution (ADR) refers to variety of processes that help parties resolve disputes without a trial. Typical ADR processes include mediation, arbitration, neutral evaluation and collaborative law. These processes are generally confidential, less formal and less stressful than traditional court proceedings. ADR often saves money and speed settlement. In ADR processes such as mediation, parties play an important role in resolving their own disputes. This often results in creative solutions, longer-lasting outcomes, greater satisfaction, and improved relationships.[44]

It is rightly said that: *'An effective judicial system requires not only that just results be reached but that they be reached swiftly.'* But the currently available infrastructure of courts in India is not adequate to settle the growing litigation within reasonable time.

42 Supra note 9.
43 Ibid.
44 What is ADR?, available at: https://www.nycourts.gov>adr>what_is (Last Modified October 14, 2015).

Despite the continual efforts, a common man may sometimes find himself entrapped in litigation for as long as life time and sometime litigation carries on even on to the next generation. In the process, he may dry up his resources, apart from suffering harassment. Thus, there is a chain reaction of litigation process and civil cases may even give rise to criminal cases. Speedy disposal of cases and delivery of quality justice is an enduring agenda for all who are concerned with administration of justice. In this context, there is an imminent need to supplement the current infrastructure of courts by means of Alternative Dispute Resolution (ADR) mechanism. With the advent of ADR, there is a new avenue for the people to settle their dispute. More and more ADR centres should be created by settling disputes out-of-court as is being done in many other countries. ADR methods will really achieve the goal of rendering social justice to the people, which really is goal of the successful judicial system.[45]

Judicial Activism also Provides Access to Justice

The phrase *'Judicial Activism'* carries more than one connotation. The common law tradition conceives of courtroom litigation as an adversarial process where the onus is on the pleaders to shape the overall course of the proceedings through their submissions. In this conception, the role of the judge is cast in a passive mould and the objective is to dispassionately evaluate the arguments made by both sides. However, the actual experienced of a court room clearly bears witness to the tendency on part of some judges to pose incisive questions before the practitioners. This may have the consequences of proceedings being judicially-directed to certain degree. While this literal understanding of activism from the bench may have its supporters as well as detractors. In the Indian context, there has been a raging debate on the proper scope and limits of judicial role especially of that played by higher judiciary which consist of the Supreme Court of India at the centre and the High Court in the various States that form the Union of India. The terms of that debate have been broadly framed with respect to the considerations of ensuring an effective 'separation of powers' between the executive, legislature and judiciary as well as concerns about the efficacy and legitimacy of judicial interventions in the long run.[46]

The judiciary has developed three means of judicial activism. First is public interest litigation (as discussed above), second wide interpretation given to fundamental rights, and third is related to the accountability of the public officials for their misuse of power.

The second means of Judicial Activism is widening the scope of Art 21 of the Constitution which guarantees the basic human right of personal liberty to all persons.

45 Ibid.

46 Judicial Activism, available at: Supremecourtofindianicin>speeches>judicialactivism (Last Modifies October 14, 2015).

In the first decision given to interpret the scope and meaning of life and personal liberty under article 21 of the Indian constitution the apex court interpreted that the words *"the personal liberty"* in article 21 are to be given a wide and fluid meaning of the expression *"due process of law"* as given under the US constitution but it refers to only state made statues laws if any statutory law prescribed procedure for depriving a person of his rights or personal liberty it should meet the requirements of article 21.[47] However, after 20 decades this was over ruled in the case of ***R.C.Cooper V. Union Of India*** (AIR 1970 SC 564) after this there where a series of decisions by the apex court including ***Maneka Gandhi v. Union of India*** it was held that any law that deprives the life and liberty must be just and fair. Krishna Iyer j. rightly said that *"in article 21 means fair , not formal procedure, law means reasonable law not any enacted pieces."*

Now it is settled that article 21 confers positive rights to life and liberty The word life in article 21 means a life of dignity and not just mere animal survival (this was also upheld in the case of ***Francis Coralie Mulin v. Union Of India***.[48] The procedure of depriving a person of his life and liberty must be reasonable, air and just. The Supreme Court through its various judgement added different rights under personal liberty and also held that Law and the procedure established by law which deprived person from personal liberty must be just, fair and reasonable.[49] Otherwise neither Law nor procedure is held to be valid. Right to live with human dignity,[50] right to travel abroad,[51] right to livelihood,[52] right to privacy,[53] right to shelter,[54] right to pollution free water and air,[55] noise free atmosphere,[56] right to medical aid,[57] rights of prisoners,[58] right to life does not include right to die,[59] right to education[60] and numerous more rights are recognised under art 21 of the Constitution. This new trend of judicial activism has been very useful in moulding the to meet the challenges of time. Today it is no longer a matter of doubt that substantial volume of law governing the lives of citizens and regulating the functions of the state flows from the decision of the superior Courts. It is settled that judges are making the law. But while making the law judges must remember the warning of honourable Lord Denning that *"a judge must not alter the material of which the Act woven, but he can and should iron out the creases."*

47 A.K.Gopalan VS. State Of Madras AIR1950 SC 27
48 (1993)1 SCC645
49 Maneka Gandhi V. Union of India AIR 1978 SC 597
50 Kharak Singh V. State of U.P.AIR 1963 SC 1295 ,Govind V. State of M.P.AIR 1978 SC 1836
51 Satwant Singh V.Asst Passport Officer, New delhi AIR 1967 SC 1836
52 Ollga Tellis Mill V. Bombay Municipal Corporation AIR 1986 SC 180
53 R. Rajgopal v. State of T.N.(1994)6SCC 632
54 Chameli V.State of U.P.(1996)2SCC549
55 Subhas kumar V State of Bihar AIR1991SC420
56 In re Noise Pollution AIR 2005 SC 3136,
57 Parmanand Katartara V Union Of IndiaAIR 1989SC2039
58 Sunil Batra V Delhi Administration
59 Gyan Kaur v.State of Panjab (1996)2SCC648
60 Mohini jain v. State of karnatka (1992) 3SCC666,Unni krishan v. State of A.P.(1993) 1 SCC 645

The third important aspect of judicial activism has been in directing the affirmative action's and fixing the accountability of public officials, who are considered to be the trustees of the public power.[61] From Rudal Shah[62] to Nilbati Beheres and thereafter the Supreme Court has granted exemplary damages for violation of human rights.

Responding to the changing time and aspirations of the people, the judiciary, with a view to see that the fundamental rights embodied in the Constitution of India have a meaning for the down-trodden and the under-privileged classes, pronounced in ***Madhav Haskot's case***[63] that providing free legal services to the poor and needy was an essential element of the 'reasonable, fair and just procedure'. Again in ***Hussainara Khatoon's case***[64] while considering the plight of under trails in jail, speedy trial was held to be an integral and essential part of right to life and liberty contained in Article 21 of the Constitution. In *Nandini Satpathy v. D.L. Dani*,[65] the Supreme Court held that an accused has the right to consult a lawyer during interrogation and that the right not to make self-incrimination statements should be widely interpreted to cover the pre-trial stage also. When there was no existence of any compensatory jurisprudence, it was the Supreme Court who ushered new hope by introducing right of compensation in case of 'torture' including mental torture inflicted by the state or its agencies. Using this weapon, many tortured victims were provided their rightful compensations in cases like *Rudal Shah v. State of Bihar,*[66] *Bhim Singh v. State of Jammu and Kashmir,*[67] *Saheli v. Commissioner of Police*.[68]

Suggestions

Though the Constitution of India provides express measures to access to justice and there are there legislative measures to ascertain access to justice to the people of India. In reference to challenges discussed above there are following suggestions to ensure the access to justice.

1. Promotion of ADR as mentioned in the sec 89 of the Civil Procedure Code.
2. Quality and efficiency number of police has to be improved to reform the criminal justice system.
3. E- Courts would be an alternative to speedy and effective measure to decrease the burden of courts.

61 Lucknow Development Authority v M.K.Gupta (1994) 1 SCC 243; Krishan Yadav v State of Haryana(1994)4 SCC165 Inder Singh v State of Panjab (1995) 3SCC 702 Shiv Sagar Tiwari v union of India (1996) 6SCC 599,M.C.Metha V Kamal Nath(2000)6SCC 213
62 Rudal shah v State of Bihar,AIR 1983 SC 1086,Nilabati Behera v. State of Bihar,AIR 1993SC 1960
63 AIR 1978 SC 1548.
64 AIR 1979 SC 1819.
65 AIR 1978 SC 1025.
66 AIR 1983 SC 1086.
67 1984 (Supp) SCC 504.
68 1990 (1) SCC 422.

4. Lawyer's initiative should be regulates as adjournments proceeding should be guarded by the strictly with the provisions of the CPC.
5. Judges must deliver judgments within a reasonable time, both in civil and criminal cases.[69] Judgments must be clear and decisive and free from ambiguity so that it do not generate further litigation.
6. Legal literarily programmed must be compulsory practice.
7. A compulsory internship for the law students has to introduce for promotion of legal literacy programme and in Lok Adalat and in mediation and conciliation proceedings.
8. Establishing more benches of High Courts in more than one city in a State may create opportunities for the people to seek judicial remedies.

Conclusion

As it is mentioned that justice cannot be given but it has to be achieved. The only measure to provide justice is that those who need justice must have the information that they can get justice. That is legal awareness is compulsory. Secondly assertion is important that assist and facilitate people to assert these rights as a matter of 'right.' Thirdly arrangements have to be made by the States as people can easily access their rights from the Courts or other justice delivery agencies.

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at Faculty of Law, University of Lucknow.

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69 Guidelines given by the apex court in the case of Anil Rai v. State of Bihar (2001) 7 SCC 318

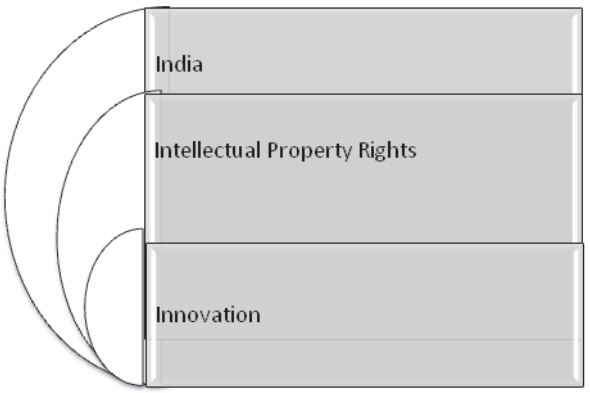
India, Intellectual Property Rights and Innovation: Readiness to Move Closer towards Ensuring Economic Security

(A slice of cake for the one who creates)

Poonam J. Singh

"When you do the common things in life in an uncommon way, you will command the attention of the world."

- George Washington Carver

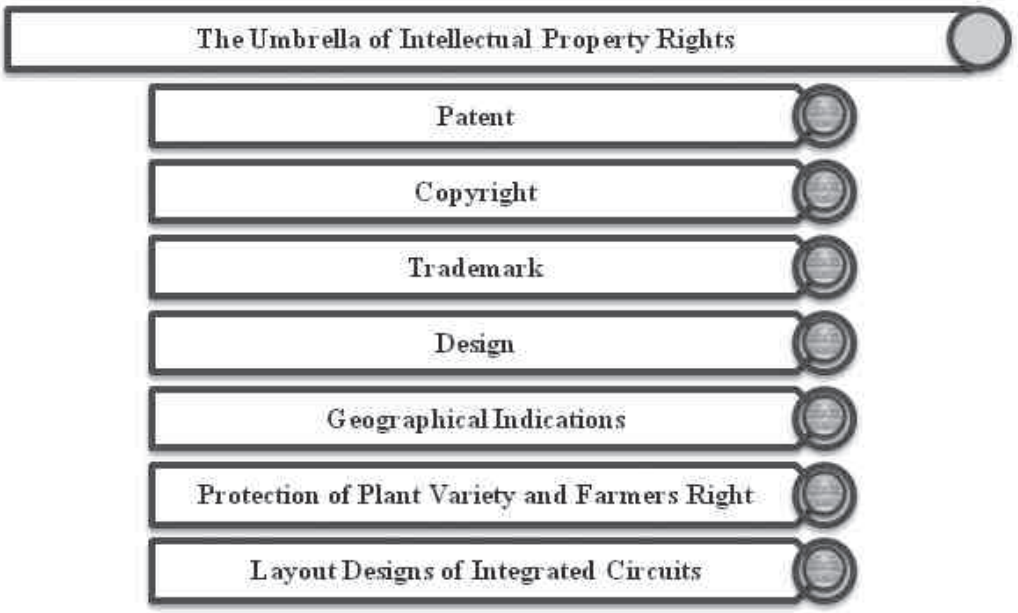


Introduction

IPR stands for Intellectual Property Rights. As the name suggests, these are rights associated with Intellectual Property which are products of human intellect, skill and creativity. The term "Intellectual Property" is reserved for types of property that result from creations of the human mind, the intellect.

IPR forms an important part of our daily lives. From morning to evening we are surrounded by various forms of Intellectual property which we hardly notice, starting from the brush we use to clean our teeth which has its design and company name protected by registration of a Trademark (TM), to the Assam tea we drink which is protected by Geographical Indications. Similarly the daily Newspaper has its contents protected by copyright. The computer has its inbuilt software programme also protected by copyright. Any place you look at we are surrounded by someone owning IPR and we are paying for it. Intellectual property is an asset like any other form of property including our car, house, land, jewels etc.

It is a property that should not be used without the permission of the owner. Similarly, using IP without the owner's consent will be analogous to breaking into the house for stealing. IPR provides various types of protection so that the intangible assets created out of human genius are rewarded and unauthorized reproduction and distribution is liable for prosecution. The seven IPRs are shown in the diagram below.



"A right is not something that somebody gives you:
it is something that nobody can take away."

- Eleanor Roosevelt

Basics of IPR

IPR provides exclusive rights to the owner and creator of Intellectual Property. It provides incentives to creativity and innovation of human Endeavour. Just like any

other tangible property, law protects IP legally in the same way as any other property. The rights provided are the right to sale, distribute, reproduce or license an IP.IP gives property rights over the creations of human endeavour. The person putting effort and intellect for creating an object or invention gets some financial incentive and encouragement as a result of endeavour put into and provides incentive to put more intellect as a means of earning more financial returns IPR , therefore promotes economic growth, creates new job prospects thereby ensuring quality life of a nation. A non exclusive list of items that are entitled for protection under IPR regime would be a Chemical formula, Company's name, Designs for objects, Geographical indications for certain types of products, Performances, Images, Logos ,Industrial processes ,Videos, Trademarks, Integrated circuits and so on.

Patent

A patent is an exclusive territorial right granted for an invention, either a product or a process that offers, a new technical advance or solution as compared to existing knowledge to a problem. Patents are statutory rights granted by the Government for a period of 20 years which cannot be renewed Patents are granted by the Government, for the commercial exploitation of an invention for a specific period of time in consideration of the disclosure of the invention so that on expiry of the terms of the patent the information can benefit the public at large. Patents promote the concept of invent around a product or process, as a product that is patentable cannot be produced without the authorization of the patent holder. The patent holder has the right to make, use, sell, import the product or process within the territory of grant of patent. Patent is therefore an award for the inventor and a reward for the investor. The requirements for Patentability are :An invention must be novel (It should not exist in prior Art. Prior Art includes everything published presented or known before the date of patent application)Should have an inventive step (i.e it should be non obvious) and Should be capable of industrial application/ economic advantage. Section 3 of Patent Act 1970, provides a list of inventions that are not patentable.

(a) an invention which is frivolous or which claims anything obviously contrary to well established natural laws;

(b) an invention the primary or intended use or commercial exploitation of which could be contrary public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment;

(c) the mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substances occurring in nature;

(d) the mere discovery of a new form of a substance which does not result in the enhancement of a known efficacy of that substance or the mere discovery of a

new property or new use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

(e) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;

(f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way;

(g) Omitted;

(h) a method of agriculture or horticulture;

(i) any process for the medicinal, surgical, curative, prophylactic, diagnostic, therapeutic or other treatment of human beings or any process for a similar treatment of an

(j) plants and animals in whole or any part thereof other than microorganisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals;

(k) a mathematical or business method or a computer program per se or algorithms;

(l) a literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever including cinematographic works and television Productions;

(m) a mere scheme or rule or method of performing mental act or method of playing game;

(n) a presentation of information;

(o) topography of integrated circuits;

(p) an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties or traditionally known component or components.

Section 3(d) empowers Indian Patent act not to allow evergreening of patent grants by multinationals.

George Alfred DePenning made the first application for patent in India on 2nd September 1856. Indian patent system is 160 years old.

Copyright

"Copyright" is a protection given by law to creators of original literary and artistic works from unauthorized uses. The kind of works covered by copyright includes: expressions as novels, poems, plays, reference works, books, pamphlets, newspapers and computer programmes; artistic works as paintings, drawings, photographs, sculpture, musical compositions, architecture, advertisements, databases, technical drawings, maps, plans, and audiovisual works cinematograph films and sound recordings. A Copyright

protection extends only to expressions and not to ideas, procedures and methods. It is not necessary to formally register a work to get copyright. A Copyright acquisition is automatic as soon as the work is created. Though National law provides for a Certificate for Registration of a work which serves as a prima facie evidence in the Court of Law in case of dispute for ownership of copyright. The term of protection of copyright works lasts for 60 years However application for copyright can be made on Form IV for works that can be registered by Registrar of Copyright in the Copyright Office.

Design

"Design" has been defined as the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or 3D or in both forms. Protection of the Design is conferred in form of copyright only if the design is new and original and has not been disclosed to the public in India or any other country for obtaining protection. The registration of a design confers upon the registered proprietor *'Copyright'* in the design for the period of registration. Once a design is registered, it gives the legal right to bring an action against those persons who infringe the design right. The term of protection of a Design is for 10 years which can be extended to another 5 years.

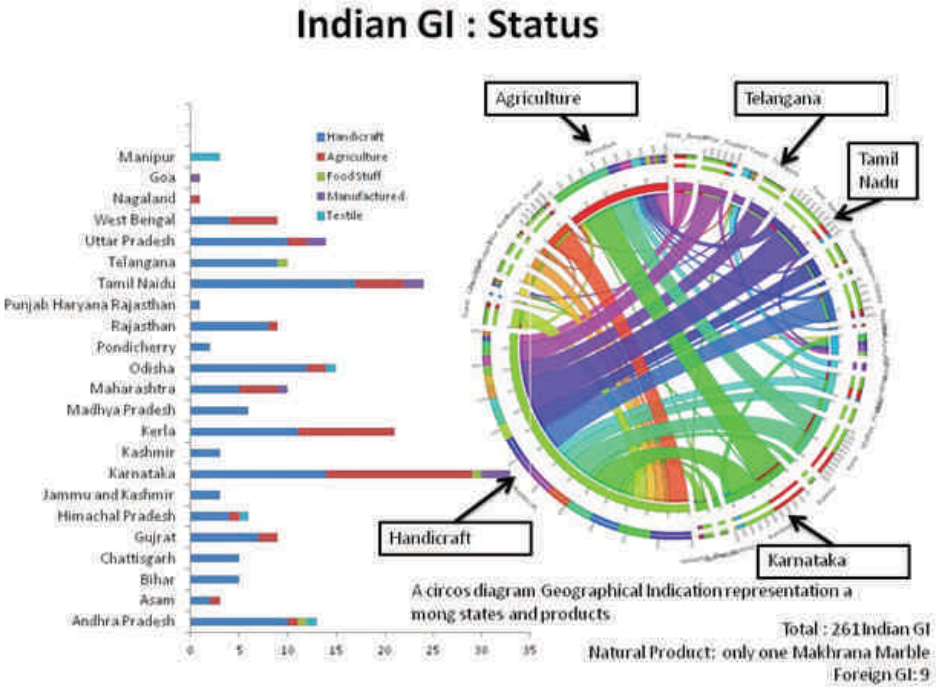
Trademark

A *"trademark"* is a distinctive sign or a visual symbol used for services or products for visually identifying them from other goods and services of similar nature. A trademark helps consumers purchase a product because of the unique nature and quality associated with the product .A trade mark can be a combination of letters, a smell mark, a sound mark , a 3 D figure. A trademark identifies a good, creates an image of the goods or services and guarantees quality and stimulates further purchase. The registration of the trademark confers on the provides exclusive right to the use of the registered trade mark in relation to the goods or services in respect of which the mark is registered and seek the relief of infringement in appropriate courts in the country. The well known marks are: "LACOSTE" for shirts, "SWATCH" for watches, "TOYOTA" for cars. The protection term for a trademark is indefinite, it can be renewed for 10 years at a time indefinitely.

Geographical Indication

"Geographical Indication" is an indicator of goods originating from a definite geographical territory having particular characteristics. Presently India has 251 Registered GIs belonging to Agricultural, Natural, Manufactured goods, Goods of handicraft or of industry and Food stuff A Geographical Indication conveys an assurance of quality and

distinctiveness which is attributable to its origin in that defined geographical locality. Agricultural goods derived from the place of production are influenced by specific local factors, such as climate and soil can be protected by Geographical Indication. Geographical Indication essentially indicates the name of the place of source of origin of the goods. Geographical Indication is a group right, a collective right. India,s famous GIs include Banarasi silks, Paschmina shawls, Darjeeling Tea, Pochampally Ikat, Chanderi saree, Kotpad Handloom fabric, Kota Doria, Kancheepuram silk, Bhavani Jamakkalam, Mysore Agarbathi, Aranmula Kannadi, Salem Fabric, Solapur Chaddar, Solapur Terry Towel, Mysore Silk, Kullu Shawl, Madurai Sungudi, Kangra Tea, Coorg Orange, Mysore Betel Leaf, Nanjanagud Banana, Mysore Sandalwood Oil, Mysore Sandal Soap, Bidriware Channapatna Toys and Dolls, Coimbatore Wet Grinder, Mysore Rosewood and Mysore Traditional Paintings.



GIs can be granted to an individual, a family, a partnership, a corporation, a voluntary association etc or any organization or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods. Initially the term of protection of Geographical Indication is ten years , however it can exist indefinitely provided the registration is renewed every ten years.

Plant Variety Protection

India has enacted a sui generis version for protection of plant variety for farmers and breeders to recognize the rights of farmers who have put efforts for conserving , breeding a plant variety. The requirements for protection are distinctiveness, uniformity novelty and stability. The term of protection for trees and vines is for a period of nine years, can be renewed till 18 years, for other crops it will be six years and can be renewed till 15 years.

Semiconductor Integrated Circuit Layout Design

"*Semiconductor Integrated Circuit Layout Design*" is a product having transistors and other circuitry elements, which are inseparably formed on a semiconductor material and designed to perform an electronic circuitry function. The Indian Government provides for a mechanism of protection of IPR in Chip Layout Designs. The layout-design of a semiconductor integrated circuit means a layout of transistors and other circuitry elements and includes lead wires connecting such elements and expressed in any manner in semiconductor integrated circuits. The term of protection is for 10 years.

IPRs and Global Governance

TRIPS is one of the agreements signed at the end of the Uruguay Round of GATT negotiations in 1995. The United States put intellectual property rights (IPR) onto the agenda of the last GATT round and TRIPS became part of the Uruguay Round package of agreements It covers seven fields of intellectual property viz : Patent, Copyright, Trademark, Geographical Indications, Industrial designs, Trade Secrets and Topographies of Integrated Circuits. It mandated ratified countries to have national provisions for compulsorily minimum standard of protection and enforcement procedures.[1] The Paris Union Convention is a universal treaty to protect industrial property rights. TRIPS through Art 27.3 (b), allows Members to exclude "plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes". Most countries worldwide have explicitly excluded patents for animals. A patent application where animals or parts thereof are deemed, in principle, patentable, a patent application may be rejected on moral or public order grounds, in accordance with Art. 27.2 of TRIPS. Article 27 of the TRIPS Agreement mandates patent protection for all new products and processes generated using any field of technology. There was a considerable difference of opinion among members regarding the specific nature of the obligation. ThusArt.27.3(b), introduced with special reference to inventions based on genetic resources, envisages different modes of protection. The most important is

1 http://japsonline.com/final/1-5.pdf

the conflict between the obligation under Art.27.3(b) of TRIPS and the protection of traditional knowledge ("TK") associated with genetic resources under the CBD. The TRIPS Agreement recognises intellectual property as a private right where as CBD treats biological resources as sovereign rights of States. India and developing countries have proposed that patent applicants should be required to disclose the source of origin of the biological material utilized in their invention under the TRIPS. The International legal regimes binding a country to adhere to basic protection for Conservation of Biodiversity and associated Indigenous knowledge are provisions laid out by WTO through TRIPS and CBD.

The Convention on Biological Diversity

India is a party to The Convention on Biological Diversity (CBD) that entered into force on 29 December 1993 with 3 main objectives viz the conservation of biological diversity, the sustainable use of the components of biological diversity, The fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[2] CBD envisages that the benefits accruing from commercial use of TK have to be shared with the people responsible for creating, refining and using this knowledge. Article 8(j) of the CBD provides for respecting, protecting and rewarding the Knowledge, Innovations and Practices (KIP) of local communities. The Convention on Biological Diversity(CBD), does cover all kinds of genetic resources.. Although not directly stated in the CBD, conservation of biological diversity necessarily includes conservation of animal and plant genetic resources which are the prerequisites for food security and the improvement of agricultural productivity. The CBD states that, while nations have the sovereign right to exploit their own resources (Art. 3), they also have the duty to conserve them. With regard to access to genetic resources, Art. 15 of the CBD recognizes the sovereign rights of States over their natural resources, and states that access is subject to national legislation. CBD is not obligatory for signatory like US, who have not ratified the treaty. It is the non binding of the provisions of CBD that developing countries need to have their own protection mechanism in place so that the rich diversity is not plundered without the benefit sharing aspect. National sovereignty over animal genetic resources may be problematic given the difficulties of attributing resources to countries and given the robust international trade in these resources that has taken place over the decades and centuries. The obligation to protect and preserve the TK associated with genetic resources and to reward the holders of TK expressly emerges from Art.8(j) of the CBD. The CBD has established the framework rules for access to biological resources. A vital feature of the CBD is that it offers formal international recognition to the role that indigenous and loc communities play in biodiversity conservation and this achieved through the mechanism of their traditional practices and cultural knowledge systems. The CBD recognizes both the dependence

2 http://www.cbd.int/intro/

of local communities on biological resources and the roles that these communities play in the conservation and sustainable use of the resources. According to Art.15(4) of the CBD, access can only occur on mutually agreed terms and with prior informed consent (PIC) of the source state. The CBD provides sovereign rights of the Nation over genetic resources, and allows for benefit sharing.

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits

India signed the *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* on 5th May 2011,[3] aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.[4]

In terms with International agreements and as per norms of CBD, the National Biodiversity Authority (NBA) was established in 2003 in India to implement the country's Biological Diversity Act (2002). The NBA is Autonomous body and that performs facilitative, regulatory and advisory function for Government of India on issue of Conservation, sustainable use of biological resource and fair equitable sharing of benefits of use.

The Biological diversity Act (2002) mandates implementation of the act through decentralized system with the NBA focusing on advice the Central Government on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources.

The Act covers conservation, use of biological resources and associated knowledge occurring in India for commercial or research purposes or for the purposes of bio-survey and bio-utilisation. It provides a framework for access to biological resources and sharing the benefits arising out of such access and use. The Act also includes in its ambit the transfer of research results and application for intellectual property rights (IPRs) relating to Indian biological resources. The Act covers foreigners, non-resident Indians, body corporate, association or organization that is either not incorporated in India or incorporated in India with non-Indian participation in its share capital or management. These individuals or entities require the approval of the National Biodiversity Authority when they use biological resources and associated knowledge

3 http://www.cbd.int/abs/nagoya-protocol/signatories/
4 http://www.cbd.int/abs/

occurring in India for commercial or research purposes or for the purposes of bio-survey or bio-utilisation. The NBA with its Headquarters in Chennai, India delivers its mandate through a structure that comprises of the Authority, secretariat, SBBs, BMCs and Expert Committees.[5]

Challenges

Intellectual Property Rights are embedded in aspects related to access to medicine, through patented drugs, In education by access to copyright materials, protection of traditional knowledge too becomes a matter of concern when bioprospecting occurs and benefit sharing does not take place. With National IPR policy 2016 in place with the mission of fostering creativity and innovation to promote entrepreneurship and enhance socio-economic and cultural development, and enhance access to healthcare, food security and environmental protection, among other sectors of vital social, economic and technological importance with the theme *"Creative India; Innovative India: रचनात्मक भारत; अभिनव भारत"*, with the objective of raising awareness among public for IPR issues, and linking it to "Make in India", "Digital India", "Skill India", "Start Up India", "Smart Cities" together for socio economic development. Some challenges with respect to protection of traditional knowledge, Genetic Resources and cultural expressions inherent in local /tribal communities and associated knowledge needs deliberation .

India has been projected as a 10 trillion dollar economy by 2032 with a 10% growth, by NITI Ayog. The economy in future will be in the hands of today's creators, who will take lead in finding solutions to problems and create value. By trying, failing fast and redoing things , different scenarios emerge for utilising creativity for a solution. Whereas all creative pursuits cannot be innovative, some do have potential to open up to unseen possibilities for thinking differently in daily works.

Creativity, Innovation and Startups

"Creativity" is a phrase that researchers seem to be made for artists. Science Is Based On Solid Foundations: within such a system is there a place for creativity. Are all artists creative? Are all non artists non creative? What defines creativity? Can creativity be applied to all aspects of life. Does thinking differently provide solutions? Creativity can exist anywhere in our daily lives. It is useful creativity that can be protected through IPRs. Any thing may be creative if not seen before, but if it has no use that creativity cannot seek IP protection. Most of ideas that do not get funding end up in a death trap valley. An idea should be defined, reworked on till successful solution is arrived at. Creativity is the genesis of Innovation, that would lead to entrepreneurship and economic growth. The fear of failure will no more be an inhibitor for growth with

5 http://nbaindia.in/content/16/14//introduction.html

the plan started by Government of India on IPR outreach and startup culture. Not all creative thing can be innovative, only those that qualify social impact and add value to lives are innovative.

"Innovation" has been defined as any new knowledge introduced into and utilized in an economic or social process. Taking an idea from its concept, prototype, to the market and successfully commercializing the product conceived from an idea is the core of innovation. An idea that owes solution to a problem is the catch for the prepared mind. A problem can just erupt during brainstorming, or during an experimental failure. Once a thorough brainstorming is done on all possible possibilities, with some hit and trail and may be serendipity, a workable solution emerges. A little tinkering and playing with problems , sometimes leaving it alone, to arrive at a solution by incubating suddenly provides a clue to a solution, giving rise to a product or a process. Patenting the product or process is the first step by a researcher to gain economic monopoly for commercialization and licensing . Stepping into the market without a patent standing will wipe out the product due to imitators. A citizen should know the niche market where there is a gap and the product will be successful. With India's start up culture that is gaining in folds, Indian ecosystem has the potential to be future entrepreneurs.

The *"start-ups"* era has suddenly bought a number of question in the minds of people who are into business, are employed, are researchers. The buzz word is biting and with the plan proposed by Indian Prime Minister, change will be evident to be seen in comming years with Indians becoming job creators and not job seekers. The question is how?. How does one suddenly throw a creative strategy and expect people to imbibe it. Large sums are pouring in. Getting the dust off the minds of Indian people, who have been educated the rote way of learning, where marks always mattered, how does change creep in. For researchers , publication and promotion gains prominence for career growth. Failure has no place in research arena in India. The projects submitted have a concrete milestone listed plan, that has to be followed to get grants flowing in. The impact does not matter , till the time you publish. Getting a grant and searching through the maze of red tapism, creativity takes a back stage. Will announcing start-ups bring about change, or a catalytic action needs to take place starting from our education , to work area. The system breeds copycat culture. A scientist goes abroad, sees what's happening there and starts emulating . Can't we start our own problem based research with right tools in hand and inculcate the same nurturing among ourselves. According to DIPP Notification "an entity shall be considered as a 'start up'-

a) Up to five years from the date of its incorporation/registration,
b) If its turnover for any of the financial years has not exceeded Rupees 25 crore, and
c) It is working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property.

Explanation

An entity shall cease to be a startup on completion of five years from the date of its incorporation/or registration or if its turnover for any previous year exceeds rupees twenty-five crores. Entity means a private limited company (as defined in the Companies Act, 2013), or a registered partnership firm registered under section 59 of the Partnership Act, 1932 or a limited liability partnership under the Limited Liability Partnership Act, 2002. The term *"Turnover"* shall have the same meaning as defined in the Companies Act, 2013 (18 of 2013). An entity is considered to be working towards innovation, development, deployment or commercialisation of new products, processes or services driven by technology or intellectual property if it aims to develop and commercialise a new product or service or process, or a significantly improved existing product or service or process that will create or add value for customers or workflow.

Epilogue

Together India, IPRs and Innovation can create an unfearing ecosystem, that has potential for Indian creators, traditional knowledge holders to be potential entrepreneurs and create jobs, adding to social security and wellbeing.

Lets Build a *"Creative India; Innovative India: रचनात्मक भारत; अभिनव भारत"*

"Seeds of discovery are constantly floating in our back,
but just throw roots in minds well prepared to receive them."

-Joseph Henry (1842)

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Public Advocacy Initiatives for Rights and Values in India (PAIRVI) was formed in 1998. PAIRVI works at the intersection of development and rights in a rights based approach. It provides advocacy and capacity building support to grassroots organizations and community based organizations, who otherwise have very limited opportunities for capacity building. Main thrust areas of Pairvi's work is a policy analysis, capacity building, protection of human rights and promotion of rights based approach to development, human rights advocacy and monitoring. Thematic areas include sustainable agriculture and food security, climate change and sustainable development, livelihoods, affirmative actions, human rights training and capacity building. Pairvi engages with a variety of stakeholders including policymakers, farmers, women, children and youth, media and judiciary at all levels from local to global.